JUDICIAL REVIEW AND COMPARATIVE POLITICS: AN EXPLANATION FOR THE EXTENSIVENESS OF AMERICAN JUDICIAL REVIEW OFFERED FROM THE PERSPECTIVE OF COMPARATIVE GOVERNMENT

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These are great questions, where great names militate against each other, where reason is perplexed, and an appeal to authorities only thickens the confusion: for high and reverend authorities lift up their heads on both sides, and there is no sure footing in the middle. This point is the great Serbian bog where armies whole have sunk.
Edmund Burke

Introduction

No more difficult and emotionally contentious debate exists in the history of American constitutionalism than the debate which seeks to define the proper role of the judiciary in American democracy. This is understandable. It is a controversy which is central to the fabric of any political system.

This note does not purport to add greatly to the continuing discussion. It will not offer any new normative theory about the judicial function. Nor will it reevaluate and reconstruct old theories. Rather, this note will essay a more modest task. It will try to demonstrate why the style of judicial review[1] is as it is—particularly in the United States.

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The author wishes to thank very much Dr. Geoffrey Marshall, Fellow of The Queen's College, Oxford, for his great help in clarifying many of the ideas in this note.

1. The phrase "judicial review" will be used throughout this note in its generic rather than its particular (American) sense unless it specifically refers to American judicial review. As such the term means, as it does in English and Commonwealth practice, the ability of the judiciary as a political body (and in contradistinction to other political bodies) to examine the actions of legislators, to determine the meaning of these actions, and to ascertain their validity according to "procedural" statutory rules governing what constitutes a legislative act, rather than according to constitutional "substantive" rules determining whether such an act is permissible. Judicial review in its generic sense is thus the power of the courts to determine not whether an admitted act of the legislature collides with a superior constitu-

To accomplish this end it will compare American judicial review with the experience of judicial review in Britain, Canada and Australia, nations arguably similar to the United States.[2] By doing so, the note will show how the peculiar institutional features of different political systems play a crucial part in making the judicial role found in individual national contexts what it actually is.[3]

The thesis that will be asserted is this: in Britain, Canada and Australia, the institutional feature of "strong government" in the nature of cabinet government[4] makes judicial intervention in the policy-making spheres of those nations unnecessary and unlikely. This explains the limited role of their courts. Conversely, inasmuch as American government is not cabinet government, and does not possess a powerful law-making capacity, the judicial role is greater.[5] American

tional rule and is thus void (for that would be to determine the act's validity according to some substantive rule), but instead whether a purported "enactment" is in fact an enactment—*i.e.*, in due form according to the procedural rules which govern and define what constitutes a legislative "act." And if it is, what the words of such an enactment mean. *See* G. MARSHALL, PARLIAMENTARY SOVEREIGNTY AND THE COMMONWEALTH 13 (1962).

2. This study is limited to an analysis of judicial review in the United States, Britain, Canada and Australia, although much of the discussion about judicial review in Canada and Australia is applicable to the practice of judicial review in other states of the British Commonwealth. *See generally* E. MCWHINNEY, JUDICIAL REVIEW (4th ed. 1969). The author chose the latter three states for comparison with the former, partly in the interests of space but more importantly because they share, as do few other nations, *inter alia*, language, values, history and legal tradition. Moreover, their notions of liberal democracy and the role of the judiciary in a system of government have been a model for emulation in other parts of the world. *See, e.g.*, T. FRANCK, COMPARATIVE CONSTITUTIONAL PROCESS (1968). These nations are therefore appropriate polities for classification and study.

3. A familiarity with each political system, as well as with its historical and cultural context, would aid attempts to draw comparisons. For such background information, see G. CARTER, THE GOVERNMENT OF THE UNITED KINGDOM (3d ed. 1972); J. MALLORY, THE STRUCTURE OF CANADIAN GOVERNMENT (1971); J. MILLER & B. JINKS, AUSTRALIAN GOVERNMENT AND POLITICS (4th ed. 1971); M. VILE, POLITICS IN THE U.S.A. (rev. ed. 1976).

4. For convenience, the convention of labelling the structure of government in Britain, Canada and Australia as "cabinet government" will be adopted, even though there are features unique to each of these cabinet government systems. In addition, the term "cabinet government" will be used to distinguish these systems from what will be labelled "presidential-congressional government," the system of government practiced in the United States. Although there is some danger of oversimplification and misconception by the use of such labels, they are necessary to avoid even more clumsy terminology. H. HAZLITT, A NEW CONSTITUTION NOW 40 n.1 (2d ed. 1974).

5. There are some scholars who have completely discarded the institutional approach to the study of comparative politics, *e.g.*, G. ALMOND & G. POWELL, COMPARATIVE POLITICS: A DEVELOPMENTAL APPROACH (1966), of judicial review, *e.g.*, G. SCHUBERT, JUDICIAL POLICY MAKING: THE POLITICAL ROLE OF THE COURTS (rev. ed. 1974), and of the comparative study of judicial review, *e.g.*, Hardisty, *The Effect of Future Orientation on the American Reformation of the English Judicial Method*, 30 HASTINGS L.J. 523 (1979). Not all scholars, though, believe it is a lost art. *See, e.g.*, M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 294-314 (1967).

courts must act to fill the void. This explains their adoption of non-legal, political functions.

If this thesis is correct, admonitions to the American judiciary to exercise "self-restraint" by those who desire a reduction in the role of American courts may be misplaced. It directs attention to a symptom rather than a cause of the problem. Moreover, in view of the fact that most social reforms in the United States since the second world war have been initiated by the judiciary, it leaves many unconvinced that pressing public needs will be met if the courts withdraw from their present concerns.

A sensible solution to the problem of expansive judicial power cannot, therefore, be one which merely advances the cause of judicial self-abstention without also offering a means of ensuring that current court policy functions will be replaced. Such proposals are entirely unagreeable to any intelligent observer of the effectiveness of American government. The only satisfactory proposal will be one which increases the capacity of American government to act, thereby making it less necessary for courts to do so. Strengthening the capacity of government to legislate should reduce both the potential and justification for extensive political judicial review, because it will rectify the numerous imbalances and nonmajoritarian characteristics of the American law-making process and thus make it a far more useful instrument of national social reform than it presently is. Without such changes it may be impossible to dampen the enthusiasm of groups with little political power for "government by judiciary."

Cabinet government, of course, is not a panacea for America's social ills. Events in Britain, Canada and Australia amply prove that. Efficient machinery of government cannot replace good judgment on the part of those who govern. But it does allow those with responsibility for government to more readily effect the plans they have for the welfare of their charges. The political system in the United States, through its inefficient procedures, precludes the implementation of good or bad policies. The result is governmental impotence, even when the public desperately requires some remedy. That is why the courts act.

I. Differences in the Scope and Style of Judicial Review in the United States, Britain, Canada and Australia and some Explanations for those Differences

A. The Scope of Judicial Review in the United Kingdom

The primary tenet of English constitutional law is the sovereignty of Parliament.[6] Stated succinctly by Albert Venn Dicey,[7] the doyen of English constitutional scholars,[8] parliamentary sovereignty[9] means:

6. Parliamentary sovereignty and legislative supremacy are not actually synonymous. The term "parliamentary sovereignty" properly refers to the legal supremacy of the "King in Parliament," the legal supremacy of an act which has been approved by the House of Commons and the House of Lords and given the Royal Assent. A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37-38 (8th ed. 1915). With, however, the historical rise in importance of the House of Commons, the concommitant fall in the influence of the House of Lords (which under the Parliament Act, 1911, 1 & 2 Geo. 5, c. 13 and the Parliament Act, 1949, 12, 13, & 14 Geo. 6, c. 103 can only delay legislation approved by the House of Commons) and the disuse by convention of the Royal Prerogative to veto parliamentary legislation, the House of Commons, the popular legislature, is in practice "legally" sovereign. *See* C. MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 103-05, 357 n.1 (1910); *cf.* G. MARSHALL & G. MOODIE, SOME PROBLEMS OF THE CONSTITUTION 15-16 (rev. 5th ed. 1971).

7. Albert Venn Dicey (1835-1922), Vinerian Professor of English Law at Oxford (1882-1909), has been indisputably the most influential English constitutional lawyer and scholar in this century. His exposition of theories of parliamentary sovereignty and the disutility of written guarantees of civil liberties in INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, *supra* note 6, and LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (2d ed. 1917), are monumental works which have had enormous influence on generations of constitutional lawyers, scholars and judges in Britain and the Commonwealth. *See* note 92 *infra*. His ideas stand in direct rebuttle to some prevailing American notions of constitutionalism and are thus thought-provoking.

8. Although there is no single written document labelled the "British Constitution," it is not incorrect to state that there is a British constitution consisting of statutes and cases which, when taken together with various conventions, delineate the structure of British government, define the rights of Englishmen and specify the limits of governmental power. For a historical description of English constitutional law, see generally F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND (1968). For a discussion of the liberties secured and enforceable under the British constitution, see generally A. DENNING, FREEDOM UNDER THE LAW (1949).

9. The doctrine of parliamentary sovereignty was not always a characteristic of English legal theory. *Compare* the view of Lord Coke in Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (1610) ("And it appears in our books, that in many cases, the common law will . . . controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void. . . .") *with* that of Sir William Blackstone in 1 W. BLACKSTONE, COMMENTARIES 160-61 ("The power and jurisdiction of parliament . . . is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. . . . It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that

> *First*, [t]here is no law which Parliament cannot change . . . .
>
> *Secondly*, [t]here is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional. . . .
>
> *Thirdly* [t]here does not exist in any part of the British Empire any person or body of persons, executive, legislative or judicial, which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution, or on any ground whatever, except, of course, its being repealed by Parliament.[10]

It follows therefore from Dicey's definition of parliamentary sovereignty that "[j]udicial legislation is . . . subordinate legislation, carried on with the assent and subject to the supervision of Parliament."[11]

Owing to this constitutional precept, the only permissible method of judicial review which has developed in the United Kingdom has been that of "judicial braking"[12]through the operation of the *ultra vires* doctrine.

> The wider powers of the courts to review governmental action start with the doctrine of *ultra vires*. Public authorities and officials must act within the powers the law allows them. If they take on unauthorised functions, they are acting beyond their powers (*ultra vires*), and the courts can intervene to stop the illegal action. . . . Judicial review is thus first and foremost a matter of statutory interpretation to make sure that the authority given by Parliament to a public body is not exceeded.[13]

In reviewing parliamentary legislation, English courts are not permitted to veto statutes. They can only decide whether action taken by public officers under the authority of a statute goes beyond what that statute allows. If it does, the action is *ultra vires* the statute and prohib-

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absolute despotic power which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms."). By the nineteenth century, Blackstone's view prevailed. *See* C. MCILWAIN, *supra* note 6.

10. A. DICEY, *supra* note 6, at 83-87.

11. *Id.* at 58.

12. E. MCWHINNEY, *supra* note 2, at 13.

13. THE LEGAL SYSTEMS OF BRITAIN 35 (1976).

The execution of Charles I in 1649 brought an end to the prolonged struggle between King and Parliament. F. MAITLAND, *supra* note 8, at 300. The result was Parliament's complete victory over the forces of the Crown. *Id.* at 301-02. Thence forward, all officers of the Crown were made amenable to Parliament's laws. S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 4-6 (3d ed. 1973). Thus, the English notion of rule of law and due process of law means executive action done according to Parliament's laws, not, as in present American theory, done according to constitutional law. *See id.* at 5, 34. Since it is the arbitrary action of the King's servants which is subject to the rule of law, the *ultra vires* doctrine has had its most extensive application in administrative regulation. *See generally* H. WADE, ADMINISTRATIVE LAW (4th ed. 1977).

ited.[14] This way English judges are able to apply brakes to executive action. They are able to halt the exercise of public power at least until Parliament enacts legislation overriding their judgments.[15]

B. The Scope of Judicial Review in Canada and Australia

The nations of the British Commonwealth inherited Dicey's view of parliamentary power with their independence from England. This inheritance did not, however, carry into the Commonwealth an entirely Dicean view of the judicial function. By a curious quirk of history the judicial function in Canada and Australia is not the same as in Great Britain.[16] It is not completely subordinated to the judicial function. This development arose historically in the following way. The Canadian and Australian constitutions are enactments of the English Parliament.[17] This means that they derive their existence from an external legal system—the English legal system.[18] They are thus incapable of being repealed or modified by the legislatures created by those enactments.[19] As such they stand above ordinary legislation,[20] as do "higher

14. E. McWHINNEY, *supra* note 2, at 12.

15. For some recent examples of English courts exercising judicial review by means of the *ultra vires* doctrine to thwart the designs of British cabinet ministers, see Laker Airways Ltd. v. Department of Trade, [1977] 2 All E.R. 182 (where the Court of Appeal held that section 3(1)-(2) of the Civil Aviation Act of 1971 did not allow the Minister of Trade to revoke a license given to the appellant to begin "low cost" passenger air service to the United States); Gouriet v. Union of Post Office Workers, [1977] 1 All E.R. 696 (where the Court of Appeal held that section 68 of the Post Office Act of 1953 entitled the appellant to apply for declaratory relief against impending union action without the consent of the Attorney General); Secretary of State for Educ. and Science v. Tameside, [1976] 3 All E.R. 665 (where the House of Lords held that section 68 of the Education Act of 1944 did not empower the Minister of Education to order a local education authority against its wishes to implement a scheme of open non-selective admission to the local authority's schools unless its refusal was unreasonable).

16. In the Commonwealth, as in Britain, parliamentary sovereignty does not mean legislative supremacy, but rather the Queen-in-Parliament or, with respect to dominion states, the Governor-General-in-Parliament. In Canada and Australia, Governors-General represent the Queen and exercise Her functions. *See* note 6 *supra* and note 19 *infra*.

17. The Canadian constitution is the British North America Act, 1867, 30 & 31 Vict., c. 3; the Australian constitution is the Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., c. 12. The Canadian constitution, as amended, is reprinted in A. ABEL & J. LASKIN, LASKIN'S CANADIAN CONSTITUTIONAL LAW 903-46 (rev. 4th ed. 1975). The Australian Constitution, as amended, is reprinted in R. LUMB & K. RYAN, THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA ANNOTATED xxxiii-lvi (2d ed. 1977).

