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MIRJAN R. DAMAŠKA

Reflections on American Constitutionalism

Understanding American constitutionalism can be advanced by distinguishing three matrices of its peculiar traits. The first is the character of political institutions whose roots lie deeply in pre-modern forms of authority. The pivotal role of the Constitution in the life of the nation, the vital energies of judicial review, and many other hallmarks of American constitutionalism are all related to this first source. The second matrix is the distinctive position of the constitutive document in a culture of predominantly judge-made law. Authoritative texts and judicial decisions vie for pride of place, and explain why so many issues of constitutional law elude conventional classificatory schemes. The third matrix is the need to adapt late eighteenth-century arrangements reflected in the Constitution to altered social needs and understandings. Many intense controversies in contemporary constitutional discourse are related to methods of this *aggiornamento*.

I shall organize my report around these three matrices, devoting to each a separate section, and try to demonstrate how they illuminate distinctive aspects of American constitutionalism. Before I close, I shall then discuss some challenges to American constitutionalism in our times. Foremost in my mind here will be the problem of adjusting an apparatus devised to contain the government to a time when decisive action is sometimes expected from the State.

I. IMPACT OF AUTHORITY STRUCTURE

Despite the creativity of its Framers, the Constitution of 1789 did not break the continuity with political arrangements the colonists transferred to the New World from England early in the 17th century. An aspect of this tradition with which the colonists were most familiar was strong local self-government, including the participation of the local elite in the administration of justice. The Framers took this aspect of governance, widely regarded as a matter of natural right, for granted, and left the lowest tier of government unregulated. But even their design of central government was in many

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ways an echo of Tudor England, characterized by a rough balance of power between three competing power centers, the monarch, the nobility and the burghers, and teeming with all-purpose officials exercising inherent authority. The three branches of American government, despite labels suggestive of functional specialization, retained a sufficient measure of fused powers to enable each branch to become an independent power center, checking and balancing one another. Federal-state relations only added to the fragmentation of relatively undifferentiated powers typical of Tudor government, and inherent authority continued to be invoked in America as it was in Tudor times.

Most significant for my purposes was another lineage of ancient English political arrangements. In Tudor England it was difficult to identify a single source of *all* authority; notions of unitary sovereignty remained undeveloped. In this situation the ultimate measure of all legitimate authority was placed in God and the Fundamental Law, with the result that all governmental activity appeared adjudicative, that is, ultimately representing an application of the vague fundamental law. In a similar constellation of coordinate branches of American government, the sovereignty was placed in the People and their Charter, with the same potential for intermingling political and legal realms and making the Constitution central to most matters in the life of the polity.¹ Practically, ultimate authority came to reside in a *process of accommodation* among competing power centers, rather than in a readily identifiable entity.

This continuity presents an important contrast to most European countries, where the rise of bureaucratic absolutism all but destroyed the traces of old constitutionalism.² The more unified but functionally more specialized apparatus of governance that emerged, and the idea that power flows from the top downwards, provided starting points for the growth of modern European constitutionalism. In America, by contrast, constitutionalism grew in an environment of widely distributed but less differentiated powers, and was sustained by an idea of power flowing *du bas en haut*.

The tradition of widely distributed but relatively undifferentiated powers is clearly visible in all branches of the American government. Congress, for example, shares in the executive function in

1. On the survival of medieval constitutionalism in Tudor England, see S. B. Chrimes, *English Constitutional History* 121-23, (2nd ed. 1953). For the influence of Tudor political traditions on the colonists, see C. H. McIlwain, *The High Court of Parliament and Its Supremacy* (1910). The reasons why England broke with the medieval constitution are discussed in S. P. Huntington, *Political Order in Changing Societies* 103-04 (1968).

2. See B. M. Downing, "Constitutionalism, Warfare and Political Change in Early Modern Europe", 17 *Theory and Society*, 7-51 (1988).

several important ways, some of which imply micro-management. In its legislative capacity³ it must cope with considerable internal fragmentation of power that exceeds even the division of the legislative branch into two working bodies: important authority is also exercised within each body by numerous committees and subcommittees, even their chairpersons. Strongly localist notions of representation make each individual member of Congress extremely sensitive to his or her constituency and capable of resisting party discipline or other forces counteracting wide distribution of independently exercised power. If a bill clears all these internal hurdles, and is not vetoed by the President, it is likely to be strewn with compromises and ambiguities.⁴ The resulting absence of clarity, coherence and attention to the long-range view decreases the importance of the legislature as a jurisgenerative organ; many important questions of social policy must be framed and resolved elsewhere.

Consider now the impact of the wide distribution of blended functions on the guardians of the Constitution — the judges. What makes them so powerful in policing compliance with constitutional mandates is the concentration of responsibilities in their hands that vastly exceed narrow adjudicative functions. Their law-making powers are exemplified not only by the fact that judicial precedent is a source of legal standards, but also by the fact that they possess a degree of rule-making competence in procedural and evidentiary matters. In the remedial and enforcement phases of a lawsuit, they also exercise broad and essentially self-defined powers of an administrative and managerial character. Thus, in enforcing their decisions, they are entitled to issue orders to officials in other branches of government, backing these orders by a threat to jail or fine those who disobey until they comply. Appellate courts review these orders only to a very limited degree. This “contempt of court” power is considered to inhere in judicial offices, so that it does not require any statutory basis. It still shows faint memories of Angevin all-purpose officials, and it predates Montesquieuan misgivings about according to the same individuals the power to pronounce the law and the power to enforce it.⁵

3. Legislative activity of the Congress is not always understood in the strict sense, i.e., as creation of general norms. For example, individual bills are by no means a rarity. Also, when Congress delegates legislative powers, it sometimes reviews administrative regulations emanating from such delegation against the background of their application to individual cases, engaging thus in quasi-judicial activity.

4. On linkages of American practices of representation to sixteenth-century England and their different development in England in the seventeenth century, see Huntington, *op.cit. supra* n. 1, pp. 106-08. How the British political system enables easier and more uncompromising legislation is discussed in D.S. Atyah and R.S. Summers, *Form and Substance in Anglo-American Law* 302-06 (1987).

5. Some Framers, including Madison, apparently shared Montesquieu's misgiv-

This concentrated power is decentralized to a comparatively remarkable degree. Even the power to decide constitutional challenges is not reserved for a highly placed tribunal, but is distributed throughout the judicial apparatus including the trial courts. And because Americans do not share the traditional continental suspicion of individual decisionmaking (*juge unique juge inique*), judicial review of constitutionality is exercised in the first instance by *individual* trial judges. This wide diffusion of authority is reinforced by the tradition of making the fundamental law the measure of all legitimate exercise of power: the power to adjudicate without the possibility to consider the fundamental law would seem deficient in its vital dimension. Nor should one imagine that American trial judges, especially in the federal system, shy away from deciding matters of great political importance implicated in constitutional questions; being people in their second career, relatively unconcerned about promotions, they make use of these powers in a comparatively bold manner.

