

Coercing Virtue

ROBERT H. BORK

Because the Left is unable to win the culture war in a democratic forum, it has turned to the courts. Taking up the Left's banner, the courts have engaged in judicial imperialism, which threatens the most important elements of democracy.

THE nations of the West have long been afraid of catching the 'American disease'—the seizure by judges of authority properly belonging to the people and their elected representatives. Those nations are learning, perhaps too late, that this imperialism is not an American disease; it is a judicial disease, one that knows no boundaries. The malady appears wherever judges have been given, or have been able to appropriate, the power to override decisions of other branches of government—the power of judicial review.

Oddly enough, the role of courts in displacing self-government and forcing new moralities has not triggered a popular backlash. Courts have been and remain far more esteemed than the democratic institutions of government, even though the courts systematically frustrate the popular will as expressed in laws made by elected representatives.

Judicial activism results from the enlistment of judges on one side of the culture war in every Western nation. Despite denials by some that any such conflict exists, the culture war is an obtrusive fact. It is a struggle between the cultural or liberal Left and the great mass of citizens who, left to their own devices, tend to be traditionalists. The courts are enacting the agenda of the cultural Left.

I sometimes refer to the faux intellectuals of the Left as the 'New Class,' a term that suggests a common class outlook and indicates

the group's relatively recent rise to power and influence. The New Class consists of print and electronic journalists; academics at all levels; denizens of Hollywood; mainline clergy and church bureaucracies; personnel of museums, galleries, and philanthropic foundations; radical environmentalists; and activist groups for a multiplicity of single causes.

The New Class's problem in most nations is that its attitudes command only a political minority. It is able to exercise influence in many ways, but when cultural and social issues become sufficiently clear, the intellectual class loses elections. It is, therefore, essential that the cultural Left find a way to avoid the verdict of the ballot box. Constitutional courts provide the necessary means to outflank majorities and nullify their votes. The judiciary is the liberals' weapon of choice. Democracy and the rule of law are undermined while the culture is altered in ways the electorate would never choose.

The socialist impulse remains the ruling passion of the New Class. What are the characteristics of an impulse toward socialism that manifest themselves in both the economic and the cultural aspects of life? A partial list would include a passion for a greater, though unspecified, degree of equality; a search for universal principles; radical autonomy for the individual (but only in a hierarchical and bourgeois culture—when that is replaced, there will be little tolerance

for individualism); radical feminism; and a rationalism that despises tradition and religion and supposes that man and society can be made anew by rational reflection.

LAW'S IMPORTANCE

In discussions of cultural warfare, law is usually overlooked. Yet law is a key element of every Western nation's culture, particularly as we turn more to litigation than to moral consensus as the means of determining social control. Law is also more crucial today because courts have become more overtly cultural and political. Courts have played major roles in many pathologies, both by breaking down the traditional legal barriers societies have erected against degeneracy and by offering moral lessons based on the emancipatory spirit. In a word, courts in general have enlisted on the liberal side of the culture war.

What does it mean to call a judge 'activist' and 'imperialistic'? The terms are bandied about freely by politicians and members of the media in an unedifying crossfire of slogans that passes for public debate, so it will be useful to give those terms more stable meanings. Activist judges are those who decide cases in ways that have no plausible connection to the law they purport to be applying, or who stretch or even contradict the meaning of that law. They arrive at results by announcing principles that were never contemplated by those who wrote and voted for the law. ▶

Though judges rule in the name of a constitution and their authority is accepted as legitimate only because they are regarded as the keepers of a sacred text in a civic religion, there is no guarantee that the results actually come from that constitution. It is often easier to predict the outcome of a case by knowing the names of the judges than by knowing the applicable legal doctrine. The nations of the West are increasingly governed not by law or elected representatives, but by unelected, unrepresentative, unaccountable committees of lawyers applying no law other than their own will.

The question of why most judges impose New Class attitudes is simply answered. Those attitudes are congenial to them, and the adoption of such attitudes is important to their reputations. Judges, having passed through colleges and law schools, are themselves certified members of the intelligentsia. The ideas and values of the New Class are part of the furniture of most judges' minds and seem self-evident. Beyond that, the prestige of a judge depends on being thought well of in universities, law schools, and the media, all bastions of the New Class. Very liberal judges are routinely labelled 'moderates,' while judges who attempt to apply a law as it was originally understood are equally routinely called 'conservative' or 'right wing.' Whether a judge deliberately caters to these organs of the New Class or is unconsciously conditioned by praise and criticism to behave in accordance with the class's tenets, the effect is to move him to the cultural Left. A by-product of this shift is a decline in the quality of judicial opinions, a decline that occasionally results in incoherence. Judicial systems were typically not designed for cultural and political roles. In adopting them, judges not only exceed their authority but perform poorly, often simplistically. Their training lies

in such mundane but essential skills as reading perceptively, thinking logically, and writing clearly about precedents, statutes, and constitutions, not in pondering philosophy and social justice. However inadequate the moral philosophizing of judges may be, in this new role courts still speak self-confidently and with ultimate authority.

As the culture war has become global, so has judicial activism. Judges of international courts are continuing to undermine democratic institutions and to enact the agenda of the liberal Left or New

The nations of the West are increasingly governed not by law or elected representatives, but by unelected, unrepresentative, unaccountable committees of lawyers applying no law other than their own will

Class. As the battle crosses national boundaries, moreover, it becomes less a series of separate or even merely parallel wars and, at the level of legal intellectuals, is increasingly a single struggle. This shift is occurring not only because of the creation of supranational courts, but also because judges on national courts have begun to confer with their foreign counterparts and to cite foreign constitutional decisions as guides to the interpretation of their own constitutions. Judicial imperialism is manifest everywhere, from the United States to Germany to Israel, from Scan-

dinavia to Canada to Australia, and it is now the practice of international tribunals.

MUCH AT STAKE

It is a dismal reflection on our times that few people other than activist groups and cultural elites, who want more of the same, seem to be concerned about the gradual replacement of democracy by judicial rule. This takeover is not a minor matter of judicial philosophy, of interest only to the theoretically inclined. At stake are personal freedoms. The fundamental freedom recognized in democracies is the right of the people to govern themselves. Specified constitutional rights are meant to be exceptions, not the rule. When, in the name of a 'right,' a court strikes down the desire of the majority, expressed through laws, freedom is transferred from a larger to a smaller group, from a majority to a minority.

Activist courts accomplish their ends by a combination of coercion and moral persuasion. Normative values pronounced, even falsely, in the name of a constitution often come to be accepted by the public and are then reflected and intensified in legislatures, schools, and other institutions. Given conflicting outcomes on particular issues, however, the courts of different nations display a tendency that is the same everywhere: the continuing usurpation of the authority lodged in democratic government, along with the movement of societies to the cultural Left. These trends may in time be halted, but at present there is little evidence of any reversal.

AEI senior fellow Robert H. Bork is a former judge for the US Court of Appeals for the District of Columbia Circuit. This is an edited account of his latest book, Coercing Virtue: The Worldwide Rule of Judges [AEI Press, 2003]. The book can be ordered through the AEI website: www.aei.org

I P A

REVIEW