18. *Id.*

19. In the Statute of Westminster, 1931, 22 Geo. 5, c. 4, the British government relinquished its right to legislate for Dominion states without their permission. Some constitutional debate remains, however, as to the effect of section 2 of that Act, which in part reads, "the powers of the Parliament of a Dominion shall include the power to repeal or amend any such [British] Act, order, rule, or regulation in so far as the same is part of the law of the Dominion." If this language means that Dominion Parliaments can repeal or amend their constituent acts, then the Dominion Parliaments would be sovereign. The various Imperial

law" documents like the United States Constitution.[21] This fact, alone of course, did not lead Canadian and Australian judges to exercise judicial review in the same manner as American judges.[22] But since it did not prevent this possibility from transpiring, judicial review of the American kind came about giving Canadian and Australian judges the power to veto legislation.[23]

During the days of colonial rule by Great Britain final appeal from Canadian and Australian courts was to the Judicial Committee of the Privy Council.[24] Situated in London, and composed almost exclusively of English and Scottish judges, it had the ultimate power of review of the constituent acts of Canada and Australia.[25] In discharging its responsibilities, the Privy Council never perceived its role as being that of a constitutional court of last resort with authority for making "political" judgments through the interpretation of a "fundamental" document.[26] But owing to the nature of the Canadian and Australian constitutions, and the Privy Council's approach to reviewing them, the Council fell into just such a role. The Council treated the constituent acts of Canada and Australia as if they were mere English statutes.[27]

Conferences held between Britain and Dominion states in preparation for this legislation indicate, perhaps, that it does not. *See* G. MARSHALL, *supra* note 1, at 76-86. In any event, neither the Canadian nor the Australian government has invoked this section to amend its constitution. *See* A. ABEL & J. LASKIN, *supra* note 17, at 92 and R. LUMB & K. RYAN, *supra* note 17, at 382-83.

20. K. WHEARE, MODERN CONSTITUTIONS 57-60 (2d ed. 1966).

21. *Id.*

22. *Id.*

23. *Id.*

24. *See id.*

25. "The Judicial Committee is a statutory body established in 1833 by an Act of 3 & 4 Will. 4, c. 41, entitled an Act for the better Administration of Justice in His Majesty's Privy Council. . . . The Act . . . provides for the formation of a Committee of His Majesty's Privy Council, . . . and enacts that 'all appeals or complaints in the nature of appeals whatever, which either by virtue of this Act or of any law, statute or custom may be brought before His Majesty in Council from the order of any Court or judge should thereafter be referred by His Majesty to, and heard by, the Judicial Committee, as established by the Act, who should make a report or recommendation to His Majesty in Council for his decision thereon, the nature of such report or recommendation being always stated in open Court. . . . It is clear that the Committee is regarded in the Act as a judicial body or Court, though all it can do is to report or recommend to His Majesty in Council, by whom alone the Order in Council which is made to give effect to the report of the Committee is made.

"But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the statute of 1833 all appeals within their purview are referred." British Coal Corp. v. The King, [1935] A.C. 500, 510. *See generally* E. MCWHINNEY, *supra* note 2, at 49-60.

26. *See* notes 27-30 *infra*. *See generally* E. MCWHINNEY, *supra* note 2, at 49-60.

27. Although the Canadian and Australian constituent acts were "constitutional" rather than statutory documents, the Privy Council always interpreted the documents as if they were English statutes: "Thus Lord Halsbury L.C., in Webb v. Outrim, [1907] A.C. 81,

In this way the Council hoped to employ Dicey's theory of parliamentary sovereignty and avoid becoming an un-English-like court.[28] But in treating them like English statutes the Privy Council naturally made them subject to the *ultra vires* doctrine,[29] the same doctrine which applied to all English statutes. As a result, if any Canadian or Australian law went beyond the limits placed on a Canadian or Australian government's law-making powers by the applicable constituent act, it could be annulled.[30] This outcome, of course, was totally unlike any result possible in an ordinary English court.[31] It enabled the Privy Council to render judicial decisions in the guise of statutory interpretation which invalidated legislation.[32]

English constitutional theory subordinated the judicial role to the legislative role in the United Kingdom.[33] By a peculiar historical development, however, it produced the reverse situation in the Commonwealth.[34] It made the scope of judicial review practiced by the Privy Council and later by its successors, the Canadian Supreme Court and the High Court of Australia[35] similar to the scope of judicial review in

seemed disposed to challenge the notion that there could be such a thing as an 'unconstitutional' act of a Dominion or colonial legislature, once that act had been assented to by the Crown. During the argument in Webb v. Outrim, Lord Halsbury, in reply to counsel's contention that a law was *ultra vires*, observed: 'That is a novelty to me. I thought an Act of Parliament was an Act of Parliament and you cannot go beyond it. . . . I do not know what an unconstitutional act means.' " E. MCWHINNEY, *supra* note 2, at 59 n.24.

28. For examples of the Privy Council's method of interpretation, *see* Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326 (P.C.), and Attorney-General for Australia v. Colonial Sugar Refining Co., [1914] A.C. 237. The failure to distinguish between constitutional and statutory documents had far-reaching consequences for the style of judicial review followed in Australia and Canada when appeals to the Privy Council ended. *See* notes 39-62 and accompanying text *infra*. *See also* T. FRANCK, *supra* note 2, at 138-40.

29. E. MCWHINNEY, *supra* note 2, at 12-14.

30. *Id.*

31. *See* note 28 *supra*.

32. For examples of Australian decisions, *see* note 274 *infra*. For examples of Canadian cases, see Saumur v. City of Quebec, [1953] 4 D.L.R. 64 (where the Canadian Supreme Court held that the City of Quebec could not bar Jehovah's Witnesses from distributing leaflets on the streets of Quebec, pursuant to legislation enacted by the Quebec legislature, because section 91 of the British North America Act, 1897, note 17 *infra*, did not permit provincial legislatures to legislate to restrict freedom of religion); Attorney-General for Manitoba v. Manitoba Egg and Poultry Ass'n, 19 D.L.R.3d 169 (1971) (where the Canadian Supreme Court held that a Manitoba law regulating the importation of eggs was designed to restrict the free flow of trade among the provinces and hence was not a power given to provincial legislatures by section 91 of the British North America Act. *See* note 17 *supra*.

33. *See* notes 6-15 and accompanying text *supra*.

34. *See* notes 29-30 and accompanying text *supra*.

35. Appeals to the Privy Council from the Canadian Supreme Court were abolished in 1949 by the Supreme Court Act, 1949, 12, 13 & 14 Geo. 6, c. 22. As a result of legislation by the Australian Parliament in 1968 and 1975, appeals to the Privy Council from the Australian High Court have also been, in effect, abolished. *See* R. LUMB & K. RYAN, *supra* note

the United States.[36]

C. The Style of Judicial Review in Britain, Canada and Australia

The historical evolution of Canadian and Australian judicial review in theory has given judges in Canada and Australia considerable freedom to substitute their own personal opinion of proper public policy in place of the views of their nations' legislators. This much has already been explained. But the actual practice of judicial review in Canada and Australia is not at all consistent with the theory.[37] It reflects an extreme reluctance on the part of Canadian and Australian judges to exercise "dynamic," "activist" judicial review.[38] This reluctance is demonstrated most dramatically by the style of judicial review practiced by Canadian and Australian judges.[39]

Like English jurists, Canadian and Australian judges follow a style of judicial review which is highly "legalistic." It focuses on literal construction of legal rules and their syllogistic analysis.[40] They therefore eschew the interest-balancing approach common to American adjudication.[41] In their view such an approach is a political one.[42] It is not the strictly legal approach which judges should follow. Lord Jowett described the proper judicial function in this way:

> [T]he problem is not to consider what social and political conditions of today require; that is to confuse the task of the lawyer with the task of the legislator.
>
> It is quite possible that the law has produced a result which does not accord with the requirements of today. If so, put it right by legislation, but do not expect every lawyer . . . to act as Lord Mansfield did, and decide what the law ought to be. He is far better employed if he puts himself to the much simpler task of deciding what the law is.[43]

17, at 260. But even prior to this legislation, appeals to the Privy Council from the Australian High Court concerning questions of the limits of the constitutional powers of the Commonwealth or its states never existed as of right. They could be taken only be leave of the High Court when it certified that the question was one which ought to be determined by Her Majesty in Council—in effect the Privy Council. *Id.* at 257.

36. *See* note 273 and accompanying text *infra*.

37. *Id.*

38. *Id.*

39. E. McWHINNEY, *supra* note 2, at 14, 60.

40. E. McWHINNEY, *supra* note 2, at 16-17.

41. *Id.*

42. For a synoptic analysis of "positivist" and "realist" legal philosophies which underlie and greatly influence English and American styles of judicial review, see S. BENN & R. PETERS, SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE 72-87 (1975). For a more detailed discussion, see G. CHRISTIE, JURISPRUDENCE 292-787 (1973).

43. Fullagar, *Liabilities for Representations at Common Law*, 25 AUSTL. L.J. 278, 296 (1951) (quoting Address by Viscount Jowitt to the Seventh Legal Convention of the Law Council of Australia (Aug. 13, 1951)).

The English, Canadian and Australian judge, therefore, only applies the law. He does not create it. At least he thinks so. This view of the judicial function has placed severe restrictions on the judge's discretion in making decisions.[44] For example, it has limited the judge's access to information useful in reaching a judgment. Specifically, it does not permit a judge

> to consider the parliamentary history or the speeches in debates in the House . . . as a guide to the meaning of contested legislation . . . [or] to allow counsel to refer to legal periodicals as authorities . . . [or] to consider these social and economic materials with which the United States Supreme Court has become familiar since the Brandeis Brief was first employed. . . .[45]

Nor does it permit the English and Commonwealth judge to discard judicial precedents. In fact, it commands a very rigid adherence to the doctrine of *stare decisis*. Curiously, this fidelity to precedent may even be stronger in Canada and Australia than in Britain. If so, it has happened almost imperceptively. For many years the English House of Lords was formally and absolutely bound by the rules of decision in their previous cases even if the application of those rules produced unjust consequences.[46] The Privy Council, while not actually obliged to follow precedent (either its own or that of other English courts), nevertheless did so.[47] It thus vastly influenced the practice of the Canadian Supreme Court and the High Court of Australia.[48] So even though in recent years the House of Lords has relaxed somewhat its attitude to the doctrine of *stare decisis*,[49]this liberalization of policy has not yet

44. *See* E. MCWHINNEY, *supra* note 2, at 14-18.

45. *Id.* at 16-17.

46. The rule that the House of Lords is absolutely bound by its former decisions was established in London St. Tramways Co. v. London County Council, [1898] A.C. 375. In 1966, the House of Lords relaxed the rule somewhat: "Their Lordships . . . propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so." Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234.

47. E. MCWHINNEY, *supra* note 2, at 17 n.29.

48. After appeals to the Privy Council ended, the Canadian Supreme Court reaffirmed the *London Tramways* principle, *see* note 46 *supra*, in Woods Mfg. Co. v. The King, [1951] 2 D.L.R. 465. *See also* D. SMILEY, CANADA IN QUESTION: FEDERALISM IN THE SEVENTIES 24 (2d ed. 1976). On the other hand, the Australian High Court had no need to reaffirm the rule because it had always followed it, albeit with a qualification: the High Court would overturn a precedent if it considered it to be "manifestly wrong." *E.g.*, Attorney-General for New South Wales v. Perpetual Trustee Co. (Ltd.), 85 C.L.R. 237 (1952). "On one notable occasion, [however] . . . the High Court of Australia, in deference to this rule, felt bound to follow a decision it had given in an earlier, more experimental period of its history, even though the individual High Court judges felt that that decision was wrong; at the same time, however, the High Court judges expressed the hope that the Privy Council would overrule the earlier decision when the present case went to it on appeal, and this in fact the Privy Council obligingly did." E. MCWHINNEY, *supra* note 2, at 17-18.

49. *See* note 46 *supra*.

greatly weakened the persuasiveness of precedents in either Canada or Australia.[50] Precedent is still enormously more influential there than in the United States, and possibly even than in England. To the extent *stare decisis* is followed, it directly reduces the ability of Canadian and Australian judges to create new legal principles by judicial decision.

The exercise of such judicial self-discipline by English, Canadian and Australian judges follows logically from their preconceived notions of what it means to be a judge. Their role, as they conceive it, is limited to the application of prior legal rules, be they legislative rules or common law rules.[51] They therefore focus their efforts on interpreting words, on discovering what meaning the words embodied in statutes and common law convey to the ordinary readers of English.[52] They do not find it enlightening to seek the intent of the legislators who wrote the legislation or the motives of the ancient common law judges who first promulgated the common law.[53] In their view to look behind the words of legislators or judges by inquiring into their thoughts and values would be an unseemly political task, one fraught with the dangers of judicial manipulation.[54] It would not aid them in making grammatical sense of the legislation or the precedent. This then explains why the use of social and economic statistics in judicial decision-making is for them simply irrelevant.[55] By the same theory of jurisprudence they justify their attachment to the doctrine of *stare decisis*. According to Lord Devlin, "[t]he theory that supports the rule must . . . be the theory that judges do not make the law but only declare it. . . . Clearly this permits no change in the law once it has been revealed and pronounced."[56] Since this is so, judges are simply not allowed to substitute their opinions for those of legislators or earlier judges. They can only declare what legislators and judges have said the law is. Once they have done so, they have stated forever (or until the legislature intervenes to

50. *See* note 48 *supra*.

51. *See* G. MARSHALL, CONSTITUTIONAL THEORY, 73-79 (1971).

52. *Id.* at 75.

53. *Id.* at 74-76.

54. *Id.* at 78.

55. *Id.* at 74-75.

56. P. DEVLIN, SAMPLES OF LAWMAKING, 21-22 (1962). Lord Devlin went on to state that "it is not, I think, too strong a sense of pride that has led the House of Lords to rely on its infallibility; it is the simple acceptance of the constitutional principle that the judiciary has only a limited right to make law. In the House of Lords the judicial process exhausts itself. The law that is there pronounced may not even at the time be the best rule for the needs of society that could be devised; and certainly, if it is, it will not always remain so. But it is the best that can be produced by development and without abrupt change. Change is for the legislature. . . . because in a democracy it is for the people to decide whether a law is good or bad, serviceable to them or not . . . . The House of Lords does not take pride in the fiction of its infallibility; it takes refuge in it." *Id.*

change the law) what the law means. No reversal of precedent is therefore possible.

This highly "legalistic" style of judicial review is the contemporary practice of English, Canadian and Australian judges.[57] It is intentionally designed to limit their exercise of judicial power, and to place the primary burden for legal change on the political branches.[58] The style is not used by these judges as a means of abdicating responsibility for national reforms.[59] Rather, their use of this style reflects a recognition on their part of the limited right and ability they have as judges to provide such reforms.[60] Sir Owen Dixon, upon his elevation to Chief Justice of the High Court of Australia, made this very clear when he rebuked critics of his court's approach to judicial review[61] by saying: "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."[62] This commitment to "complete legalism" has made the Canadian and Australian courts in particular very reticent to use the power they possess. They have not exploited their power to undertake intensive judicial review.

D. The Scope and Style of Judicial Review in the United States

American judicial review is in large part the product of the historical acceptance and evolution in the United States of Chief Justice John Marshall's constitutional theory. In the case of *Marbury v. Madison*[63] he declared that the American Constitution was fundamental law, and that its interpretation was solely within the competence of the judiciary.[64] Although neither assertion was logically necessary,[65] or even im-

57. *See* notes 51-55 and accompanying text *supra*.

58. *See* P. DEVLIN, *supra* note 56, at 1-27.

59. *Id.* at 23.