The radical decentralization of judicial review of constitutionality and the implicit absence of specialization have had a profound influence on the more recent role of the United States Supreme Court. Early in this century, this Court was still but an ordinary tribunal of last resort, offered the usual menu of constitutional and non-constitutional cases generated in the courts below. As the century progressed, however, the Court began employing various techniques at its disposal to curb the (now defunct) mandatory appellate review of routine cases and concentrate on constitutional cases of its own choice.⁶ This fact should not cause one, however, to overlook the difference that exists between the American system and others with a specialized constitutional court. To begin with, American judicial review continues to be decentralized; trial judges decide constitutional cases in the first instance, and not all of these cases find their way to the Supreme Court. It is by no means rare that the Court will refuse for a long time to decide an issue, even in those instances where intermediate appellate courts in the federal system diverge in their constitutional pronouncements. But there is also a

ings. See, e.g., Madison, *The Federalist*, No. 47, 324, 326 (J. Cooke ed. 1961). As they failed to define judicial powers, however, constitutional limitations on the administrative component of the judicial office are uncertain to the present day. See, e.g., R.F. Nagel, "Separation of Powers and the Scope of Federal Equitable Remedies" 30 *Stan.L.Rev.* 66 (1978). It is only in its 1989 Fall Term that the U.S. Supreme Court chose to consider two cases which raise the issue of constitutional limits on the powers of the federal judiciary to coerce action from officials.

6. Note that Continental countries are traditionally hostile to giving higher courts the power to select appeals they will decide. The West German Constitutional Court has even branded this power as unconstitutional. See the Decisions of Jan. 16, 1979 [in 1979 *Neue Juristische Wochenschrift* 151,533] and the decision of June 11, 1980 BVerfGE 54,277.

significant difference in the sense in which the Supreme Court "specializes" in constitutional matters. Since it is the tribunal of last resort on all matters, constitutional *vel non*, the Court has the power to decide cases on the merits, and is thus not limited to decide the "abstracted" constitutional issue as is the rule in those systems that entrust the resolution of constitutional questions to a special court.

There being no strict specialization in deciding constitutional matters, there are also no special constitutional actions; the vehicle for raising and resolving constitutional issues is ordinary litigation, of which various types of injunctions are probably in recent times of greatest practical significance. Injunctive decrees in which they result, backed by contempt powers, may require defendants to do specified things (*cogere ad actum proprium*), and can be quite effective in constitutional litigation. Taking as an example the exercise of judicial power for a generally approved cause, imagine parents of a black child trying to have her admitted to a school with a record of racial discrimination. If they request injunctive relief, alleging the impending danger of a violation of the constitutional equal protection clause, the judge can order the officials to admit the child, and monitor compliance with the decree by the threat of finding them in contempt of court. As we shall see in the last section, when such injunctions are combined with so-called class-actions, they carry great potential for converting trial judges into institutional and social reformers who mold reality into conformity with specific visions of constitutional demands.

Stemming not only from decentralization and fusion of powers, but also from low institutionalization characteristic of pre-bureaucratic forms of authority, is the peculiarly personalized manner in which American judges perform their tasks, including judicial review of constitutionality. Judicial decisionmaking is as much expression of a person as it is of an office. This can be observed even at the very top of the judicial hierarchy: justices of the Supreme Court seldom choose the anonymity of *per curiam* opinions. At least in more recent times, they are comparatively unrestrained in delivering dissenting and concurring opinions, so that even where a majority is obtained in support of a particular result, the import and significance of the decision can remain ambiguous.⁷

The radical decentralization of constitutional control has subtle but important implications for American judges' general attitudes

7. Since the 1960s, the number of U.S. Supreme Court rulings in which no majority emerged for any decisional ground (plurality opinions) has greatly increased. See Note, "Plurality Decisions" 94 *Harv.L.Rev.* 1127 (1980). The incidence of dissents is also on the increase. See "The Supreme Court, 1980 Term" 95 *Harv.L.Rev.* 441 (1981). For comparisons with Britain, see Atyah and Summers, *supra* n. 3, pp. 283-89.

toward the law. It is only a slight exaggeration to say that all law below the constitutional level binds the judges only conditionally until it is subject to constitutional scrutiny.⁸ As this scrutiny necessarily requires involvement with broad political, ethical and other substantive considerations, sensitivity toward these issues permeates the whole judicial system, increasing the readiness of judges to go behind the verbal expression of the law, and thus decreasing the relative weight of formal arguments. Coupled with an autonomous judicial self-image, radical decentralization creates habits of listening to many voices in the law, and a remarkable tolerance of indeterminacy and instability in the legal system. Accordingly, even in the constitutional area, foreigners should be prepared to find an abundance of questions with several authoritative answers. And what to them may seem a confusing state of affairs, too baroque in its *chiaroscuro* and its repudiation of forces of gravity, seems domestically an acceptable price for an institutional arrangement of widely distributed authority.

II. THE COMMON-LAW LEGACY

The Framers imagined the Constitution as an authoritative text similar to a colonial charter. Also influential was the Enlightenment ideal of law as a textually fixed norm; all major schools of thought that influenced the Framers adhered to the ideal of legislative enactments as the highest form of law.⁹ But the legal tradition in which the Constitution came to be immersed refused to share this ideal; here true law-givers were judges, who discovered the true meaning of spoken and written normative sources generated by competing power centers. The core of law in this tradition was not textually settled and was associated with litigation. Since law conceived as a canonical text and law associated with court decisions cannot be placed side-by-side without creating friction, a source of inner tension was present in American constitutionalism from its beginning. And because proper understanding of this constitutionalism, particularly on the part of those coming from less litigation-centered legal cultures, requires attention to the common law component in the mix, I must quickly review some vivid symptoms of the common law heritage.

It is true that when courts police the constitution, its text inevitably becomes covered by judicial gloss. But the degree to which the

8. Compare this to the image of the traditional continental judge subordinated to the statute. As Abbé de Mably exclaimed at the time when this image was shaped, "All is lost if the judge wants to be smarter than the statute". See H. Drost, *Das Ermessen des Strafrichters* 88 (1930).

9. See G. Wills, *Explaining America* 121,132 (1981).

gloss submerges the text varies, depending on the manner in which court decisions are treated. There is a technique that is easily reconcilable with textualism; decisions referring to a text are detached from factual contexts and converted into abstract norms that fill conceptual vessels of the governing text with more specific content. Here the judicial gloss is translucent; as the gloss thickens the text may even become clearer. American case-law, however, is of a different nature: fact and law remain more closely intertwined, and precedent becomes a story from which ordering thought cannot easily derive clear rules. Decisions "applying" a text are compared to one another, rather than fitted into the scheme of the text as its concretization. Assuming thus a life of its own, this variety of case-law makes the judicial gloss over any enactment (including the Constitution) opaque, tending to submerge it and reduce its significance. Nor does constitutional scholarship prevent this submersion by exercising a sort of weed control, pruning out some decisions as redundant or aberrational and trying to weave the remainder into the scheme of the text.¹⁰ As a consequence, constitutional law in America tends to be equated with constitutional adjudication that follows its own inner dynamics.

Among numerous implications of this development, let me single out for special consideration its impact on constitutional creativity, a matter that is so important for the flavor of constitutionalism. Imbued by Enlightenment theories, the Framers contemplated their text to be alterable by way of *contrarius actus*, that is, by way of following amendment procedures laid down in Article Five, procedures which, they thought, could take the pulse of the People. But as the Constitution came to be covered by the moss of accumulated judicial gloss, changing the latter became tantamount to changing the underlying text — always, of course, under the pretext of merely acting within textual parameters, merely interpreting the Founding text. Very demanding amendment procedures thus acquired a serious competitor in highly flexible judicial techniques of changing consti-

10. Neither does American constitutional scholarship regard it as its important task to try to interpret the text of the Constitution in terms of imagined future cases. The main scholarly effort goes into providing arguments for one or another side *after* an actual controversy arises, with the consequence that there is usually very little scholarly authority in advance of an actual controversy. (Of course, because scholars seldom commit themselves to a position under the veil of ignorance, the fruits of their efforts have relatively weak claims to neutrality). No wonder that even constitutional questions of potentially great significance receive little scholarly attention unless they arise in the context of a real-life problem. For example, there is at present little scholarly discussion of a variety of issues connected with potentially very important processes of formal constitutional amendment (e.g., how does Congress convene a Constitutional convention, what voting rules should apply there, does the President play the presentment role, and so on).

tutional case-law.¹¹ Observe that a doctrine established by case-law can openly be discarded if it appears wrong in light of substantive arguments, but it can also be transformed by more covert techniques. Since American precedents are enmeshed in constellations of facts, constitutional "doctrines" can almost imperceptibly be expanded, or, slowly nibbled away until they shade into insignificance. The flexibility of case-law has allowed the American constitutional system to absorb dramatic changes, such as the departure from strong *laissez-faire* positions — changes which would in more formal and textually centered systems have required a new Founding instrument, perhaps even a revolution. However, the same flexibility means that only in a very limited sense can the American Constitution nowadays be classified as "rigid", i.e., as containing arrangements that are strongly entrenched and difficult to alter.

Symptomatic of the reduced significance of the constitutional text is also the absence of pressures, present in many other systems, to incorporate into it matters of such fundamental importance to the governance of the Nation that they would merit insulation from ordinary politics. Consider, for example, that the Constitution was not amended to "entrench" the direct election of the President, the legitimacy of regulatory agencies, or, ironically, the very power of federal judges to invalidate congressional enactments. To the extent that some of these matters (omitted from the Constitution) are matters of standing practice, the difference vis a vis the unwritten British Constitution is on this score not as dramatic as might appear at first sight.

The common-law heritage is also clearly visible in the method of raising constitutional challenges. A constitutional issue cannot be placed before the courts *in abstracto*, by alleging, on the basis of mere textual comparison, that a lower norm violates the Constitution. Instead, an actual litigational impulse is required, and the constitutional question is decided in the context of a "case or controversy" (Art.3, sec.2). Until quite recently this requirement was taken quite seriously, so that one wishing to test the constitutionality of a law would sometimes have actually to break it, to create a litigation in the course of which the constitutional question could incidentally be decided. It is now easier to seek an anticipatory (declaratory) judgment that a law is unconstitutional, and this demand can be coupled with a request that the use of the law in question be prohibited. Yet, a concrete stake in the case must still be shown by the plaintiff (e.g., an impending plan to violate the

11. It is interesting to note in this connection that one-fourth of all amendments that have been adopted since the Bill of Rights were framed not really to change the text but to overturn specific Supreme Court decisions. See F. McDonald, "Cleaning up the Justices' Messes", *The Wall Street Journal*, July 31, 1989, p. A-10.

law).¹² It is also true, as we shall see in the next section, that the case and controversy requirement was relaxed in certain types of action brought in the public interest. Nevertheless, even at the zenith of this novel breed of litigation, the constitutional question continued to present itself for resolution in a particularized factual setting, linked to individual destinies. Nor have various technical implications of the litigational approach, such as ripeness of the dispute, or standing, been made completely ethereal; they always remained available to the court to refuse to consider a matter as too abstract or speculative.¹³

Case-law influences and a depreciation of textualism can be observed in prevailing forms of invalidation of enactments. Only in limited areas is a type of invalidation frequently encountered that could be imagined as a declaration of *textual* incompatibility of an enactment and the Constitution. But even this so-called "facial" infirmity lies more in the incompatibility of underlying policies than in textual dissonances. Much more common is an invalidation of enactments as "applied" (or interpreted) in a specific litigational context, and here the court's pronouncement is immediately enveloped by the concrete circumstances of the case.

The effect of the decision beyond the parties to constitutional litigation is linked to the *stare decisis* doctrine, and therefore changes with the rank of the court in question. But even if the curse of unconstitutionality is declared by the U.S. Supreme Court, so that the practical effect of the decision is *erga omnes*, it is no more than a directive addressed to the courts below to refuse to enforce the condemned enactment unless and until the Court decides to change its mind. Assuming that the Court does change its mind, it is uncertain whether the once invalidated statute needs now to be re-enacted. Perhaps it was never really dead, only comatose? The resulting absence of a clear-cut answer, or its "in-betweeness," is characteristic of law arising out of the litigational context. Associated with the centrality of judge-made law is also the difficulty in the American constitutional system of envisioning a constitutional right as an abstract aspiration: a right without an enforceable claim to remedy in case of violation seems grotesquely deformed to the ju-

12. See, e.g., *United Public Workers of America, v. Mitchell*, 330 U.S. 75 (1947); *Poe v. Ullman*, 367 U.S. 497, 501 (1961). There is no possibility in the federal system to frame an abstract question pertaining to the constitutionality of a bill or contemplated statute and submitting it to a court for resolution, since the federal courts refuse to issue advisory opinions. It should be noted, however, that federal courts sometimes ask for advisory opinions from state supreme courts.

13. More recently, the U.S. Supreme Court has begun to take subdoctrines of "case or controversy" again more seriously. See generally R. Fallon, "On Justiciability" 59 *N.Y.U.L.Rev.* 1-75 (1984).

dicial mind.¹⁴ It may thus be harder in America than elsewhere to proclaim certain sonorous constitutional rights without a directly enforceable content, rights one often encounters in some foreign constitutional systems: it can be expected in America that the recognition of such rights (aspirations) will soon lead to litigation in the course of which judges will be tempted to fashion some sort of remedy.