60. *Id.* at 23-25.

61. E. MCWHINNEY, *supra* note 2, at 79.

62. 26 AUSTL. L.J. 2, 6 (1952) (cited in E. MCWHINNEY, *supra* note 2, at 79). This view was recently repeated by the present Chief Justice of the High Court, Chief Justice Barwick, when he said: "The only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole: and to find its meaning by legal reasoning." Attorney-General for Australia v. Commonwealth of Australia, 7 Austl. L.R. 593, 600 (1975). It was expressed more bluntly by Canadian Chief Justice Taylor of the Manitoba Court of Appeals when he said: "I am not here to dispense justice. I am here to dispose of this case according to law. Whether this is or is not justice is a question for the legislature to determine." Cavalluzzo, *Judicial Review and the Bill of Rights: Drybones and its Aftermath*, 9 OSGOODE HALL L.J. 511, 517 (1971). Compare this view with the American one expressed in note 87 *infra*.

63. 5 U.S. (1 Cranch) 137 (1803).

64. *Id.* at 177.

65. "[I]n theory, all the organs of the government are of equal capacity; or, if not equal,

mediately accepted by the nation, his view is today unassailable. History has settled the matter.[66]

In Marshall's view, the judiciary was empowered to have the last word as to the propriety of governmental actions. This naturally established a degree of prominence and power for the American judiciary not given to English courts,[67] and not yet claimed by the highest courts of Canada and Australia.[68] This capacity for judicial review, however, did not empower the American courts to rule on every social issue brought before them. But since it did not logically preclude such an approach, the historical development of Marshall's theory of judicial review, particularly during this century, and most noticeably since the second world war has given the American judiciary the power to resolve a large number of essentially social disputes which in other countries are resolved by the political branches.[69] Led by the United States Supreme Court, the judicial role in the American political system expanded, on the one hand, by means of the interpretation of general clauses of the Constitution,[70] and on the other, by a lowering of the traditional procedural barriers to judicial review of legislation.[71] The effect was to enlarge synergistically the sphere of social conflicts within the American polity, not only subject to judicial review, but also, as a result of Marshall's theory, to the final judgment of the courts.[72] Accordingly, the scope of American judicial review is much broader and far more important than that exercised by British, Canadian or Australian courts.

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each must be supposed to have superior capacity only for those things which peculiarly belong to it; and as legislation peculiarly involves the consideration of those limitations which are put on the law making power and the interpretation of the laws when made, involves only the construction of the laws themselves, it follows, that the construction of the constitution, in this particular, belongs to the legislature, which ought, therefore, to be taken to have superior capacity to judge of the constitutionality of its own acts." Eakin v. Raub, 12 Serg. & Rawl. 330, 350 (Pa. 1825).

66. "Historical accident and bad logic may explain the inception of judicial review, but by now the American nation has lived with the consequences for more than 150 years." R. McCLOSKEY, THE AMERICAN SUPREME COURT 17 (1960).

67. *See* notes 6-15 and accompanying text *supra.*

68. *See* notes 16-36 and accompanying text *supra.*

69. *See generally* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 1-21 (The Brookings Institution, (1977).

70. "Some of the changes, but not all, result from reading into the generalities of the Due Process and Equal Protection Clauses notions of wise and fundamental policy which are not even faintly suggested by the words of the Constitution, and which lack substantial support in other conventional sources of law." A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 100 (1976).

71. *See id.* at 108 (*e.g.*, standing, political questions, declaratory judgments and class actions).

72. *See generally* A. COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM (1968). *See also* notes 205-07 and accompanying text *infra.*

Given the wide reach of American judicial review, it is not surprising to find that courts in the United States actively occupy a role fully commensurate with that scope. Unlike Canadian or Australian courts, the American judiciary has seldom consciously foregone its ability to make far-reaching decisions.[73] Quite to the contrary, the judiciary has been the principal instrument of social change in the United States since the second world war.[74] This has of necessity created a style of judicial review which is quintessentially pragmatic in approach.[75] Indeed it has virtually eliminated even the pretense of "legalism."

American judges fully admit that they "make" law, and, (to the horror of the followers of English jurisprudence), that it is their proper function to do so.[76] In the view of many American judges, a pragmatic approach is required because:

> Though policy considerations have . . . very clearly intruded into the courts' decision-making, they have all too frequently entered by the back door to operate as "inarticulate major premises" only for the courts' ultimate holdings. The essential weakness of the [English] position in this respect has been the failure to recognize that it is not a choice between judicial policy-making and absence of judicial policy-making; but between policy-making based on a full and open canvasing of alternative lines of action and policy-making in the dark.[77]

Consonant with a philosophy which commands them to make a full inquiry into policy alternatives, American judges behave a great deal like legislators. They frequently use social and economic information, as well as legislative historical materials to assist them in reaching a decision.[78] More often than not they are unpersuaded by precedent.[79] In their view, common law judges existed not only in medieval times.[80] Their successors are today as much common law judges as were the jurists of the *Curia Regis*.[81] This realization provides American judges

73. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (criminal procedure); Reynolds v. Sims, 377 U.S. 533 (1964) (reapportionment); BROWN V. BOARD OF EDUC., 349 U.S. 294 (1955) (desegregation). Inspired by these decisions of the United States Supreme Court, American state supreme courts have become bolder in discarding their claims of deference to the legislative will. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975) (the adoption of comparative negligence by judicial decision); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (the annulment of governmental and charitable immunities to suit).

74. *See generally* note 72 *supra*.

75. E. MCWHINNEY, *supra* note 2, at 238.

76. *Id. See also* E. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 3-80 (1962).

77. E. MCWHINNEY, *supra* note 2, at 29-30.

78. *Id.*

79. *See* note 73 *supra*.

80. *See* Green v. Superior Court, 10 Cal. 3d 616, 639-40, 517 P.2d 1168 (1974).

81. *Id. See also* State *ex rel.* Thorton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) (Black-

with the justification for making subjective decisions by "weighing and balancing" interests.[82] It encourages them to focus on the normative aspects of decisions and not on how those decisions are made. In short, it makes them result oriented.[83]

Such a free-wheeling pragmatic style of judicial review is very different from the legalistic one practiced by English and Commonwealth judges.[84] It is not designed to limit the role of American judges, but to expand it. It thus places the onus of legal reform on the courts.[85] It is not surprising, then, to find that American judges share the work of creating social change with their executive and legislative comrades.[86]

E. Some Reasons Commonly Given for the Differences in the Style of Judicial Review Practiced by American, British, Canadian and Australian Courts

A comparison of the style of judicial review practiced by English, Canadian and Australian courts, with the approach taken by American courts reveals some extraordinarily large differences.[87] The former ju-

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stone's notion of custom was used to create an easement in land which neither statute nor precedent could create).

82. MCWHINNEY, *supra* note 2, at 29-30.

83. *See* Forrester, *Are We Ready for Truth in Judging?* 63 A.B.A.J. 1212 (1977).

84. Professor Sanford Kadish feels that it is in fact this overtly "political" style which has made the United States Supreme Court so vulnerable to allegations that it is usurping legislative powers. Kadish, *Judicial Review in the United States Supreme Court and the High Court of Australia (Part II)*, 37 TEX. L. REV. 133, 167-68 (1958). By comparison, he notes that the Australian High Court has been relatively free from such accusations. *Id.* According to Professor Kadish, the High Court has avoided widespread criticism, not because it has not rendered controversial judgments, for it has made a number of them, *see* notes 274-75 *infra*, but because when it has done so, it has been extremely careful to couch its analysis of the legal issues and its reasons for the decision in the mechanistic, "legalistic" manner it is accustomed to use. *Id.* The High Court has thus been far better able to "look" like a court than has the Supreme Court, and has thus been less open to attack. *Id.*

85. *See* notes 72-73 and accompanying text *supra*.

86. *Id.* "[T]he method and criteria of constitutional adjudication advanced by Chief Justice Dixon [of the Australian High Court, *see* notes 61-62 and accompanying text *supra*], would find little acceptance in the contemporary Supreme Court. In the United States "legalistic" has become an opprobrious adjective. Fixed concepts and logical categories have come to be regarded as chimera concealing the true springs of motivation of decision making. . . . Strictly legalistic techniques . . . [are] subordinated in favor of a sophisticated use of the world of fact[,] of sociology, economics, political theory and history." Kadish, *supra* note 84, at 135-36. As another commentator recounted: "A century ago a great American judge, Chancellor Kent, in a personal letter explained his method of arriving at a decision. He first made himself 'master of the facts.' Then (he wrote) 'I saw where justice lay, and the moral sense decided the court half the time; I then sat down to search the authorities. . . . I might once in a while be embarrassed by a technical rule, but *I almost always found principles suited to my view of the case. . . .*'" G. CHRISTIE, *supra* note 42, at 700 n.109 (italics in the original).

87. The magnitude of constitutional adjudication in the United States is best seen by comparing it with that found in Canada and Australia.

diciaries perform a much less sizable role in their respective political systems than do the latter.[88] Why is this so? Canadian and Australian courts possess nearly the same ambit of judicial power as do American courts.

Scholars of comparative judicial review usually give three explanations for the relative extensiveness of American judicial review. First, constitutional theory and political development in the four na-

	1903-1965	1948-1968	1949-1971
	AUSTRALIAN HIGH COURT	U.S. SUPREME COURT	CANADIAN SUPREME COURT
Federal laws held invalid in whole or in part	100	831	1*
Federal laws held valid	240	940	17
Percent of Federal laws held invalid	34.0%	46.9%	5.3%
State laws held invalid in whole or in part	70	182**	15
State laws held valid	90	75**	22
Percent of State laws held invalid	43.8%	72.4%**	41.0%
Total laws held invalid in whole or in part	170	1013**	16
Total laws held valid	330	1015**	39
Percent of total laws held invalid	34.0%	49.9%**	29.1%

* *Regina v. Drybones* is not included. *See* note 198 *infra.*
** includes only state criminal law totals.

A comparison of the figures reveals that the United States Supreme Court has considered the validity of more than five times as many public laws, and has held more than eight times as many of them invalid in twenty years as has the Australian High Court in sixty years. When its work is compared to the work of the Canadian Supreme Court the figures magnify beyond sensible comparison the enormous role played by the United States Supreme Court in the American political system. The figures in the table with respect to the United States, Australia and Canada are found in P. MCCLOSKEY, THE MODERN SUPREME COURT, 339-41 (1972), G. SAWYER, AUSTRALIAN FEDERALISM IN THE COURTS, 80 (1967) and Weiler, *The Supreme Court and the Law of Canadian Federalism*, U. OF TORONTO L.J. 307, 361 nn. 102-04 (1973), respectively.

These comparisons should no doubt be made with caution. But even if one allows the differences in jurisdictional ambit to account for the vast disparity in total constitutional adjudication, one cannot escape the import of the percentage figures. Just over a quarter of the Canadian laws, and a third of the Australian laws have been held invalid by the highest courts in those countries, while in the United States nearly half of the federal and state laws enacted between 1948 and 1968 have been annulled by the United States Supreme Court. Thus the figures reveal in a startling manner the relative roles played by each judiciary in its respective political system.

88. *Id.*

tions have been different.[89] To justify their subservience to the legislative will, Canadian and Australian judges still profess allegiance to Dicey's conception of the judicial role.[90] Indeed, they continue to do so even in face of the fact that their parliaments are manifestly not sovereign in the way the English parliament is.[91] Dicey's constitutionalism, therefore, remains a powerful intellectual impediment to expansive Canadian and Australian judicial review. Through the media of legal education and experience it molds and colors the practices of Canadian and Australian judges.[92] In America, of course, Dicey's view of legislative sovereignty never took hold. Chief Justice Marshall's theory of judicial power has reigned supreme.[93] No similar theoretical obstacles to active judicial review ever existed to block the advance of judicial

89. *See* notes 6-87 and accompanying text *supra*.

90. "The [Canadian Supreme] Court exercises judicial restraint largely because of its acceptance of the concept of the supremacy of Parliament. . . ." Cheffins, *The Supreme Court of Canada: The Quiet Court in an Unquiet Country*, 4 OSGOODE HALL L.J. 259, 263 (1966).

The Australian High Court, on the other hand, practices self-restraint in a more subtle fashion. It does not avowedly exercise legislative deference by an adherence to Dicey's formal logic of parliamentary sovereignty; in fact, it has been quite receptive to American constitutional ideas. *See, e.g.*, Australian Communist Party v. Commonwealth, 83 C.L.R. 1, 262-63 (1951) (Fullager, J., concurring) ("in our system the principle of *Marbury v. Madison* . . . is accepted as axiomatic, modified in varying degree in various cases . . ."). Yet notwithstanding such views, evidence of judicial review indicates that "[i]n construing an enactment the constitutional validity of which is in issue, the [High] Court will not hold it to be *ultra vires* unless the invalidity is clear beyond all doubt; the presumption is always in favour of validity. . . ." W. WYNES, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA 34 (4th ed. 1970). *Accord*, R. LUMB & K. RYAN, *supra* note 17, at 19-23. Thus Dicey's influence seems apparent.

91. *See* G. MARSHALL, *supra* note 1, at 103-17; Lyon, *The Central Fallacy of Canadian Constitutional Law*, 22 MCGILL L.J. 40 (1976).

The Canadian government, by virtue of the British North America (No. 2) Act, 1949, 12, 13 & 14 Geo. 6, c. 81, was given power to amend the Canadian constitution in all matters except certain broadly defined subjects, principally those concerning provincial government powers and autonomy. *Id.* Amendment of these matters still requires a British statute. G. MARSHALL, *supra* note 1, at 88-90.

The Australian constitution cannot be amended by the Australian Commonwealth Parliament acting alone. The procedure for amendment is described in section 128 of the Commonwealth of Australia Constitution Act, and requires, *inter alia*, a referendum. R. LUMB & K. RYAN, *supra* note 17, at lv-lvi. Therefore, as C.H. McIlwain put it: "When the referendum really comes, the sovereignty of Parliament must go." *quoted in* G. MARSHALL, *supra* note 1, at 103.