Constitutional systems often embrace an elaborate hierarchy of legal sources that establishes a rigid protocol of precedence: norms of lower rank cede before their superiors in case of conflict; the validity of each lower norm depends on a grant of authority from the superior jurisgenerative agency. The vision underlying this ranking scheme is one of *Rechtsordnung* in which all general rules originate from a high source and cascade downwards over levels of normative hierarchy. Where this vision is strong, as it still is in several European countries, judicial review of constitutionality tends to center on the constitutionality of statutes (i.e. legislation); invalidation of lower enactments typically entails a finding of their incompatibility with a statute, and the constitutionality question need not be reached.

The American system is again *sui generis*, as can be expected in a setting of loosely hierarchical power centers, and in a legal culture where judicial decisions compete for primacy with enactments. It is not that rules of precedence do not exist. In fact, the basic distinction between the constitutional level and the rest of law is more frequently and vigorously enforced here than in other countries. The "supremacy clause" (Art.6, sec.2) establishing the precedence of federal over state law is entrenched in the constitutional text, and the principle that state law pre-empts local law is proclaimed in state constitutions. However, the ranking of authorities below the constitutional level is riddled with ambiguities and eludes expression in coherent general formulae. In addition, the objects of constitutional challenge need not be enactments at all, let alone statutes.

Where lines are blurred between the constitution and judge-made constitutional law, and where each individual judge can find a statute unconstitutional, judicial decisions take precedence over legislation in a variety of important senses. The practice is not uncommon in America for Bench and Bar to cite a statute through references to it in cases, as if the former needed pedigree support rather than the latter. In contrast to countries where judicial decisions are not a formal source of law, American judges generate norms even in those areas that are not covered by legislation, so that there may be a direct conflict between principles stemming from ju-

14. See, e.g., P.Shuck, *Suing the Government* 26 (1983).

dicial decisions and the Constitution. For a variety of reasons, this conflict between "common law" and the Constitution is by no means settled.¹⁵ Curious to report also is the possibility of conflict between legislative and judicial lawmaking due to inherent powers of many state supreme courts to enact rules and to openly legislate in areas such as the law of evidence. The possibility thus arises of a statute, passed by the state legislature, being challenged as an unconstitutional intrusion in the jurisgenerative sphere of the court.¹⁶

An enactment of local government can also become an object of direct constitutional attack more easily in this system than in many others. As suggested before, local autonomy has deep roots in America, and local law does not require specific grants of authority from state government.¹⁷ Quite often, then, a municipal ordinance cannot be traced even to umbrella-like state authorization, and its content can deal with matters which people under other skies would believe required uniform solutions throughout the state. As a result of this frequent attack on local enactments, questions of constitutionality and "legality" cannot as easily be teased apart as in systems with a more rigid hierarchy of formal legal sources.

What is the principal lesson to be drawn from this cursory exploration of various common-law influences on American constitutionalism? Unlike the situation in countries where the litigational context is less central to the law, constitutional problems can seldom be discussed *grosso modo* and detached from sometimes Lilliputian details of factual situations. Constitutional law defies abridgement in terms of a body of interrelated legal standards, and the constitu-

15. Part of the reason are ambiguities of the so-called "state action" doctrine. See L. Tribe, *Constitutional Law* 1711-15 (2d ed., 1988). Observe also that American judges can often shape conditions of probation without any statutory support, so that a decision on this subject cannot be challenged as contrary to statute but only as contrary to the Constitution. See, e.g., *People v. Pointer*, 151 Cal. App. 3d, 1128 (1984).

16. Recently the Supreme Court of Mississippi invalidated an enactment of the state legislature as unconstitutionally encroaching on the court's inherent powers to promulgate "rules of practice." See *Hall v. State*, 539 So.2d 1338(1989).

17. A wide sphere of local autonomy was considered in colonial America to be a matter of inherent right. This belief remained essentially unchanged until about 1850, when the view prevailed that cities and other units of local government only exercise powers delegated to them by the state. See H. Mc Bain, *The Law and Practice of Municipal Home Rule* 5-6 (1916). Yet, in many states, successful attempts were made to preserve a limited number of matters (such as the provision of transportation or education services) for cities. See C.J. Antieau, *Municipal Corporation Law*, Vol.1, Chapt.2 (1989). Even more importantly for my purposes, state legislation remained quite fragmentary, leaving considerable room for local norm-creation outside the private law area. For a good survey of cases showing the continuing importance of municipal ordinances in the total normative output, see M. Libonati, "Reconstructing Local Government" 19 *The Urban Lawyer*, 645 (1987). A good example of litigation in the area is the pending lawsuit of the Justice Department against the city of Oakland, Calif., which passed a law prohibiting the production, storage or transport of nuclear weapons. Justice claims that this law unconstitutionally interferes with the government's power to conduct foreign policy.

tional text, apart from its application to actual controversies, hardly seems worthy of attention. In a system of judge-made law there is, like jazz improvisation, no score in advance of the performing act.

III. THE RISE OF ACTIVIST GOVERNMENT

Unlike their French contemporaries, the Framers contemplated no change in social relationships through the use of governmental power. Because of their belief that society could best develop with minimal state interference, (except, perhaps, to support a market economy), the Constitution is devoid of programmatic provisions designed to guide legislative and other state action; few and far between are substantive provisions, such as the contract clause. The constitutional debate in Philadelphia focused on the organization of federal government and its relation to the states. It was concerned with organic matters, and was process-oriented. The structure of government that emerged from the adaptation of traditional institutions fitted the Framers' conception about governmental functions: where government has few tasks to perform in society, and may even be a hostile force, fracturing and weakening power may be an alluring animating principle of governmental organization. Fundamental rights added to the Constitution in 1791 reflected the same political outlook. Citizens were envisaged as possible targets of aggressive governmental action, and rights understood as a protection from such action. Note, quite in parenthesis, that these rights only legitimated the traditional substance of rights exercised by colonists before the Revolution.¹⁸

In this larger context, the power of the judiciary to police the Constitution could be understood as an additional check on the government to remain within its charter, and thus easily reconciled with the philosophy of containing the powers of the state. Where judicial review was exercised, - and it happened infrequently, at least with respect to congressional enactments, until about 1870, - it dealt mostly with the framework of political institutions.¹⁹ The prevailing

18. Consider the contrast between late 18th century Paris and Philadelphia. The makers of the French Constitution were fashioning a *nouveau regime*, complete with a new inventory of rights. To achieve these objectives, they desired a strong and centralized government, rather than one saddled with Montesquieuan *freins et contre-poids*. No wonder then that some prominent French politicians castigated the American Framers for their choice of weak government. For a polemic with French critics of checks and balances, see J. Adams, *A Defense of the American Constitution*, in *The Political Writings of John Adams* 122-25 (1954).