92. E. MCWHINNEY, *supra* note 2, at 27-28. *See also* Cavalluzzo, *supra* note 62, at 513, 532. The influence of Dicey in the training of Canadian lawyers, judges and academics at Canadian law schools has been pervasive. There is some suggestion, though, that the English Inns of Court are becoming less of a mecca for Canadian legal scholars than they once were. *Id.* at 532. Indeed, the latest generation of Canadian legal scholars are apparently pursuing graduate degrees at American law schools. *Id.*

93. *See* notes 64-72 and accompanying text *supra*.

supremacy.[94]

A second explanation for the comparative extensiveness of American judicial review lies with the nature of the judicial personnel of each nation's judiciary. The character of the individuals chosen to be judges has reenforced the divergent judicial styles.[95] In the United States the selection of judges has been a rather haphazard process. Numerous members of the American bench have been "men of affairs," individuals with motley backgrounds.[96] They have included large numbers with political experience.[97] By contrast, English, Canadian and Australian judges are selected from a special barrister class of professional litigators.[98] They have often been the elite of the legal profession, many of them eminent scholars.[99] This difference in the make-up of the judicial personnel has undoubtedly buttressed the pragmatic "political" style of American judges, and the abstract "legalistic" style of their English, Canadian and Australian counterparts.[100]

A third reason for the larger level of American judicial review may possibly be found in the dissimilar procedures and caseload of the Canadian, Australian and American high courts. For example, one Canadian procedure obliges the Supreme Court of Canada to render advisory opinions.[101] Since such cases do not deal with "real" issues and conventional adversary procedures, but are judged in the abstract, they may encourage that court to treat all cases similarly, and resolve even real issues in a legalistic way. Another example points to the greatly different jurisdictional caseloads handled by the three high courts. In contrast to the United States Supreme Court, and despite being federal states, both the Canadian Supreme Court and the Austra-

94. *Id.*

95. *See generally* E. MCWHINNEY, *supra* note 2, at 247-48. *See also* J. SCHMIDHAUSER, THE SUPREME COURT: ITS POLITICS, PERSONALITIES, AND PROCEDURES 30-62 (1960).

96. E. MCWHINNEY, *supra* note 2, at 247.

97. *See* notes 95-96 *supra.*

98. "In a word, [Commonwealth judges] . . . tend to view their *role* as being far more strictly professional and so as imposing far more restraints of political prudence than do their American counterparts. This is a direct consequence, and also a means of insuring the maintenance, of the principle that the judges themselves should be legal professionals and that strictly professional legal criteria should be uppermost in the search for candidates for judicial office. The Commonwealth supreme courts, up to recent times, have generally been free of the 'men of affairs' who have so largely staffed the United States Supreme Court since the Roosevelt era." McWhinney, *Constitutional Review in Canada and the Commonwealth Countries*, 35 OHIO ST. L.J. 900, 904 (1974). *See generally* E. NEUMAN, THE HIGH COURT OF AUSTRALIA A COLLECTIVE PORTRAIT, 1903-1972 at 83 (2d ed. 1973); Clark, *Appointments to the Bench*, 30 CAN. B. REV. 28 (1952).

99. *Id.*

100. *See* E. MCWHINNEY, *supra* note 2, at 247-48. *See also* Kadish, *supra* note 84, at 160-62 for descriptions of how judicial appointments buttress "legalistic" and "pragmatic" attitudes to judicial review.

101. CAN. REV. STAT., c. S. 19, S. 55 (1970).

lian High Court preside over unitary court systems.[102] This makes them the highest tribunals in their lands for private law matters.[103] The bulk of their legal work concerns problems of tort, contract, property, etc.[104] As a result, "judicial constitution-making in Canada and Australia has been a part time, more casual, less absorbing responsibility."[105] In the United States the discretionary power given the United States Supreme Court over its case load by the Judiciary Act of 1925,[106] has permitted that Court to concentrate its attention exclusively on public law matters.[107] This has made it politically conscious and attuned to current events.[108] And it has allowed the court to deliberately plan its attempts at judicial legislation.[109] This ability has no doubt increased the "political" character of American judicial review far beyond the everyday pursuits of Canadian and Australian judicial review.[110]

These three foregoing factors inescapably have influenced the amount of judicial review practiced in Britain, Canada, Australia and the United States. They may not be, though, the entire explanation for the extensiveness of American judicial review. There is, perhaps, a more persuasive reason.

II. An Institutional Explanation for the Differences in Judicial Review Practiced by English, Canadian, Australian and American Courts

A. An Institutional Reason Proposed

No proper understanding of the role of the judiciary in a system of government is possible without an understanding of the political system within which it operates.[111] Political institutions do not function in a vacuum. The judiciary is no exception. On the contrary, the judiciary like all institutions interacts with other parts of the political system. As Jeremy Bentham observed, "law is not made by judge alone, but by

102. H. ALBINSKI, CANADIAN AND AUSTRALIAN POLITICS IN COMPARATIVE PERSPECTIVE 363 (1973).

103. *Id.*

104. *Id.*

105. *Id.*

106. 28 U.S.C. § 1254 (1976).

107. E. MCWHINNEY, *supra* note 2, at 235.

108. *Id.*

109. *Id.* at 248.

110. *See* notes 101-09 and accompanying text *supra.*

111. R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955). In Justice Jackson's opinion, "[n]o sound assessment of our Supreme Court can treat it as an isolated, self-sustaining, or self-sufficient institution. It is a unit of a complex, interdependent scheme of government from which it cannot be severed." *Id.* at 2.

judge and company."[112] Therefore, before one can adequately assess any single law-making body, one must analyze the total law-making apparatus of the political system.[113]

In analyzing the structure of the American, British, Canadian and Australian political systems, it becomes apparent that American presidential government is plagued by inherent institutional disabilities.[114] Self-frustrating mechanisms operate throughout the political system to debilitate the American law-making process. So "weak" has been American government that it has not been very responsive to public demands for reforms nor very willing to shoulder voluntarily the responsibility of dealing with politically intractable social problems. This impotence has kept it from governing properly, and from preventing other parts of the political system—like the courts—from governing in its stead.[115]

Elsewhere the situation has been different. In Britain, Canada and Australia, the operation of cabinet government has been, by comparison, "strong" government. By centralizing and arterializing political power, "cabinet government" has been able to provide political coordination, government control and national legislation in ways in which American government cannot. Therefore, cabinet government in these political systems has been the primary instrument of social reform, as well as the principal deterrent to activist judicial policy-making. In the United States the judiciary has found it necessary to fill the void in law-making because the political branches could neither perform their proper task nor prevent the courts from performing it. In Britain, Canada and Australia the courts have not found such gaping voids because the political branches there could assume a fuller legislative role. Nor have they been inclined to regularly challenge the power of their cabinet governments because the political branches would not tolerate an usurpation of their work.

B. Comparative Constitutional Theory

1. United States

The institutional organization of government in the United States is very different from its organization in Britain, Canada and Australia. It should not be surprising, then, to find that the scope and style of judicial review in the United States is also different. What may be surprising, though, is the realization that this atypical American institutional scheme of government fosters the difference.

112. *Quoted in* P. FREUND, ON UNDERSTANDING THE SUPREME COURT 78 (1949).

113. *See, e.g.*, L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS (1969) for a study of comparative judicial review.

114. *See* notes 153-94 and accompanying text *infra*.

115. *Id.*

The American founding fathers greatly distrusted the potential political power of the Union government they were assembled to create.[116] They had experienced the misguided rule of what they believed was an unrestrained sovereign, so they were committed to minimizing the likelihood of tyrannical government in their new constitutional arrangements.[117] Following the constitutional maxim of the separation of powers with which they were familiar, the framers of the American Constitution divided the political sovereign into three completely independent, co-equal agencies of government,[118] and pitted them against each other so as to check and hinder their operations.[119] The personnel of one branch was forbidden to perform the work of the other branches. The functions of each branch, insofar as they interfered with the autonomous functioning of other branches, were severely circumscribed—*i.e.*, limited to impeding the other's work.[120] In this manner, the framers reckoned, no one branch could overwhelm the others by arrogating unto itself all political power.[121]

The authors of the American Constitution sincerely believed that their scheme of institutional organization was the only means of avoiding totalitarianism.[122] Indeed, they believed that their rather literal interpretation of the doctrine of separated powers was the most serviceable to the nation.[123] Many American constitutional scholars agree with them.[124] Indeed, consonant with the framers' casuistic spirit, present day American constitutionalism suggests that the more minutely one subdivides political power, and the more widely one disperses it amongst government institutions and empowers each political unit to block the work of all the others, the greater will be the obstacles to coordinated political action, and therefore the greater the certainty of a citizen's protection from arbitrary government.[125] As long as government is able to act only slowly and laboriously, then public safety is maximized.[126] Government at all levels in the United States embodies this idea;[127] it is designed to be difficult, not efficient.[128]

116. C. BEARD, THE ENDURING FEDERALISTS 209 (rev. ed. 1964).
117. *Id.*
118. D. HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 20-24 (1975).
119. *See* THE FEDERALIST No. 47 (J. Madison).
120. *Id.*
121. THE FEDERALIST No. 48 (J. Madison).
122. D. HUTCHISON, *supra* note 118, at 24.
123. *Id.*
124. *See generally* SUBCOMM. ON THE SEPARATION OF POWERS, S. REP. No. 91-549, 91st Cong., 1st Sess. (1969).
125. *Id.*
126. *See* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).
127. "Fortunately, the federal executive is not dispersed into its [sic] many elements as the executive of each of our States is. The dispersion of our state executives runs from top to bottom. The governor has no cabinet. The executive officers of state associated with him in

2. Britain, Canada and Australia

The Canadian and Australian founding fathers (following the dictates of English constitutional theorists) were seemingly less fearful of the potential of government power than their American counterparts.[129] Unlike the American framers, the framers of the Australian and Canadian constitutions had the advantage of witnessing and studying the evolution and development of English constitutional arrangements in the nineteenth century.[130] They were able therefore to organize their government according to notions of the separation of powers which had reached a greater degree of maturation.[131] The theory which underlies the British, Canadian and Australian institution of cabinet government manifests a wholly different interpretation of the meaning of separated powers than that underlying American constitutional organization.[132] It emphasizes, not the division and diffusion of political power, but its concentration and coordination.[133]

Cabinet government operates in the following way:[134] All political power is initially consolidated in the legislature from whose membership is subsequently drawn by internal election an executive management board of government directors—styled the cabinet. The cabinet collectively exercises executive power, but must secure all its proposals through the legislature to which it must remain constantly responsible.[135] The cabinet is the visible locus of accumulated executive power. But its ability to act hinges entirely on the legislature's confidence in it.[136] A majority of the legislature must always support it.[137] Since the executive-cabinet is not only dependent on the legislature for its legislative program, but also (and perhaps more importantly) for its very existence as the government of the nation, the cabinet system coercively encourages executive-legislative cooperation and the coordination of

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administration are elected as he is. Each refers his authority to particular statutes or particular clauses of the state constitution. Each is responsible politically to his constituents, the voters of the State, and, legally, to the courts and their juries." WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 205 (1961).

128. 272 U.S. at 293 (Brandeis, J., dissenting).

129. *See* R. MENZIES, CENTRAL POWER IN THE AUSTRALIAN COMMONWEALTH 54-55 (1967).

130. *Id.* at 52-53.

131. *See* M. VILE, *supra* note 5, at 263-98.

132. *See id.*

133. *See id.*

134. *See generally* W. BAGEHOT, THE ENGLISH CONSTITUTION, AND OTHER POLITICAL ESSAYS (1895); R. DAWSON, THE GOVERNMENT OF CANADA (5th ed. 1970); S. ENCEL, CABINET GOVERNMENT IN AUSTRALIA (1962); I. JENNINGS, CABINET GOVERNMENT (3d ed. 1969).

135. I. JENNINGS, *supra* note 134, at 472-510.

136. *Id.*

137. *Id.*

law-making activities.[138] Further, it is precisely because cabinet members are members of both executive and legislative bodies and because they are the visible expression of the majority's will that they are able to accomplish successfully the task of central coordination and cooperation.[139] The cabinet is the vital link between the executive bureaucracy and the legislature—in Walter Bagehot's famous phrase, "[the] *hyphen* which joins [the executive and the legislature and the] *buckle* which fastens [them together]. . . ."[140]

At first glance to an American, cabinet government may seem to violate the principles of separated powers.[141] It does not. As a method of constitutional organization, cabinet government is as faithful to the seminal ideas of western constitutionalism as the American scheme of presidential-congressional government.[142] It adheres to the notions of separated powers, albeit in a different way. In Britain, Canada and Australia, there are three branches of government.[143] The personnel and function of the judiciary are completely separate from those of the other two branches.[144] But the executive and legislature maintain only a partial separation of personnel and functions.[145] They share some of them.[146] Cabinet ministers are members both of the executive and legislature:[147] they function as executive heads of bureaucratic departments, and as parliamentary legislators.[148] Thus, although not *all* political power is capable of being accumulated in the same hands (the fundamental tenet of the doctrine of separated powers)[149] because not all the members of the executive are members of the legislature, or vice versa, a considerable amount of political power is concentrated in the hands of a group of individuals—the cabinet—in the interests of ensuring the cooperation of the executive and legislature and of coordinating

138. *Id.* at 59-89, 228-89, 472-510.

139. W. BAGEHOT, *supra* note 134, at 79; WOODROW WILSON, CONGRESSIONAL GOVERNMENT 92 (1956).

140. W. BAGEHOT, *supra* note 134, at 82.

141. *See, e.g.*, Professor Hutchison's statement in D. HUTCHISON, *supra* note 118, at 24.

142. *See* D. Hutchison, *supra* note 118, at 24.

143. *See generally* M. VILE, *supra* note 5, at 14-20.

144. *See generally id.* at 19, 212-37.

145. *See generally id.* at 18-19.

146. *Id.*

147. *Id.*

148. R. MENZIES, *supra* note 129, at 54.

149. This maxim does not require each branch to be "wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments. . . ." J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 393 (5th ed. M. Bigelow 1905). *See also* THE FEDERALIST NO. 47 (J. Madison); M. VILE, *supra* note 5, at 19.

their activities.[150] Deviation from the doctrine of separated powers as practiced in the United States is therefore merely one of degree.[151]

C. A Comparison of Cabinet Government and Presidential-Congressional Government

1. *The Nonmajoritarian Nature of the American Law-making Process*

Law-making in the United States is an extremely intricate and arduous procedure. Pitfalls for legislation are arrayed at every juncture of the process, making legislation slow and its outcome uncertain.[152] This is the stark reality of American government.[153] Less immediately apparent, perhaps, is how highly nonmajoritarian this system actually is.

The disruption of legislation is possible through deadlocks both between the political branches and within them.[154] Not only is either branch able to veto the work of the other, but within each branch numerous, self-functioning political vortices are also able to do the same.[155] The internal organization of the legislature, its procedures and committee structure frustrate rather than coordinate law-making.[156] So too does the internal operation of the executive department,

150. *See* M. VILE, *supra* note 5, at 212-38, 315-51.

151. The doctrine of the separation of powers is an ancient one. It is not an exclusively American concept. Its expression in western governments takes various forms. The doctrine in its purest form commands the complete separation of government agencies, functions and personnel, and prohibits the interference of one with the other. M. VILE, *supra* note 5, at 14-18. Consonant with this pure theory, the French constitution of 1791 explicitly denied the judiciary any power of judicial veto over legislation. *Id.* at 188-89. Oliver Cromwell's Instrument of Government (1653) did the same in establishing the *interregnum* Protectorate in England. *Id.* at 47-48. And in the United States various colonial governments adhered to a close approximation of the pure theory until the adoption of the Federal Constitution in 1789. *Id.* at 122, 133. The operation of the pure theory, however, made effective government impossible. Thus, each nation which applied the theory found it necessary to compromise the original idea to allow for a modicum of coordination among government agencies, functions and personnel. *Id.* at 119-293. The results of those compromises are seen in the present operation of presidential-congressional government and cabinet government. The former emphasizes more separation and less coordination than the latter. But in both cases English and American constitutionalism turns on the degree and nature of the separation of powers and not, as believed by some, on its existence in the former and its non-existence in the latter. K. WHEARE, *supra* note 20, at 25-28. *See also* M. VILE, *supra* note 5, at 18-19. For a view that the concept of separated powers has little analytic utility other than as a phrase meaning "limited government," see G. MARSHALL, *supra* note 51, at 97-124.