19. The anti-slavery provisions of the 13th Amendment, enacted after the Civil War, were an exception to the general position that the Constitution is but a shield against *state* action and does not have broader effects. But the constitutional amendment was used here to create a *nouveau regime* in the South, so that the objective of constitution-makers was in this instance closer to that of French Founding Fathers of 1791 than to the Framers of the original Philadelphia document. It is thus

mode of review was prohibitory. A law or measure would be found *ultra vires*, as it were, and other branches of government would thus be left with considerable freedom to choose alternative ways of pursuing their objectives. It is only with the emergence of welfare legislation at the turn of the century that judicial review, especially of congressional enactments, became more frequent. It also began to change its character: judges came to discover substantive content in the husk of constitutional provisions, first to protect *laissez-faire*, and later to support state intervention in economic and social life. This discovery gradually transformed judicial review from an exercise of mainly prohibitory powers into an exercise of a curious mix of prohibitory and policy-shaping powers. With that transformation we are fully in the modern constitutional current.

It is interesting to look at this modern compound of prohibitory and shaping powers from the vantage point of those states which have self-consciously designed a constitutional system for a modern welfare government. In this perspective, the compound appears as a set of epicycles for the conversion of a constitutional scheme designed to contain the government into one that generates support for fragmentary and hesitant governmental intervention in society. To present this perspective, a brief digression is in order.

The modern welfare state rests on the assumption that self-regulating social mechanisms cannot assure desired levels of social harmony without substantial governmental interference. Welfare state constitutions therefore contain many programmatic provisions spelling out guidelines for the content of state legislation and other governmental actions. Because rights guaranteed by the constitution are inspired not only by the image of citizens as victims but also by their image as beneficiaries of state activity, classical defensive rights are supplemented by so-called "social rights," such as the right to education or to a minimum level of material well-being.²⁰ These new rights tend to relativize the old because the optimal allocation of rights to constrain the state is not necessarily optimal for the realization of programs designed to produce benefits to which social rights refer. As the welfare state constitution becomes a policy-shaping instrument, its provisions place positive demands on govern-

scarcely surprising that some scholars have detected in the 13th Amendment elements of welfare state constitutionalism *avant la lettre*. See A.R. Amar "Philadelphia Revisited: Amending the Constitution Outside Article V" 55 *U.Chi.L.Rev.* 1043, 1045 n.(1988).

20. Not all of these social rights are rights in the usual sense of enforceable subjective entitlements. For example, provisions creating such "rights" are sometimes addressed to the government, urging it to create conditions conducive to the actual enjoyment of such rights. For an excellent discussion see R. Alexy, *Theorie der Grundrechte* 454-58 (1985). See also M. Damaška, *The Faces of Justice and State Authority* 83-84 (1986).

ment and even on individuals. This broader "radiation" of the constitution is openly recognized and self-consciously regulated, so that new constitutional doctrines appear, replacing the old ones focusing on state action as the virtually exclusive concern of constitutional control.²¹

An important new feature of judicial review is that judges in the welfare state can now easily find constitutional support for demanding the institution of social programs or the launching of specific affirmative actions by the government. Worthy of note also is the fact that protection of particular substantive values now enshrined in the constitution may require that particular conduct heretofore permitted be made criminal. Where prohibitory constitutionalism only required decriminalization, the new one may brand *decriminalization* as unconstitutional. (Note that the West German and Spanish Constitutional Courts found the decriminalization of abortion unconstitutional). Whether or not welfare state judges demand positive action from other branches of government depends not only on various political considerations (too complex to be considered here), but also on the degree to which the executive and the legislative branches initiate constitutionally required positive action *sua sponte*. Observe, however, that this transcendence by the judiciary of mere negative powers may cause legitimacy problems. Judicial review can now more seriously interfere with the freedom of other branches of government. No longer can judges merely limit the choice-set of other branches, they can now demand from them that they make a specific decision, thus totally displacing their judgment. And a program found constitutionally mandated may be cost-intensive, for example, straining the budget for which more representative governmental agencies are responsible. (Citizens dislike to be taxed without representation). More generally, review of constitutionality may now be suspect as a manifestation of too much emphasis on creating obstacles to governmental action. *L'homme a programme* sees little virtue in dilatoriness; checks and balances, of which judicial review is but an example, may seem to him as a undesirable paralytic device, unsuitable to changed political circumstances.

Contemporary America remains deeply ambivalent about the use of governmental power in social and economic life, and the role

21. Typical is the German doctrine of *Drittwirkung*. See, e.g., K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* 139-43 (14th ed., 1984). Because constitutional provisions now embrace principles for the ordering of social life, one even encounters views that private law is necessary mainly as *applied* constitutional law. If one could derive precise guidelines for the resolution of inter-personal controversies from theoretically applicable constitutional texts, private law legislation would not be necessary. See Alexy, *supra* n.20 at 491-92.

of the state in society is comparatively modest. Yet, the agenda of government has greatly expanded since the New Deal and the subsequent war effort: numerous regulatory schemes and social programs are now in place and have resisted attempts to roll them back. Has this expansion of government affected American constitutionalism in the way suggested by the example of more resolute welfare states?

Although some differences could be expected from the paucity and hesitancy of steps that have been made in the direction of a more interventionist government, let me focus here on differences related to the fact that the apparatus of government survived the challenges of the New Deal essentially intact.²² It is the durability of a structure of independent power centers designed to contain the government that plays no small part in explaining the peculiar role that the judiciary has assumed in contemporary America. Consider that the United States has no unified executive, supported by a parliamentary majority, capable of managing national affairs in the manner of a typical European Cabinet. The legislatures, state and federal, are subject to so many internal fragmentations of power that they are seldom capable of coming up in timely fashion with clear formulations of policy or definitions of values required by an activist government. The judiciary, however, with its blend of legislative and managerial powers, always remains available as a propulsive force. It is therefore scarcely surprising that in the activist *Zeitgeist* of the sixties the majority of the U.S. Supreme Court decided to make use of the judiciary's "activist" potential and employ constitutional litigation in the service of prodding government into various forms of positive action. Soon various reform-minded groups, frustrated by stalemates in other branches of government, began taking advantage of the decentralized process of raising constitutional issues, and provided activist courts with the necessary litigational impulses. And, as is normal in the radically decentralized judicial system, a prominent role came to be played not only by the Supreme Court, but also by individual trial judges. In the golden age of this activism, during the years of the Warren Court, federal trial judges become initiators and sometimes also implementors of a

22. Significant shifts occurred in the relations between federal and state governments, with the federal government assuming a much larger role. At the center, administrative agencies were created, some of them independent from the executive, and the powers of the President were enlarged.

One of the most important examples of mild interventionism, (left outside the scope of this essay), is the refusal of the American government to follow most other welfare states and nationalize important social services. These services remained in private hands, but were subject to regulation. As a result, many issues that are elsewhere an internal administrative matter, remain in America a subject of potential litigation between private industry and public agencies.

variety of programs, such as educational, prison, and mental hospital reforms. They also pioneered changes in the treatment of various minorities and even attempted to create a guaranteed income.²³ This remarkable efflorescence of judicial activism may have produced a negative feed-back effect on other political institutions: politicians discovered that judicial initiatives could provide them with an excuse not to grasp the nettle of public policy issues on which their constituents expressed strong but conflicting feelings. As a result, the role of legislation to shape clear governmental policy schemes may have been further reduced.²⁴

Although the sampling of the heady wine of judicial activism has more recently subsided, American judges still perform tasks which seem to most outsiders to belong to the sphere of other branches of government.²⁵ The question is still topical: how can all this effort take place in the context of constitutional litigation?

What should be remembered at this point is that judges have the authority not only to determine what the Constitution mandates, but also traditional powers to coerce officials to undertake specific actions under threat of finding them in contempt of court. What was needed to enable judges more resolutely to shape social policy was only to transform traditional litigation from an instrument for resolving narrow inter-personal disputes into a device for the formulation and implementation of policy, usually in the context of suing individual governmental officials.

This transformation indeed took place, but can here only be silhouetted in broadest outline.²⁶ Early on, standing requirements (*legitimatío ad litem*) were relaxed to enable "ideological plaintiffs" to initiate action without proving tangible injury, or, in the injunctive setting, the threat of impending tangible injury: an injury to the plaintiffs' moral sense of right was often found sufficient. Espe-

23. How courts tried to create a guaranteed income is discussed interestingly in Krislow, "The OEO Lawyers Fail to Constitutionalize the Right to Welfare" 58 *Minn.L.Rev.* 211 (1973).

24. In the period when judicial review began to undergo a transformation, a noted American legal scholar expressed his concern that legislative responsibility may be weakened in the wake of this transformation. See J.A. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" 7 *Harv.L.Rev.* 129, 155-56 (1893). It is worth noting that legislative inactivity can manifest itself not only in the failure to enact new statutes, but also in the failure to repeal antiquated ones.

25. Especially striking to foreigners is that bold activist roles are assumed by trial judges, some of which appear uninhibited as fauns in Debussy's afternoon. Even those observers who are basically in sympathy with judicial activism, find that a warning against activist excesses is warranted in the case of the United States. See, e.g., M. Cappelletti, *The Judicial Process in Comparative Perspective* 47 (1989).

26. For a sympathetic account of this development, see A. Chayes, "The Role of the Judge in Public Law Litigation" 89 *Harv.L.Rev.* 1281 (1976). For a more skeptical view, see A. Cox, "The Effect of the Search for Equality Upon Judicial Institutions" 1979 *Wash.Un.L.Rev.* 795-816; P. Schuck, *supra* n.14, at 150-69.

cially useful in springing the bounds of traditional litigation was the consolidation of roughly similar claims of large groups into "class actions", without the need of actual plaintiffs to identify more than a few members of the group, or prove that the remainder of the group is willing to seek a particular redress. Through this device, the door of the lawsuit came wide open to various public-spirited interveners to express their views and provide an informational base similar to one provided by hearings before legislative committees. If needed, judges could inform themselves informally on what came to be openly called "legislative" facts.²⁷ How this transmogrified litigation released the legislative and managerial potential of trial judges, dormant in their traditional concentrated authority, can best be exemplified by returning to the earlier illustration of an injunction to force school officials to admit a minority child to a school. If a single child is involved, such litigation can hardly become a vehicle for reforming the school system in a particular area. But where injunctive relief is sought on behalf of all minority children in a district, the ensuing litigation readily provides the judge with an opportunity to do so. Reorganization plans of sorts must now be developed and compliance with them monitored. In this situation the initial judicial decree can hardly express more than the readiness of the judge to bring the functioning of the school system into harmony with constitutional demands for equal protection. A series of flexible supplemental decrees, all backed by judicial contempt powers, then spell out details of the reorganization plan (law-making component) or issue specific orders on what should be done (managerial component). Persons not involved in the original injunctive suit may be drawn into its vortex by becoming subjects of so-called "anti-obstruction" injunctions. Sometimes judges would even order officials in other branches of government to provide resources needed for the reorganization, although this order belongs to those in the arsenal of judicial power whose constitutional status is far from clear.²⁸ Obviously, then, constitutional litigation so transformed can become an effective instrument for generating affirmative governmental action.

27. Observe that facts thrown up by conventional litigation seldom provide the vista required for successful regulation: cases do not present themselves in a fashion sufficiently representative so as to permit reliable guesses about the universe of possible problems which a regulative scheme purports to cover. As presented by the litigants, facts often do not embrace what is central or typical to a sphere one intends to regulate, leading to undesirable slants. For some problems that arise in attempts to legislate in a litigational context, see M. Damaška, "On Circumstances Favoring Codification" 52 *Revista Juridica de la Universidad de Puerto Rico* 355, 357-58 (1983).

28. For a compendium of cases in which judges ordered expenditure of funds, see G.E. Frug, "The Judicial Power of the Purse" 126 *U.Pa.L.Rev.* 715, 718-32 (1978). On the uncertainties surrounding the limits of judicial powers to order the so-called "structural relief", see R.F. Nagel, *supra* n. 5, p.61; P. Shuck, *supra* n.14, p.153.

But how can this action find support in an eighteenth century Constitution whose basic inspiration was one of containing, rather than triggering governmental intervention? As already suggested, judges began to construe broad constitutional provisions in novel ways so as to achieve goals associated with modern governmental objectives. What a pronouncedly activist constitution would mandate directly, judges would struggle to achieve in circuitous ways.

As an example, consider the characteristic use of the equal protection clause of the 14th Amendment to provide services to the disadvantaged, and to mold social relations in ways judges deem required by the Constitution. Courts do not openly proclaim that the government should provide a service, or a service of a specified quality, to a particular disadvantaged group. Instead, they seize upon the absence of symmetry in the position of the disadvantaged and the rest of society, and demand that the asymmetry be eliminated. If the service is to be provided at all, it should, they say, be extended on equal protection grounds to include the disadvantaged. Since the total withdrawal of the service, or its general downgrading, is often not politically feasible, the actual effect of the court's order is tantamount to demanding extension or improvement of a service or benefit. The Supreme Court's decision signalling the end of the dual education system (*Brown v. Board of Education*) is a good illustration: the Court did not hold that states are constitutionally required to maintain a public education system, but demanded that, if they do, the system should be the same for students of all races.