152. *See* notes 153-94 and accompanying text *infra*.

153. *See generally* C. HARDIN, PRESIDENTIAL POWER AND ACCOUNTABILITY: TOWARD A NEW CONSTITUTION 1-9 (1974); H. HAZLITT, *supra* note 4; M. VILE, POLITICS IN THE USA, *supra* note 3, at 143-218; THE PROSPECT FOR PRESIDENTIAL-CONGRESSIONAL GOVERNMENT (A. Lepawsky ed. 1977).

154. S. FINER, COMPARATIVE GOVERNMENT 225 (1977).

155. *Id.*

156. *See generally* 1 J. BRYCE, THE AMERICAN COMMONWEALTH 92-204 (1889). As

with its independent agencies and quasi-public bodies.[157] "Thus the federal government does not consist simply of three bodies which must concur for an act of government to be sanctioned; it consists of many more; and each one of these, by its refusal to concur, can veto the operations of all the others."[158]

This lack of executive and legislative central coordination and internal cohesion produces nonmajoritarian, and in a strict sense, undemocratic, government.[159] Each of the many scattered power centers throughout the political system possess a *liberum* veto power. Each is able to block the enactment of legislation it dislikes. Even proposals with the support of large numbers of people in the executive and legislative branches have, at times, tremendous difficulty in securing passage.[160] Many never do. "This arrangement, as already described, is designed to stultify government—to enable one bit of the government to say something different from—[another] bit and, whenever this occurs, to prevent government *as a whole* from saying anything at all."[161] Presidential government in the United States is not like cabinet government—majority government—but instead something akin to "government by minorities."[162]

Bagehot observed, Congress "is a body hanging on the verge of government." W. BAGEHOT, *supra* note 134, at 53 (quoting Andrew Johnson).

157. *See generally* H. SEIDMAN, POLITICS POSITION AND POWER (1970). In Finer's words, "[t]o call it the executive 'branch' is a misnomer. It is a congeries of thrones, principalities and powers." S. FINER, *supra* note 154, at 250.

158. S. FINER, *supra* note 154, at 225.

159. *See generally* J. LIVELY, DEMOCRACY (1975).

160. *See generally* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 18-22 (1966); D. TRUMAN, THE GOVERNMENTAL PROCESS (1971).

161. S. FINER, *supra* note 154, at 208.

162. Interest group domination of American government has become so pervasive that one school of American political theory has found it necessary to redefine the concept of "democracy", which traditionally meant majority rule, to mean "minorities rule." R. DAHL, A PREFACE TO DEMOCRATIC THEORY 132 (1956). In a conversation with the present writer, the English political philosopher, the late Professor John Plamenatz, criticised Professor Dahl's attempted redefinition of democracy. In Professor Plamenatz's view, the redefinition seemingly was made to accommodate the nonmajoritarian nature of American government. And if so, that rationale, in itself, did not make the definition correct. In his opinion, government by General Motors, AFL-CIO, Common Cause, Standard Oil and other such groups is not democratic. *See generally* P. PLAMENATZ, DEMOCRACY AND ILLUSION 180-212 (1977). Professor Plamenatz's familiarity with the majoritarian nature of cabinet government in his country, and its prominence in nearly every other western liberal-democracy, *see* H. HAZLITT, *supra* note 4, at 159-62, may have led him to this conclusion and his reassertion that democracy is "government by the consent of and responsible to the *majority* of the governed." *See* P. PALMANTZ, *supra*, at 38-39, 69-70, 107-08, 194-95, 200.

2. The Irresponsible Character of American Government

a. Unrestrained

The divisive, self-defeating nature of American government cannot help but make it somewhat irresponsible. Its labyrinthian lawmaking procedures defy total public control. Lord Bryce, the well-known English historian of American life, already noted this fact in the last century.

> [T]he [American] nation does not always know how or where to fix responsibility for misfeasance or neglect. The persons or bodies concerned are so unrelated to one another that each can generally shift the burden of blame on someone else, and no one acts under the full sense of direct responsibility [as one does in cabinet government]. . . .[163]

Lord Bryce's words ring true particularly in the modern era. In the United States there is no centripetal organization like the cabinet to concentrate and focus political responsibility.[164] No one agency of government is answerable, as a cabinet is, at an election [or to a legislature] for official wrong or dereliction.[165] Instead, American executive and legislative powers are finely ground; their political authority is divided amongst a manifold number of disconnected political entities.[166] This diffusion of political authority permits each isolated unit of American government to point the accusatory and exculpatory finger at another unit for their mutual failure to cooperate in a legislative enterprise, and thus to escape liability for the overall government of the nation.[167] In such a situation, responsibility for government as a whole is necessarily ambiguous. The voter is unable to assess adequately the accountability of public servants.[168] With no one institution in charge of government, the way a cabinet is, the voter cannot assign to any political entity the responsibility of overall administration and in turn discipline it with his ballot.[169] The voter can vote for part of the government some of the time, but never for the whole government at any time.[170] The most a

163. 1 J. BRYCE, *supra* note 156, at 287.

164. "They [the founders] divided the legislature from the executive so completely as to make each not only independent, but weak even in its own proper sphere. The President was debarred from carrying Congress along with him, as a popular prime minister may carry Parliament in England, to effect some sweeping change. . . . He is forbidden to appeal at a crisis from Congress to the country. . . . Congress on the other hand was weakened, as compared with the British Parliament in which one House has become dominant, by its division into two co-equal houses, whose disagreement paralyzes legislative action. . . ." *Id.* at 278.

165. *See* note 172, *infra.*

166. *See* note 152-94 and accompanying text *infra.*

167. *See* note 163 and accompanying text *supra.*

168. I. JENNINGS, *supra* note 134, at 475-76.

169. *See id. See also*, note 192 *infra.*

170. *See id.*

voter can do is disperse the disciplinary power of his franchise amongst various political centers, dissipating what little control the voter exercises over those who govern him.[171] In this sense, American government is irresponsible and not easily amenable to public control.[172]

b. Unresponsive

Government in the United States is also irresponsible in another sense. Its law-making procedures are notoriously unresponsive to the meritorious claims of many minority groups, especially those traditionally dispossessed by American society.[173] This is so because American government is acutely susceptible to interest group pressures which thwart the advancement of minority group proposals.[174] The structure of American government is "superbly adapted to the task of registering and reflecting the interests and opinions of innumerable groups throughout the country and of aggregating those interests in a way which will facilitate the emergence of compromise policies. . . ."[175] But all too often the law-making maze only is able to devise policies which "represent the lowest common denominator of interested opinion."[176] Worse, perhaps, from the standpoint of traditionally disadvantaged minorities

171. *See id.* at 473.

172. "[W]ithout adequate power there can be no . . . responsibility, and if the power is not concentrated and obvious to all, there can be neither the fixing nor the enforcement of this responsibility." C. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 142-43 (1947). Where political power is diffused rather than concentrated, so too, is the public's ability to control and discipline that power through its votes. The strength of the electoral check, the most potent of all checks of government power, is weakened and dissipated by its dispersion among numerous disconnected elected officials. Hence, the Watergate affair, for example, was an inevitable outcome of this unsatisfactory state. "In a parliamentary [system] the troubles of Watergate could not have festered. This is partly because a parliament would much earlier have questioned and harried and forced the resignation of a prime minister (as it cannot question and harry and force the resignation of a head of state without causing the sort of constitutional crisis in which America is now embroiled)." *Wedding Bells*, THE ECONOMIST, November 17, 1973, at 13, col. 2. *See also* H. HAZLITT, *supra* note 4, at 14-25; Levin, *Liability of the Prime Minister to the Court Process*, 39 MANITOBA BAR NEWS 143 (1972). *But see* P. KURLAND, WATERGATE AND THE CONSTITUTION 153-55 (1978). Professor Kurland suggests that cabinet government in the United States would not have prevented Watergate. *Id.* In his opinion, "while it may be true that no other nation utilizes our system of government, it cannot be said that any of these other governments functions better than ours does." *Id.* at 154. He is probably alone in that view. *See* H. HAZLITT, *supra*; Levin, *supra*; R. MENZIES, *supra* note 129 at 54. *See also* note 177 *infra*. America is very badly governed. It has only been successful in avoiding ultimate political crises through the resiliency of its people, the strength of its traditions, and its enormous natural wealth.

173. M. SHAPIRO, *supra* note 160, at 18-22, 34-39.

174. *Id.*

175. M. VILE, *supra* note 3, at 270.

176. *Id.*

> is that the compromises which work so well in many fields are potentially disastrous in those areas which demand coordinated and continuous policies. The compromise politics of consensus give to interested groups the opportunity to delay, and to modify substantially the policies which eventually emerge. In this way minorities defend themselves from attack, but at the same time they gain the ability to veto effective action on behalf of other minority groups. When confronted by a head-on clash of interests the political system instead of being able to resolve such conflicts can only shelve them.[177]

With a myriad number of political units in the system able to veto any legislative action, it is useless for a minority group to lobby only one part of the government.[178] It must not only try to ensure that all parts of the government favor its endeavors, but that they do so simultaneously.[179] Focusing attention on the executive branch does not guarantee the same success that it generally does in cabinet government.[180] In cabinet government, "espousal of a proposal by the executive [cabinet] will have the support of the party's majority . . . and in more than nine cases out of ten, therefore, to win over the minister or civil servant is to win the campaign."[181] In the United States, the political system places such a premium on bargaining and compromise at so many points in the law-making process, that major reform of the status quo is rarely possible.[182] Reformers must lobby so many politicians that only the groups which are the best organized and which have the greatest amount of resources have any hope of success.[183] Traditionally oppressed minority groups are placed at an enormous disadvan-

177. *Id.* "This self-stultifying, divisive system of government indeed sometimes produces no movement or action at all; but, in the United States, this situation, where government can grind to a halt and produce no action for a very long time, is not only tolerable but often even agreeable, and in any case is usually irrelevant because the United States is, by world standards, an empty country and a most wealthy one, so that the slowness with which new measures may be introduced there does not bother the average U.S. citizen anything like as much as it would bother his counterpart in the more crowded and considerably poorer states of Europe." S. FINER, *supra* note 154, at 189. One wonders, of course, whether this system of government will begin to bother Americans as their nation becomes more densely populated and less rich. The current energy crisis suggests that it will.

178. S. FINER, *supra* note 154, at 248.

179. *Id.*

180. *Id.* at 249.

181. *Id. See generally* C. HARDIN, *supra* note 153 at 119-41.

182. "There is an excessive friction in the American system, a waste of force in the strife of various bodies and persons created to check and balance one another. There is a want of executive unity, and therefore a possible want of executive vigour. Power is so much subdivided that it is hard at a given moment to concentrate it for prompt and effective action. In fact, this happens only when a distinct majority of the people are so clearly of one mind that the several co-ordinate organs of government obey this majority, uniting their efforts to serve its will." J. BRYCE, *supra* note 156, at 295-96.

183. M. SHAPIRO, *supra* note 160, at 18-22.

tage.[184] The sheer number of impediments to legislation presented by the American law-making process effectively discourages them from using it as a major tool in social reform.[185]

c. Illiberal

American minority groups cannot at times impel the government to act for their benefit, even when a large majority of people in the executive and legislative branches wish to aid them, if other minorities entrench themselves in key power centers to block the initiative.[186] This much is clear from the experience of everyday government in the United States. The political system is irresponsible however in still another way. Since minority groups have problems moving government to act when they have a majority of supporters backing them, it is not surprising that they should find it even more difficult to do so when they have only a minority of supporters and they seek legislation which a majority of law-makers and the public dislike.[187] This occurs because government in the United States is not designed to lead but to follow. American government is perhaps too accurate a mirror of popular views.[188] Its political fragmentation causes each fragment of government to ape the constituency it represents.[189] "Never mind if it reflects public opinion more faithfully . . . as its apologists contend, for that is

184. *Id.*

185. The social reform referred to in the text should not be taken to mean the product of a particular ideology. Professor Cox may have had a particular ideology in mind when he observed that the Warren Court responded to an intellectual impulse of egalitarianism, A. COX, *supra* note 70, at 36, which had perhaps been stymied by the law-making process. It is abundantly clear, however, that reform of any character or ideology is extremely difficult in the United States. The irresponsible and nonmajoritarian political process make it so. In an editorial, a leading American magazine lamented about the problems involved in securing economic reform: "Almost all legislators agree that the growth of Government spending should be reduced, but many are unwilling to face the wrath of lobbies for old people, veterans, civil servants and others.

"Lobbies that support capital-sapping Government regulations are equally potent and vengeful. Big steelmakers, textile manufactuers and agribusiness interests put their political muscle behind tariffs and import quotas. Wealthy shipowners lavish contributions on legislators who support the Jones Act, which requires that U.S. flagships carry all cargo among domestic ports. . . .

"It would seem suicidal for any political leader to challenge just a few of these groups, let alone most of them. Yet the broad mass of Americans are wearying of inflation, regulation, and budget busting . . . . In times of such ferment, the public may well be prepared to accept fairly radical steps." Loeb, *America's Capital Opportunity*, TIME, April 2, 1979, at 49. One wonders whether the American public is prepared for the radical political steps needed to set their government right so it can deal with national problems. *See* notes 188-94 and accompanying text *infra*.

186. *See* notes 174-79 and accompanying text *supra*.

187. *See* A. COX, *supra* note 70, at 35-36.

188. S. FINER, *supra* note 154, at 246.

189. *Id.*

precisely its drawback. American society is too variegated for its reflection to be anything but diffuse and unfocused. . . . [I]t is like a window-pane which lets the sun's rays pass through it, where what is needed is a burning glass."[190] Since American government is not a very good filter of public opinion, government finds it unbearably painful to make unpopular political decisions.[191] The tenets of liberal-democracy may command in some cases the protection of minorities from the power of the majority.[192] But the American law-making process is singularly inadept at providing minorities with that security.[193] It is too politically weak, and too easily apt to respond reflexively to the interest groups which incessantly besiege it.[194]

By contrast, cabinet government in Britain and the Commonwealth is strong government. Its detachment from legislative squabbles and from the often irrational political fray makes it a very attractive political institution for minorities in particular to use.[195] In Britain and the Commonwealth minorities have only to persuade their cabinet to employ its national law-making power for their benefit.[196] This is usually enough to effect unpopular reforms.[197]

Indeed, so ingrained is the belief that cabinet government is quintessentially responsible government—responsible to minorities as well as to majorities—that few people in Britain or the Commonwealth think it necessary to have the courts enforce fundamental liberties.[198]

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190. *Id.*

191. *See* note 185 *supra.*

192. *See* generally S. BENN & R. PETERS, *supra* note 42, at 211-32.

193. *See* M. SHAPIRO, *supra* note 160, at 18-22.

194. *See* notes 188-90 and accompanying text *supra.* "In 1958, a group of American political scientists, deliberating on an outline of research for the study of pressure groups, concluded that federalism and the separation of powers created decentralized parties and legislative bodies 'less able to aggregate interests and protect themselves against interest penetration than Cabinet-dominated parliaments. . . .' In the United Kingdom particularly, 'a disciplined parliamentary party system . . . protects the legislative process from effective interest group penetration. . . .

'A disciplined party system and a powerful executive [cabinet government] force interest groups to direct their energies to the upper levels of the executive and the bureaucracy where only moderate claims, well supported with technical information, become possible.' " C. HARDIN, *supra* note 153, at 134-35 (italics omitted).

195. *See* notes 269-72 and accompanying text *infra.*

196. *Id.*

197. *Id.*

198. At present there is a fascinating debate in Canada which should interest American constitutional scholars. The Canadians have been experimenting for the last 20 years with a statutory Bill of Rights. *See generally* W. TARNAPOLSKY, THE CANADIAN BILL OF RIGHTS (1966). Like the American Bill of Rights, the Canadian Bill of Rights, 1960, 8 & 9 Eliz. 2, c. 44, limits in a general way the exercise of governmental power. Despite the similarity of language, though, the Canadian courts interpreting the statute have not concluded that their Bill of Rights empowers them to annul laws which conflict with its provisions. *See, e.g.*, Regina v. Gonzales, 32 D.L.R.2d 290 (1962). Indeed, the *Gonzales* case concluded that the

Since a cabinet is always answerable to the members of the legislature, civil rights are guaranteed by the political process in ways in which they are not in the United States.[199] Hence, the need exists in America

Bill of Rights enumerated only canons of construction and not fundamental prohibitions. *Id.* at 292. According to the *Gonzales* court, the Bill was a mere statute and as such could not be construed to detract from Parliament's primacy in the legislative field. *Id.* Therefore, if the court found it possible to construe statutes to be consistent with the canons of the Bill of Rights it would do so; if it could not, then Parliament's language would prevail. *Id.*

Not anxious to deal with the question, the Canadian Supreme Court at first simply avoided using the Bill of Rights to reach its decisions. Tarnopolsky, *The Canadian Bill of Rights from Diefenbaker to Drybones*, 17 McGILL L.J. 437, 442-43 (1971). It was not until the now famous case of Regina v. Drybones, 9 D.L.R.3d 473 (1970), that the court finally confronted the issue. In *Drybones* the court, in a six to three judgment, declared part of a federal law inoperative by reason of the Bill of Rights. The decision sparked substantial controversy among Canadians about the proper role of their Supreme Court and the utility of providing the Canadian courts with an "entrenched" non-statutory Bill of Rights. The debate continues to the present day. Recently, at an Ottawa conference, Prime Minister Trudeau failed yet again to persuade the 10 provincial premiers of Canada of the need for, *inter alia*, an "entrenched" Bill of Rights. *Short Sight*, THE ECONOMIST, February 17, 1979, at 76.

An American viewing this Canadian controversy would undoubtedly be at least mildly surprised to discover that the recommendations for increased Canadian judicial review by even the most persistent critics of the Canadian Supreme Court have been exceedingly modest. *See, e.g.*, P. WEILER, IN THE LAST RESORT: A CRITICAL STUDY OF THE SUPREME COURT OF CANADA (1974). With their southern neighbor's Supreme Court the leading practitioner of the style of judicial review they seek to introduce into the Canadian political system, one would expect them to look to the American judiciary for direction. They have not. If anything, they have sought to ignore the experience of the American Supreme Court. *See, e.g., id.*; Symposium, *The Supreme Court of Canada*, 1875-1975, 53 CAN. B. REV. 459, 459-714 (1975). Meanwhile their opponents have done their best to disseminate that record as widely as possible. *See, e.g.*, Willis, *Book Review*, 20 U. TORONTO L.J. 274, 281 (1970). Perhaps even more revealing was the recent spectacle of a Canadian Minister of Justice who, in response to questions from members of the House of Commons, found it necessary to reassure the House that his announced appointments to the Canadian Supreme Court were not calculated to transform the court into an American one. McWhinney, *supra* note 98, at 906. Thus, from an American perspective the present debate about the proper extent and nature of Canadian judicial review seems rather timid. Most Canadians are either strongly opposed to the American style of judicial review, or favor a very modest version of it. *See generally* 4 J. McRUER, ROYAL COMMISSION ENQUIRY INTO CIVIL RIGHTS, REPORT NO. 2, at 1659-62 (1969).

Ignoring this debate (or perhaps reacting in an extremely sensitive manner to it), the Canadian Supreme Court has now effectively abandoned its *Drybones* position. Morgentaler v. The Queen, 53 D.L.R. 3d 161 (1975) (concerning substantive due process); Attorney-General of Canada v. Canard, 52 D.L.R.3d 548 (1975) (concerning notions of equal protection); Attorney-General of Canada v. Lavell, 38 D.L.R.3d 481 (1973); Curr v. The Queen, 26 D.L.R.3d 603 (1972). In doing so, the Justices have relied on reasons which have not been entirely consistent with their rationale in *Drybones*. Tarnopolsky, *The Supreme Court and the Canadian Bill of Rights*, 53 CAN. B. REV. 649, 654-74 (1975). But underlying those reasons is perhaps a more fundamental worry: "The retreat from the positive position taken in *Drybones*, . . . [has been] accompanied by statements which indicate a strong sense of judicial guilt at having tasted what is perceived as the forbidden fruit of judicial supremacy." Lyon, *supra* note 91, at 57.

199. *See* notes 200-03 and accompanying text *infra*.

for some body like the courts to enforce a bill of rights.

Sir Robert Menzies, one of Australia's most renowned prime ministers, described for an American audience why a formal bill of rights was unnecessary in Australia:

> There is a basic difference between the American system of government and the system of "responsible government" which exists in Great Britain and Australia. . . . [I]n Australia (and in Great Britain) the Executive . . . is part of and directly responsible to the Legislature. With us, a Minister is not just a nominee of the head of the Government. He is and must be a Member of Parliament, elected as such, and answerable to Members of Parliament at every sitting. He is appointed by a Prime Minister similarly elected and open to regular question. Should a Minister do something which is thought to violate fundamental human freedom he can be promptly brought to account in Parliament. If his Government supports him, the Government may be attacked, and if necessary defeated. And if that, as it normally would, leads to a new General Election, the people will express their judgment at the polling booths.
>
> In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. . . .
>
> In America, if I may say so as a most friendly observer, [executive officials] are not directly answerable in Congress, where they do not sit, and in whose proceedings they are "outsiders," it has been thought necessary to impose constitutional limits upon them, with the Supreme Court as the interpreter of those limits.[200]

Sir Owen Dixon, as Chief Justice of the Australian High Court, echoed the same idea before a different group of Americans:

> The men who drew up the Australian Constitution had the American document before them; they studied it with care; they even read the standard books of the day which undertook to expound it. They all lived, however, under a system of responsible government. . . . They felt therefore impelled to make one great change in adapting the American Constitution. Deeply as they respected your institutions, they found themselves unable to accept the principle by which the executive government is made independent of the legislature. . . . [Their] steadfast faith in responsible government . . . [as the surest guarantee of freedom made such a principle objectionable.][201]

In the opinion of both Australians, cabinet government is the foremost guarantee of protection for minorities because it coerces constitutional behavior.[202] Executives are encouraged to be tolerant by having to an-

200. R. MENZIES, *supra* note 129, at 54.

201. *Id.* at 52-53.

202. This is an opinion shared by at least one American, Mr. Justice Jackson: "I am a

swer constantly for their every official act, and ultimately by having to answer to the public as a group for their joint performance. Since this cannot happen in the United States, the courts must periodically intervene to maintain notions of civility. In America, the Supreme Court is usually thought to perform the function of educating society to use its better instincts.[203] In Britain, Canada and Australia, it is the political process which performs this function. It is understandable then why in America, where an irresponsible political system exists, minority groups of all kinds seek refuge with the courts to protect themselves from illiberal politicians.[204]

D. The Reaction of American Courts to Presidential-Congressional Government

1. The New Role of the American Courts

There is unmistakably a new mode of legal adjudication in the United States. Professor Archibald Cox recently described it in this way:

> As nowhere else in the world, Americans have developed the extraordinary habit of casting critical aspects of social, economic, political and even philosophical questions into the form of actions at law and suits in equity so that courts—and ultimately the Supreme Court of the United States—may participate in their disposition.
>
> . . . .
>
> That the Supreme Court has always played a *partly* political role—that it has always made a certain amount of public policy in some areas under the guise of interpreting the Constitution—is all too obvious. That it has usually felt *partly* bound by "law" is equally obvious to anyone who understands the self-discipline of the legal method.
>
> . . . .
>
> [However] [t]he past quarter century seems to me to have brought dramatic changes not only in the weight of the political components of constitutional decisions but also in the nature, character, and extent of the judiciary's share of the overall business of government. Taken all together these changes give constitutional adjudication . . . new dimensions. . . .[205]

fairly consistent reader of British newspapers. I have been repeatedly impressed with the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of government is picked up in Parliament, not merely by the opposition but by the party in power, and made the subject of persistent questioning, criticism, and sometimes rebuke. There is no waiting on the theory that the judges will take care of it." R. JACKSON, *supra* note 111, at 81-82.

203. A. COX, *supra* note 70, at 117.

204. *See* note 216 *infra*.

205. COX, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791,

Indeed, so wide has the sweep of American judicial review become that one very eminent English lawyer and scholar has called it somewhat uncertainly both a "nightmare" and a "noble dream."[206]

This new role has yet to be fully articulated into rules of law by the courts, but a fair summary of the rules delineating the new role might be as follows: The courts should exercise judicial power to substitute their judgment for those of the political branches when either (1) a majority of the legislators, executives and/or the nation is unwilling to do something which the moral dictates of liberal-democracy command should be done in just societies, or (2) legislators and executives are willing to do something which a majority of them and/or the nation believes is desirable but cannot act because of institutional disabilities.[207] Naturally, these two standards are very unsuitable as formal rules of law. They are extremely "political" in content, not at all similar to the ordinary rules of traditional legal method. This, of course, explains why the courts have not yet promulgated them in this way. Nevertheless, these rules express the underlying fundamental rationales which inspire present day American courts to exercise their capacity for judicial review.

In plain language and in view of earlier discussion here, the first rule suggests that American courts must act because government in the United States is irresponsible.[208] The second rule suggests that the courts must act because government is nonmajoritarian.[209]

2. *Irresponsible Government: The Theoretical Justification for the New Role*

American constitutional theory insists, today more than ever before, that courts—particularly the United States Supreme Court—must intervene to protect "minorities" from the irresponsible (unrestrained, unresponsive, illiberal) American political process and ensure justice for them.[210] Recognition of this judicial responsibility first received intellectual support from Chief Justice Harlan Stone in his now famous footnote to the decision in *United States v. Carolene Products Co.*:[211]

791-92 (1975).

206. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GEO. L. REV. 969, 971 (1977).

207. The distillation of these rules from the case law was done first by Professor William Raymond Forrester. The author is grateful to him for having shared his inspiration with the constitutional law class of which the author was a member.

208. *See* notes 163-94 and accompanying text *supra*.

209. *See* notes 153-64 and accompanying text *supra*.

210. *See* notes 163-94 and accompanying text *supra*.

211. 304 U.S. 144 (1938).

> Nor need we enquire whether similar considerations [of exacting judicial scrutiny] enter into the review of statutes directed at particular religious or national or racial minorities whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[212]

With this idea in mind, an entire school of American constitutional learning began. It championed the use of the courts as a forum of last resort for those with little political power to effect legislation in their interests.[213] Spurred by many Warren Court decisions, the notion gained widespread respect and acceptance from judges and scholars in a short time.[214] Even the Burger Court has been obliged to support it.[215] Hence, today it forms the focal point from which American judicial review derives its impetus.

> At bottom, the theor[y] assert[s] that the ultimate protection for minorities, for spiritual liberty, and for freedom of expression, political activity and other personal liberties comes rightfully from the judiciary. . . . [T]he political process, filled with arbitrary compromises and responsive, as in some degree it must be, to short-run pressures, is inadequate to enforce the long-range enduring values that often bespeak our aspirations instead of merely reflecting our practices. The Warren Court thus came to be influenced by an extremely self-conscious sense of judicial responsibility for the open and egalitarian operation of the political system, for minorities, for the oppressed, and for a variety of "rights" not adequately protected by the political process.[216]

Professor Laurence Tribe has summarized this new view of the judicial function in the preface to his treatise on constitutional law: "[T]he

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212. *Id.* at 153 n.4 (citations omitted).

213. *See, e.g.*, G. SCHUBERT, *supra* note 5, at 209-13; M. SHAPIRO, LAW AND POLITICS OF THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 1-49 (1964); M. SHAPIRO, *supra* note 160, at 34-39.

Professor Archibald Cox has criticized this overtly political approach to judicial review, A. COX, *supra* note 70, at 106-07, reluctantly admitting that though "[l]aw professors cannot keep a myth [of the court's impartiality] alive if political scientists are able to expose the fiction because of their greater candour or truer perception." *Id.* at 107.

214. *See generally* note 213 *supra*.

215. *See* San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).

216. Cox, *supra* note 205, at 800. Professor Cox notes that a literal interpretation of the *Carolene Products* footnote does not in itself explain many Supreme Court decisions which followed Chief Justice Stone's assertion of the theory. *Id.* at 797. This is true. The theory did, however, stand generally for the protection of all minorities from nonmajoritarian politics. In this less narrowly literal sense it explains a good many more Supreme Court cases than Professor Cox seems willing to admit.

highest mission of the Supreme Court . . . is not to conserve judicial credibility, but in the Constitution's own phrase, 'to form a more perfect Union' between right and rights within that charter's necessarily evolutionary design."[217] In other words, the first rule governing the new role of the American courts exists to implement "the Constitution's implicit vision of a just society"[218] through the Courts because the political branches often do not have a suitable vision of justice.[219]

3. Nonmajoritarian Government: The Pragmatic Justification for the New Role

Beneath the theoretical layer of thought which justifies the new role of the American courts lies, however, a more practical reason for the role. It is a rationale embodied in the second rule governing the current extended scope of constitutional adjudication in the United States.[220] If a majority of the government is willing to act, but cannot, owing to its institutional disabilities, the courts must act in its stead. Many examples could be given exhibiting the operation of this rule. But it would be pointless to catalogue them here. Suffice it to note, as Professor Louis Jaffe does, that in many cases

> [t]he initiative [for the state law reform] should have come from state lawmaking agencies. It is the state legislatures which [should have solved the problems]. . . . They did not do so. The [Supreme] Court, faced with the enormity of our dereliction, has gradually . . . assumed the initiative, taking upon itself the lapsed responsibility.[221]

The Federal Supreme Court has not been alone in assuming the lapsed responsibility of Congress and state legislatures. The various state supreme courts have also done their part to compensate for legislative inaction.[222] This has been necessary because even though a majority of state citizens may in some cases want certain legal reforms, it is entirely possible for the political system, through the operation of a nonmajoritarian law-making process, to prevent their enactment.[223] Justice Clark grudgingly confessed this in his concurring opinion in *Baker v. Carr*:[224]

> I would not consider intervention by this Court into so delicate a field [as reapportionment] if there were any other relief available to the people of Tennessee. But the *majority of the people of Ten-*

217. L. TRIBE, MODERN CONSTITUTIONAL LAW iv (1978).
218. *Id.* at 13.
219. *Id.*
220. *See* notes 207-08 and accompanying text *supra.*
221. L. JAFFE, *supra* note 113, at 43-44.
222. *See* note 73 *supra.*
223. *See* notes 153-62 and accompanying text *supra.*
224. 369 U.S. 186 (1962).