This use of the equal protection clause, with the anti-discrimination idea inherent in it, carries a tremendous potential for urging the government to reduce various disadvantages flowing from economic and other circumstances, or to propagate new forms of social consciousness. It can also be used to extend the reach of criminal prohibitions.²⁹ Yet, as can be expected in a polity that continues to be ambivalent about the use of governmental power, this potential has been tapped seldom and very selectively. Traditional common law techniques proved particularly useful to confine sporadic decisions to narrow contexts, weakening their gravitational pull and their capacity to expand to new areas by analogical reasoning.

The same is true for other constitutional provisions that are used by courts to achieve goals usually associated with objectives of

29. An example of bizarre extremity is the decision of the highest court of New York State in *People v. Liberta*, 64 N.Y. 2d 152 (1984). Here the Court pronounced the state's rape statute punishing male aggression toward women as contrary to the equal protection clause of the Constitution. Anticipating, however, that the response of the legislator would not be the abolition of the crime of rape altogether, the Court *sua sponte* extended the rape statute to encompass sexual aggression by women on men.

the modern welfare state.³⁰ A single example should suffice. Until the era of the New Deal, the 6th Amendment right to counsel in criminal cases was isolated from the question of whether the defendant can actually afford legal assistance. The Amendment has since been interpreted by the Supreme Court to embrace an affirmative duty of the state to provide legal service to impecunious defendants. However, this position was never expanded into a broad principle requiring the government to supply material conditions for the exercise of recognized constitutional rights. It was not even extended to civil litigation, on the pattern of "judicare" arrangements adopted by most modern welfare states.³¹

Outside of the narrow area of racial discrimination, where the 13th Amendment provides a historical precedent, American courts are very reluctant to recognize that constitutional rights can radiate "horizontally", i.e., in relations among citizens, rather than only "vertically", i.e., as a protection of the individual against state action.³² Nevertheless, a body of decisional law developed since the New Deal greatly attenuated the link to state action in some areas. And, while even here the link to state action has not been totally eviscerated, it is only through legal legerdemain that one can still insist that constitutional rights do not "radiate" into the private sphere. For example, essentially private conduct can now become linked to government action by the mere fact that it takes place on land leased from the government.³³ In many areas, however, the state action requirement continues to exert a strong limiting effect on the capacity of litigants to coerce government into positive action, or to require the compensatory payment of damages.³⁴

30. For an interesting discussion of this problem see D. P. Currie, "Positive and Negative Constitutional Rights" 53 *U.Chicago L.Rev.* 864, 872-86 (1986). See also S. A. Barber, National League of Cities v. Usery; New Meaning for the Tenth Amendment, in, 1976 *Supreme Court Review*, ed. P.B. Kurland, pp. 169-73 (1977).

31. On the refusal of American courts to recognize civil litigants' constitutional right to the assistance of counsel, see R. Schlesinger, H. Baade, M. Damaska, P. Herzog, *Comparative Law* 361, n. 41c (5th ed. 1988). This is not to say that many American courts have no power to appoint counsel for an indigent party. See 69 ALR Fed. 666 (1984). A comparativist should not fail to recognize here that American procedure is extremely costly, so that subsidizing litigation presents a more serious problem here than in most other countries.

32. For a potentially dramatic inroad on state action requirement see *Shelley v. Kraemer*, 334 U.S. 1 (1948). But see *Moose Lodge No.107 v.Irvis*, 407 U.S. 163 (1972).

33. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In *Webster v. Reproductive Health Services*, 109 S.Ct 3040 (1989) abortions which were private in every other respect were treated as linked to the state because the hospitals where they were performed were situated on land leased from the state.

34. It should also be emphasized that some recent Supreme Court decisions, as well as decisions of lower federal courts, strongly suggest that many constitutional clauses will continue to be interpreted as limitations on the state's power to act, not as guarantees of certain minimal levels of safety and security. See, e.g., *DeShaney v. Winnebago County*, 109 S.Ct 998 (1989), for the interpretation of the due process

While the judicial branch has been thus instrumental in introducing fragments of welfare state arrangements into contemporary America, it would be a mistake to think that the forceful judicial policing of the Constitution was limited only to those spheres that can readily be associated with the ideology of governmental intervention in social life. Throughout the period of unabashed judicial activism, the Supreme Court continued to render decisions affirming individual freedom from intrusion in purlieus of private life, even if support for some of these decisions required the justices to seek illumination in the deep shadows of the constitutional text³⁵, and even if some of these decisions implied the invalidation of legislative enactments of long standing. Prominent examples are a long series of decisions expanding procedural rights of criminal defendants, several decisions establishing an individual's right to control his or her role in procreation³⁶, as well as decisions protecting various forms of freedom of expression even when it entails behavior deeply disturbing to prevailing sensibilities³⁷. As with other branches of American government, so with the courts: judges remain torn between impulses to contain and to release governmental action, holding together warring demands which these impulses generate in a sometimes dazzlingly precarious balance.

IV. CONCLUDING REMARKS

The peculiar American constitutional arrangements, especially the system of widely distributed authority, may possess a measure of seductive charm to all those who have experienced totalitarian government. But the very centrality of the Constitution in the life of the nation and the prominence of courts as its custodians also make some challenges to modern constitutionalism quite serious and probably more visible than elsewhere. Two challenges deserve brief mention in these concluding observations.

The first challenge is native to America and concerns the efficiency of polycentric norm creation, with its overlaps and uncertainties, to which the traditional constitutional arrangements give rise.

clause of the 14th Amendment. See, also *Jackson v. City of Juliet*, 715 F.2d 1200, 103 (7th Cir. 1983).

35. Here the right to privacy was discovered. For a discussion of the judicial exploration of penumbral constitutional "emanations", see L. Tribe, *supra* n. 15, p. 774 ff.

36. See, e.g., *Griswold v. Connecticut*, 381 U.S.479(1965), holding that a couple could not be criminally convicted for using birth control, and *Roe v. Wade*, 410 U.S. 113 (1973), establishing that the state cannot criminalize abortion before viability. The later decision has been lately somewhat eviscerated by the decision *Webster v. Reproductive Health Services*, 109 S.Ct. 3040(1989).

37. See *Johnson v. Texas*, 109 S.Ct 2533 (1989), holding that the state cannot criminalize the burning of the national flag as a form of political protest.