> *nessee* have no 'practical opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination.' . . . The people have been rebuffed at the hands of the Assembly. . . . It is said that there is recourse in Congress and perhaps that may be, but from a practical standpoint this is without substance. To date Congress has never undertaken such a task in any State.[225]

The intimation is clear. The American judiciary, led by the Supreme Court, filled the legislative vacuum in the political system created by the lethargic and largely impotent political branches. It seemingly had no other choice. "[A] complex constitutional structure, . . . which works only with extreme difficulty and slowness may place tremendous pressures on the judiciary, and necessitate an acceptance by the judges of prime responsibility for constitutional change."[226] Stated somewhat more bluntly, the second rule governing American constitutional adjudication implies that "[where] the legislature [and executive are] supine, judicial lawmaking is appropriate."[227]

4. The New Role of the American Courts and American Constitutional Theory

The new role of the American courts is inextricably bound up with the constitutional theory of separated powers which Americans understand.[228] The American version of the separation of powers doctrine provides legitimacy for the type of judicial review practiced by American courts. The doctrine does this with the following rationale: since the American law-making process is undemocratic and irresponsible, judicial review does not need to be either.[229] If the courts are part of an atomistic, anarchic system of competitive political power, they have the legitimate right to exercise their power, however irresponsible and nonmajoritarian that power may be, because all the other parts of the political system exercise equally irresponsible and nonmajoritarian political power.[230] Consequently it is axiomatic within the American political system that the courts exercise their power specifically to counterbalance (check) the exercise of irresponsible and nonmajoritarian political power by other political units in the system.[231]

It is noteworthy, for the purposes of the discussion here, that both

225. *Id.* at 258-59 (Clark, J., concurring) (emphasis added).

226. McWhinney, *The Great Debate: Activism and Self-Restraint and Current Dilemmas in Judicial Policy-Making*, 33 N.Y.U. L. REV. 775, 792 (1958).

227. L. JAFFE, *supra* note 113, at 17.

228. *See* notes 116-27 and accompanying text *supra*.

229. *See* A. MASON, THE SUPREME COURT-PALLADIUM OF FREEDOM 164-65 (1962).

230. *Id.*

231. *Id.*

rules which describe the new role of the American courts depend entirely on one's theoretical and pragmatic perspective of the nature of American politics.[232] For example, Justice Frankfurter never agreed with Chief Justice Stone's theory of the proper judicial role expounded in *Carolene Products*, nor did he agree with Justice Clark's pragmatic view of the political situation in *Baker v. Carr*.[233] He did not precisely because he did not share their understanding of American government.

> The divergence between Stone [and Clark, on one side] and Frankfurter [on the other side] indicates disagreement as to the kind of government the framers established and the relation of the Courts thereto. Frankfurter thinks of the American system as "popular." For him legislative supremacy and majority rule are well-nigh inexorable commands. He is accustomed to draw British analogies and cite British decisions. *But in America, unlike Britain [and Canada and Australia], legislation cannot be equated with the popular will.* When contested legislation comes to the Court for adjudication, it represents a popular will already deflected by various constitutional devices. . . . Legislation may be the work of organized minorities, not unorganized majorities. Judicial review does limit popular government. In this sense it is oligarchal. But, in this respect, it is not distinguishable from other undemocratic devices [of American government] such as the presidential veto, the bicameral legislature, and other majority-limiting [devices]. . . . [O]urs is a political system without a model.[234]

Indeed, since it is such a unique political system, it has created a judicial system which is also without model.

E. The Response of Presidential-Congressional Government to American Judicial Review

Weak government has a dual peril. It cannot solve pressing national problems, nor can it prevent another part of the system from trying to do so. The fragmentation and diffusion of political power in the United States prevents the marshalling of cohesive majorities, either inside the political branches or within the electorate, to effectively oppose extensive judicial review by American courts. As academician and journalist John Roche notes:

> The power of the Supreme Court to invade the decision-making arena, I submit, is a consequence of that fragmentation of political power which is normal in the United States. No cohesive majority, such as normally exists in Britain, would permit a

232. JUDICIAL REVIEW iii (Forte ed. 1968).

233. *Compare* Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring) *with* United States v. Carolene Products Co., 304 U.S. 144 (1938), *and* Baker v. Carr, 369 U.S. 186, 266-330 (1962) (Frankfurter, J., dissenting).

234. A. MASON, *supra* note 229, at 164-65 (emphasis added).

> politically irresponsible judiciary to usurp decision-making functions, but, for complex social and institutional reasons, there are few issues in the United States on which cohesive majorities exist. The guerrilla warfare which usually rages between Congress and the President, as well as the internal civil wars which are endemic in both the legislature and the administration, give the judiciary considerable room for maneuver.[235]

An English student of American politics, Professor M.J.C. Vile, concurs:

> [T]he explanation of the Court's power is . . . to be seen in the general context of the pluralist . . . system of the United States. The Court is able to exercise its power because it rarely comes squarely into conflict with a truly united opposition, either inside or outside the formal institutional structure of government.[236]

Vile has elaborated on Roche's notion of how "cohesive majorities" shape the role of judiciaries.[237] By focusing in some detail on the reasons for the levels of judicial review in Britain, Australia and America, he distinguished between opposition to the courts from cohesive majorities internal to the political branches, and opposition from external electoral forces.[238] With regard to Britain, Vile opines that even without the doctrine of legislative sovereignty, English judicial review probably would still be minimal because of the apparent regular coincidence of both political and electoral majorities.[239] The legislative majority in Britain reflects the electoral one and is thus a powerful deterrent to extensive judicial review.[240]

In Australia, as in Britain, cohesive legislative majorities ordinarily exist as a result of the disciplined party system enforced by the operation of cabinet government.[241] They do not, however, always reflect cohesive public opinion. Vile suspects that the Australian federal system, like the American one, disperses electoral attitudes, making those attitudes susceptible to vargaries of locale rather than to a continuous reenforcement of national legislative majorities.[242] In this context, then, the Australian High Court has had room to maneuver in the exercise of judicial review and has done so much more frequently and effectively than might otherwise be expected from a court so closely

235. J. ROCHE, SHADOW AND SUBSTANCE 203 (1964).

236. M. VILE, *supra* note 3, at 256-67.

237. Vile, *Judicial Review and Politics in Australia*, 51 AM. POL. SCI. REV. 386 (1957). Professor Vile's reasons for the limited judicial review practiced by Australian courts also explain the existence of limited judicial review in Canada. In both nations the operation of cabinet government is a deterrent to extensive judicial review.

238. *Id.* at 387.

239. *Id.* at 391.

240. *Id.*

241. *Id.* at 387.

242. *Id.* at 388-90.

attuned to English notions of judicial review.[243] By comparison, in the United States, the absence of cohesive legislative majorities is common. There is no institution of cabinet government to structure them.[244] Where they exist they rarely reflect cohesive electoral majorities.[245] In addition, as in Australia, cohesive public opinion is weakened by the federal system.[246] Therefore, by implication Vile suggests that judicial review is demonstrably more extensive in the United States than in either Britain or Australia.[247]

The absence in the United States of cabinet government as found in Britain, Canada and Australia, has been instrumental in preventing the American political branches from coordinating opposition to extensive judicial review. Without cabinet government to form "party government," the American party system has been left in a debilitated condition.[248] In such a state, it has been unable to assist the political branches in being an effective check on judicial power. As one American historian put it:

> In perspective then, American [historical] experience suggests that the success of judicial review of national policy varies in close inverse relation to the efficacy of the political party system. Or to put it differently, judicial "legislation" apparently feeds on defects in the political structure. If, as some insist, public opinion is important in the judicial process, it seems even more important when implemented by dynamic and responsive party machinery. The Supreme Court's only power is to persuade. Purse and sword are in other hands. But judicial persuasiveness multiplies when political opposition is lacking or disorganized. On the surface at least, Australian experience with judicial review seems to teach the same lesson and by contrast so

243. *Id.* at 391.

244. *Id.* at 387.

245. *Id.*

246. *Id.* at 388-89.

247. *See id.* at 391. Professor Vile does not say this directly but seems to assume it throughout his study.

248. Not all political scientists feel that the institution of cabinet government would necessarily structure political opinion into "party government." According to some of them, "what prevents legislative action by longer-lived majorities is *not* our formal constitutional machinery, but the whole complex of the people's attitudes and the character that those attitudes impose on our politics." A. RANNEY & W. KENDALL, DEMOCRACY AND THE AMERICAN PARTY SYSTEM 522 (1956). Another view, however, seems more convincing: "Of course, attitudes shape institutions; but institutions also profoundly influence attitudes. The framers of the American Constitution laid the groundwork for political institutions that fragmented the electorate . . . By the same token, a centralizing change in American political institutions [in the nature of cabinet government would] nourish a different set of attitudes, and these, in turn, [would] encourage and support party government." C. HARDIN, *supra* note 153, at 168. *See also id.* at 161-62. For examples of political institutions shaping political attitudes, see P. WILLIAMS, POLITICS IN POST-WAR FRANCE 328-29 (2d ed. 1958) and S. BEER & A. ULAM, PATTERNS OF GOVERNMENT 414 (Beer & Ulam 2d ed., rev. 1968).

does that of Great Britain.[249]

The federal system disorganizes political opinion in Australia; its absence strengthens it in Britain. But in both nations (as in Canada), cabinet government with its attendant cohesive legislative majorities ensures that judicial review is limited. On the other hand, in the United States the absence of cabinet government, coupled with a federal system, in practice relegate the political branches to the less than equal role with respect to the courts. As a result, to use Sir Francis Bacon's well known metaphor for the English judiciary of his time, the American courts have not been "lions under the throne" but on it.[250]

F. The Reaction of British, Canadian and Australian Courts to Cabinet Government

1. The United Kingdom

In the United Kingdom the legislature is supreme, which explains why English judges undertake less judicial review than their American counterparts.[251] Parliament has the final word on any matter, so judges in Britain simply cannot engage in the sort of judicial review practiced in the United States.[252] Moreover, the various philosophical and sociological factors discussed earlier augment this tendency, causing the judges to refrain from activism.[253] These may not be the only reasons for less English judicial review, however. Comparing the total law-making capacity of the English political system (cabinet, Parliament and the courts) with the total law-making capacity of the American political system (President, Congress and the courts), one might perceive another reason. Professor Louis Jaffe did.

> It would seem that the English Parliament is potentially capable of dealing with more of the country's law needs than are our legislatures. If so, the demand for judicial lawmaking in England may be to that extent less.
>
> . . . .
>
> I conclude that the role of the English judge as lawmaker should be more restricted than that of the American judge. Parliament is better able to solve the country's legal problems than are the legislatures of the United States.[254]

249. Mendelson, *Judicial Review and Party Politics*, 12 VAND. L. REV. 447, 456-57 (1959). The article is an historical study of the relationship between judicial review and political parties in the United States.

250. "Let judges also remember that Salomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty." FRANCIS BACON: A SELECTION OF HIS WORKS 187-88 (S. Warhaft ed. 1965).

251. *See* notes 6-16 and accompanying text *supra*.

252. *Id.*

253. *See* notes 89-110 and accompanying text *supra*.

254. L. JAFFE, *supra* note 113 at 69, 83.

It is this governmental reality which encourages the higher degree of judicial restraint in Britain, quite as much as Dicey's abstract doctrine of parliamentary sovereignty, its philosophical ramifications or the sociological background of the judges who propound it.

2. Canada and Australia

Among the commonwealth states, the scope of judicial review in Canada and Australia has been closest to the American model.[255] This similarity, though, has not prevented judges in both nations from exercising extreme restraint in reviewing executive and legislative acts.[256] They exercise restraint even though they possess the capacity to declare what the law is according to their respective constitutions, and to protect those decisions from legislative circumvention.[257] Several explanations have been offered for why Canadian and Australian judges are less active than their American counterparts. The influence of Dicey and the lawyers and scholars reared in his constitutional theory, the differences in national history and legal philosophy, the diverse jurisdictional ambits of the highest courts, and the character of judicial personnel cannot be easily discounted.[258] But they are not the complete answer.

The institutions of government in the United States, Canada and Australia are crucially different.[259] This difference of cabinet government in Canada and Australia and of presidential-congressional government in the United States, accounts in no small measure for the submissive role of Canadian and Australian courts and the vastly more assertive role of the American courts.[260] The political branches shape the behavior of the judiciary. And the strength of the judiciary varies inversely with the ability of the government branches to act. Experience in Canada and Australia repeatedly indicates this is so.[261] An ex-

255. *See* notes 17-38 and accompanying text *supra*.

256. *See* notes 39-62 and accompanying text *supra*.

257. *See* notes 17-38 and accompanying text *supra*.

258. *See* note 87 and accompanying text *supra*.

259. *See* notes 153-64 and accompanying text *supra*. One commentator noted: "The British House of Lords, the United States Supreme Court, and the Supreme Court of Canada [as well as the Australian High Court] . . . [have] fundamental differences at the heart of their operations. On reflection, this should not be so surprising; we also find significant differences in the legislative institutions in these . . . countries." P. WEILER, *supra* note 198, at 6 (italics omitted).

260. *See* notes 163-72 and accompanying text *supra*.

261. The ability of cabinet government to resolve national problems is best illustrated by examples of national legislation enacted in Britain, Canada and Australia which would be extremely difficult to enact in the United States because of the numerous political roadblocks in the American law-making process. *See* CAN. REV. STAT., Can. Criminal Code (1970) (of a single criminal code in Canada); G. CARTER, *supra* note 3 at 146-50 (regarding the reorganization of local government accomplished in Britain in 1971); R. LUMB & K.

ecutive cabinet supported by a majority of followers in the legislature is a much more majoritarian and responsible government than any American administration imaginable. Being so, the cabinet is more responsive to majoritarian demands for reform. It is also more responsible to minorities in its perceptions of proper public policy.[262] In both Canada and Australia cabinet government is thus more sensitive to the interests of both majority and minority.[263]

Several recent cases and legal comments in Canada and Australia confirm the correctness of this view. In the decision of *Attorney-General for Australia v. Commonwealth of Australia*,[264] the Australian High Court, speaking through Chief Justice Barwich, rejected various American reapportionment precedents squarely applicable to the case before it.[265] In doing so, the court upheld a parliamentary act which apportioned electoral seats largely according to non-population factors. The Chief Justice gave this reason for ignoring American judicial precedent:

> Further, it must always be borne in mind that the American colonies had not only made unilateral declarations of independence but had done so in revolt against British institutions and methods of government. The concepts of the sovereignty of Parliament and of ministerial responsibility were rejected in the formation of the American Constitution. Thus, not only does the American Constitution provide for a presidential system, but it provides for checks and balances based on the denial of complete confidence in any single arm of government.
>
> . . . .
>
> [U]nlike the case of the American Constitution, the Australian Constitution is premised upon a parliamentary government with ministerial responsibility.
>
> The contrast in constitutional approach is that, in the case of the American Constitution, restriction on legislative power is sought and readily implied whereas, where confidence in the Parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers. Thus, discretions in Parliament are more readily accepted [by this Court] in the construction of the Australian Constitution.[266]

In Chief Justice Barwich's opinion the differences between the institutional structure of government in Australia and in the United States

RYAN, *supra* note 17, at 14 (the creation of a national commission to supervise the utilization of waters from rivers that border states in Australia).

262. *See* notes 163-72 and accompanying text *supra*.

263. *Id.*

264. 7 Austl. L.R. 593 (1975).

265. *See, e.g.*, White v. Weiser, 412 U.S. 783 (1973); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).

266. 7 Austl. L.R. at 605-06.

warranted the Australian High Court's deference to its legislature. It did so, according to Barwich, precisely because the Australian government structure reposes confidence in a single arm of government—Parliament as it operates through the cabinet—whereas the American government structure does not.

Canadian Professor J.R. Mallory, echoing this thought, notes that the same could be said for Canada:

> [The role of the Canadian Supreme Court] has been modest, partly for reasons which may be peculiar to the times, but partly also I think for reasons which bear on the nature of the Canadian political system. These reasons include . . . the nature of the balance between the courts and other branches of government as they are perceived in a parliamentary, as distinct from a congressional system.
>
> . . . .
>
> Canadian constitutional arrangements are sufficiently different from those of the United States that the role of the courts in the constitution is bound to be different and more modest.[267]

This is certainly also the opinion of at least one Justice of the Canadian Supreme Court. Mr. Justice Dickson compared the position of his court in the Canadian political system with that of the American Supreme Court in the American political system and concluded:

> When you speak of the United States Supreme Court, it is also essential to recognize the very different United States constitutional set-up. The judiciary is part of a system of checks and balances. . . . It is not a case of deciding whether they are going to be creative; that is their undoubted right and duty. . . . We are not in the same situation from a constitutional point of view.[268]

Two Canadian legal sholars have provided an insight into why government structure is such a crucial feature in determining the level of judicial review in their country. Writing about the Canadian Supreme Court's refusal in *Attorney-General of Canada v. Lavell*[269] to invoke the "equality" provision of the Canadian Bill of Rights to render inoperative discriminatory legislation, Professor Kerr adjudged that it was unnecessary for the Court to have intervened.[270] The Court could avoid intervention into the policy-making sphere because, in his view,

> [t]he remedial powers of the legislature are a major advantage to the use of legislative reform in preference to judicial reform.

267. Mallory, *Constraints on the Courts as Agencies of Constitutional Change: The Canadian Case*, 1977 PUB. L. 406, 418, 427.

268. THE CANADIAN JUDICIARY 84 (A. Linden ed. 1976).

269. 38 D.L.R. 3d 481 (1973).

270. Kerr, *The Canadian Bill of Rights and Sex-Based Differentials in Canadian Federal Law*, 12 OSGOODE HALL L.J. 357, 387 (1974).

> More importantly, under the Canadian legislative system [in stark contrast to the American legislative system] the chances of obtaining legislative reform are reasonable. Because the Cabinet controls the votes of its party supporters in the legislature, one has achieved a major task in the implementation of a reform by convincing the cabinet of the need for it.[271]

Another Canadian writer, in his response to an American law professor's suggestion that the Canadian judiciary undertake a more creative role like the role of the American judiciary, stated even more forcefully why extensive judicial review was unnecessary in Canada:

> [W]e [Canadians] should seriously question whether legal institutions and remedies, whether existing or yet to be created, are the most effective way to achieve social change in this society.
>
> We might note in this regard that our reforms in landlord-tenant law came through the legislature. Our proposed Spadina expressway was halted by the cabinet. The federal government suspended urban renewal, old style. It is of interest to note that the Ontario government is . . . suing the U.S. Dow Chemical [Co.] for damages for allegedly polluting Lake Ontario. It could be that the Canadian political system is sufficiently sensitive to social injustice to provide an avenue of change more effective than that of its U.S. counterpart.[272]

What can be said of the Canadian political system can equally be said of the Australian and British political systems. Where government is majoritarian and responsible, judicial law-making is unnecessary.

G. The Response of Cabinet Government to Judicial Review in Britain, Canada and Australia

Courts in Britain, Canada and Australia, by and large, have escaped the sort of controversy which has embroiled the American judiciary throughout its history. In England, courts are subordinate bodies to the legislature, and by being so they have not had to be responsible for the "last word." Criticism of public policy has therefore been directed at Parliament, and the courts have been spared much adverse

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271. *Id.*

272. Comment by J. Jowell in LAW AND SOCIAL CHANGE 34 (J. Ziegel ed. 1973). Perhaps more expressive of Canadian feelings toward this suggestion is Mr. Jowell's humor: "However, as we are becoming increasingly sure of our capacity to stake an alternative in our own image, Professor Friedman detracts from our growing certainty by telling us that the 'creative disrupters' in the U.S. . . . represent a legal avant-garde. The implication we draw from this is both that things in the U.S. are more hopeful than we had assumed and that their methods might well (yet again) prove to be a model for us.

"As we look south and see the spectre of [advocates of this legal avant-garde] marching across our borders, some might react in the same way that Oscar Wilde did when first shown the Niagara Falls. 'Very impressive,' he said, 'but wouldn't it be more impressive if it went the other way?' " *Id.* at 34.

attention.[273]

Canadian and Australian courts have not been in such a privileged position. In the process of interpreting their respective constitutions, they, at times, have used their *ultra vires* powers to annul important legislative acts.[274] This has not always been accomplished without arousing critical responses and attempts to circumvent their decisions.[275] But Canadian and Australian governments have not found it necessary to reassert their authority. It has been unnecessary for obvi-

273. "The example of the Supreme Court of the United States of America shows that if we [English] want to keep politics out of the administration of justice, we must deprive the officials who administer justice of all discretion which might be influenced by political considerations. Else there will be an incentive for politicians to attempt to 'pack' the courts with their own partisans. But where the ultimate authority is a non-judicial court or assembly, all we need to ensure when selecting people to be judges is that they shall faithfully apply the laws enacted by the Legislature in all cases to which they clearly apply. It was not necessary to pack the English Bench because the same judges who decided the Taff Vale case could be relied upon, whatever their political opinions or private views, to apply the provisions to the Trades Disputes Act, which reversed the Taff Vale decision. Provided the judges, like reeds, will bow to political winds in due legislative form, there is no reason for them not to exercise, in the absence of a clear directive from Parliament, their own judgment on what is equitable and just. All that we do demand is that where Parliament has given a ruling, judges should follow it, even against their own judgment, not because Parliament is wiser, more equitable or more just than the judges, but . . . because it is expedient to concentrate all political discretion in Parliament, where, though wrong may be done, it will be done openly." J. LUCAS, THE PRINCIPLES OF POLITICS 217-18 (1966). Of course, this is not to say that English courts are immune from criticism. The power of statutory interpretation is not an insignificant one, nor is its exercise by judges possible without also the exercise of some political discretion. *See* J. GRIFFITH, THE POLITICS OF THE JUDICIARY 175-216 (1977). Criticism of the courts, however, is directly related to the degree of political discretion exercisable by judges. The less discretion they have, the less useful it will be to disparage them. Thus, the English courts, by possessing only the capacity to interpret "narrowly drawn" statutes, rather than "broadly written" constitutions, are required to confine their subjective judgments to the interstices of legislation. Hence, their judgments cause much less controversy than those of American, Canadian or Australian courts, who, by possessing the power to make definitive interpretations of their constitutions, have free rein to interpolate their subjective judgments into the molar regions of the law.

274. *E.g.*, Australian Communist Party v. The Commonwealth, 83 C.L.R. 1 (1951) (where a law dissolving the Australian Communist Party was held *ultra vires* the constitution); Bank of New South Wales v. The Commonwealth, 76 C.L.R. 1 (1948) (where the government's attempted nationalization of the bank was declared to be beyond the legislative powers given it by the Australian constitution). In addition, a number of Canadian laws dealing with economic and social matters were held invalid by the Privy Council between 1896 and 1949. E. MCWHINNEY, *supra* note 2, at 67 n.27.

275. The Australian government made an attempt to amend the Australian constitution to reverse the High Court's invalidation of the law dissolving the Communist Party. But the voters rejected the amendment at a referendum. Vile, *supra* note 237, at 389. "New Deal" legislation held invalid in Canada by the Privy Council was partly reenacted after the Canadian federal government (pursuant to an agreement with the provincial governments) requested the British government to legislate an amendment to the Canadian Constitution empowering the federal government to enact the legislation. F. SCOTT, ESSAYS ON THE CONSTITUTION 90-101, 369-70 (1977).

ous reasons. Cabinet government is able to command the support of a majority in the legislature. Thus it is capable of nearly instantaneous action to reverse judicial judgments resting on nonconstitutional grounds. This support also allows the cabinet expeditiously to enact legislative proposals that could curb court powers. The awareness that such proposals are possible and easily implemented is undoubtedly enough to give courts pause before rendering judgments on constitutional grounds which are flagrantly in opposition to cabinet opinion.[276] No doubt, as long as the Australian High Court and the Canadian Supreme Court exercise their *ultra vires* powers selectively and carefully, and continue to couch their approach to legal issues in methods of analysis avowedly legalistic in style, there will be few vindictive cries of "pack the courts" even when legislation is annulled.[277] Should the situation change, though, one can be sure that the Australian and Canadian governments will be able to account for themselves in any struggle with their judicial branches.

Conclusion

Professor Eugene Rostow inadvertently, and surely unwittingly, summed up this note's thesis in a passage from his book, *The Sovereign Prerogative*. While defending the American style of judicial review, and advocating an even more extensive role for American courts than practiced at the time of his writing, he alleged that it was useless for American scholars to clamor for law-making only by the political branches and not by the courts because "[t]he Constitution of the United States does not establish a parliamentary government, and attets to interpret American government in a parliamentary perspective [by advocating a limited judicial role] break down in confusion or absurdity."[278] He could not have been more correct in his analysis of the problem.[279]

Disagreement among scholars who desire an expansive role for the courts and those who prefer a lesser one typically occurs because of their different views of the political context within which American judicial review takes place.[280] Since this is so, it only confirms the analysis in this note. The major cause of extensive American judicial review

276. "As Canadian Professor Peter Russell [has noted,] 'The [Canadian Supreme] Court's hesitant treatment of the Bill of Rights [*see* note 198 *supra*] does not necessarily signify a modest abdication of judicial power; it may well reflect a shrewd instinct for the conservation of judicial authority.' " Mallory, *supra* note 267, at 426.

277. *See* note 84 *supra*.

278. E. ROSTOW, *supra* note 76, at 148-49.

279. But he could not have been more incorrect about its solution—greater judicial involvement in politics.

280. *See* note 229 *supra*.

does not lie with the courts themselves, but rather with the political branches of government. It is sensible, then, to believe that when American government is made more majoritarian and responsible, those who currently desire extensive judicial review will come to favor less of it. There will simply be less reason or justification for them to desire a large judicial role. This is the only means by which advocacy of judicial self-restraint will be made legitimate.

The answer, of course, is not the wholesale adoption of cabinet government in the United States at all levels of the political process. Such a solution, however desirable in an ideal world, is not a likely alternative for the near future. What is needed are institutional reforms which duplicate the effect of cabinet government.[281] To accomplish this end will require a reevaluation and restructuring of American constitutional theory and politics. But this is not beyond the capacity of Americans to appreciate. Indeed, such reforms will be necessary because, in Justice Jackson's words, "[t]he future of the [American

281. Suggestions for reforms to produce this effect abound. *See generally* C. HARDIN, *supra* note 153, at 182-97; H. HAZLITT, *supra* note 4, at 30-36. More interesting, perhaps, is Professor Vile's proposal, which would not require constitutional amendment. THE PROSPECT FOR PRESIDENTIAL-CONGRESSIONAL GOVERNMENT, *supra* note 153, at 59-62. According to Vile, the present defect in the American law-making process is the extreme division of the executive from the legislature. To remedy this problem, he urges that the chief executive take his government into the legislature. If the chief executive and his cabinet were able to sit in the legislature, answer questions, participate in debates and lobby legislators, much of the present isolation and discoordination of the two branches might be alleviated. Vile's proposal violates no principle of separation of powers, *see* note 143 *supra*, nor does it require formal amendment of the Constitution to permit certain executive officers also to be members of the legislature. All that it requires is an invitation by the legislature to the executive to join with them in their common endeavor.

Of course, the number and character of the reforms one wants depends largely on how serious one deems the present American situation to be. It is the present writer's belief that the American law-making process is badly in need of reform. Its condition is inherently divisive and unstable. It tends to produce either impotent government, or something potentially worse, government by judges. Therefore, there should be careful consideration of cabinet government (which not surprisingly is the method of large scale business organization most frequently employed by Americans) and how its features might be duplicated, particularly by states and local authorities. State and local government have always been the source of institutional experimentation in the American federal system.

If this suggestion is thought to be unrealistic, so too, no doubt, were the progressive era reforms of American government: "[i]t is difficult to have much patience with this sort of objection. It is not an argument; it is simply the expression of a paralyzing fatalism. It helps to perpetuate the very condition it affects to deplore. The American people will compel a change to the cabinet form of government the moment they are actively convinced of the necessity for it. Those who are convinced that this change is imperative must try to persuade their fellow citizens." H. HAZLITT, *supra* note 4, at 48. It is the obligation of law professors and political scientists as well as that of politicians to study the problem more carefully than they have done, to come to their own conclusions and if convinced of the need for reform, to engage themselves more actively than they otherwise have to accomplish that end.

Supreme] Court [as well as that of the entire judiciary] may depend more upon the competence of the executive and legislative branches of government to solve their problems adequately and in time that upon any merit which is its own."[282]

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282. R. JACKSON, *supra* note 111, at 83.