As indicated before, the legislative process is so replete with obstacles to the timely formulation of clear and coherent social policy that legislative schemes provide relatively little grammar to social life, putting pressures on the judicial branch that simply do not exist in other countries. But imperfectly hierarchical courts, with judges exercising power in strongly personal ways, may be institutionally inadequate to provide clear solutions to more and more problems that surface in a rapidly changing and litigious society. Is it not possible that the traditional apparatus of governance and the changing functions of the modern state are in discord? Many New Dealers thought so, but their reforms did not weaken the system of checks and balances.³⁸ At present, the question receives relatively scant attention by lawyers, and those who address it are frequently guided by the old flow of sympathies for the inherited system of fragmented powers.³⁹ Some of them question the need for encompassing policy schemes as an illusion of the Enlightenment's *terrible simplificateurs*: human affairs may be systematically unpredictable, even mysterious, so that small prudential steps and compromises to which fragmented powers lead may be the best approach there is.⁴⁰ Others believe that governmental gridlocks force society to seek solutions outside the state apparatus, and that this by-passing of governmental structures is all for the best, a harbinger of the future.⁴¹

The second challenge is to the legitimacy of judicial review. Generalities of constitutional concepts inevitably open constitutional discourse to controversial issues of ethical and political philosophy, bringing the formal element in the law to its lowest ebb. The boundary between the legal and political, always elusive, is here most difficult to ascertain and to maintain. What is to prevent judges from discovering in the abstractions of constitutional lan-

38. The thrust of their efforts was to create independent administrative agencies of the federal government as propulsive instruments of government. The influential expositor of this view was James Landis. See J.M. Landis, *The Administrative Process* (1938).

39. For a recent panegyric to checks and balances see C. R. Sunstein, "Constitutionalism After the New Deal" 101 *Harv.L.Rev.* 421, 489-90 (1987). Cft. *J.L. Sunquist, Constitutional Reform and Efficient Government* (1986).

40. See, e.g., A. Kronman, "Alexander Bickel's Philosophy of Prudence" 94 *Yale L.J.* 1567,1588-90,1602,1611 (1985). The preference for prudence and common sense over broad philosophical designs is not infrequently associated by foreign observers with the prevailing currents of American constitutionalism. See, e.g., J. Habermas, *Naturrecht und Revolution*, essay in *Theorie und Praxis* 92 (1978). ("*Der Berufung auf Philosophie entspricht in Amerika die Berufung auf den Common sense*").

41. The by-passing of official structures is perhaps best exemplified in the procedural domain, where various forms of settlement tend to replace official mechanisms for the administration of justice. Interestingly enough, the movement away from state controlled forms is viewed with approval both by some believers in the powers of the market and by some advocates of a return to small communities expected to share a *nomos* and moral commitments.

guage, as in some species of abstract art, whatever they bring with them to the task of resolving constitutional questions?

In American constitutional practice, it is not widely held that the Founding document contains an immanent and guiding scheme of values whose application to constitutional questions could generate constraints. As with ordinary legislation, so with the Constitution: the political process is perceived as incapable of producing coherent outcomes, leading instead to an omnium gatherum of deals and compromises.⁴² The view that the Constitution is a charter of principles is also contrary to the heritage of judge-made law with its innate skepticism of the search for widely encompassing schemes. Case-law doctrines, of course, could be a more serious factor constraining discretion, but their elegantly chaotic laxities reduce their stabilizing potential. As can be expected in a legal culture where paradigmatic law is judge-made, so that norm-creation and norm-application cannot be separated, the idea that judges apply pre-existing law is repudiated as a myth more successfully than elsewhere. However, because the image of a judge applying the law may not only be a myth but may also be an aspiration, if human beings are motivated by aspirations, another constraining force on judicial behavior has been discredited. In this environment, the view is gaining ground that deciding constitutional issues is a matter of formally unconstrained political choice. If this is indeed the case, why should the judiciary be authorized to frustrate the political will expressed by more representative political institutions, especially in the federal system where judges are appointed for life?

The further spreading of this view may usher in a legitimacy crisis more widespread and serious in America than in other constitutional systems. Not only is the Constitution more pivotal to the life of the Nation than elsewhere, and the judges more powerful and less inhibited than in other countries, but also the authority to decide constitutional questions is allotted to *all* judges rather than to a specialized quasi-legislative tribunal.⁴³ The crisis, if it develops,

42. If the Constitution contained a deep structure of harmonious principles, a constitutional amendment could be unconstitutional. In countries where the tradition of philosophical amplitude is stronger, this view is sometimes openly expressed by judges, but it is difficult to imagine the U.S. Supreme Court endorsing the same idea. See L. Tribe, *supra* n. 15, p. 102. Some American scholars have nevertheless suggested that the multitude of conceptions that mingle in the "charter" are absorbable into a coherent system. See, e.g., R. Dworkin, *Law's Empire* 176-90, 379 (1986); W. Murphy, "An Ordering of Constitutional Values" 53 *S.Cal.L.Rev.* 703, 744 ff (1980).

43. That constitutional courts are akin to a super-legislature is a widespread opinion in Europe, shared by such luminaries as Kelsen in Austria and Calamandrei in Italy. See J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* 201 (1970); J.C. Balat, *La Nature Juridique de Contrôle de Constitutionnalité des Lois* 79-80 (1982).

could thus not be contained to a segment of the judicial branch and prevented from spreading to areas where the function of justice is to defuse the political. There is, accordingly, an ever-present risk inherent in the American propensity, registered already by de Tocqueville, to convert all social issues, including those of high politics, into legal ones, and to entrust their resolution to the judges. Like an egg-eating snake, law cannot swallow politics without altering its shape: if politics are legalized, law becomes politicized. It is then no wonder that so much contemporary American constitutional theorizing is largely a pilgrimage to the problem of how constitutional decisionmaking can be structured in the absence of conventional formal constraints.⁴⁴

44. Some scholars try to develop constraints by proposing a form of rational discourse within an ideal communication community. See, e.g., F.I. Michelman, "Traces of Self-government" 100 *Harv.L.Rev* 4, 74-76 (1986). For another variant of this approach, see B.A. Ackerman, "Why Dialogue," 86 *Journal of Philosophy* 5 (1989). Others, following the American philosopher John Rawls, consider constitutional problems from the standpoint of a person under the veil of ignorance as to his or her position in the proposed constitutional arrangement, attempting by this device to convert questions of *inter*-personal into questions of *intra*-personal choice. They then use tools derived from welfare economics in grappling with constitutional dilemmas.

No matter how interesting this theoretical literature may be, it remains silent on the subject of the resolution of disagreements or doubts that survive the structured dialogue or a single person's reasoning behind the veil of ignorance. The problems of political constraint and the authority of the state are thus largely ignored. See P. Kahn, "Community in Contemporary Constitutional Theory", 99 *Yale L.J.* 1 (1989). To the extent that the inspiration for the construct of ideal communication community is the German *Diskurstheorie*, this omission is hardly surprising: *Diskurstheorie* associates discourse and consensus; it actually represents a model of truth discovery. See J. Habermas, "Wahrheitstheorien" in *Wirklichkeit und Reflexion*; Walter Schultz zum 60. Geburtstag, 211 ff.(1973).