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ACTIVISM IN STATE SUPREME COURTS

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree of Doctor of Philosophy in the Graduate
School of The Ohio State University

By

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*****

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This work is dedicated to my mother; she thought I would do it and made certain I could.

I express my sincere thanks to Larry Baum without whose observations, both critical and uncritical, I would not have persevered and to Deborah Haddad, without whose assistance this document could not have come together.
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CHAPTER I

STATE SUPREME COURTS IN THE POLICY MAKING HIERARCHY

State legislatures in every state have created local school districts, authorized them to raise money locally for their operation, and appropriated additional funds when necessary. In some states the state supreme court has overridden these provisions by the legislature and ordered that these costs be borne equally by the taxpayers in all the districts. The legislatures in every state have adopted criminal laws that protect private property by providing criminal penalties for persons who are guilty of trespass, an unauthorized invasion of it. Supreme courts in some states have promulgated orders that have modified their state's criminal law to authorize the public to trespass on certain privately owned property. Most state legislatures have required those who use the state's courts to recover for personal injury to file their suits within a reasonably short period of time after the injury occurred. Some state courts have extended that period of the statute of limitations by decreeing that the statute of limitations does not begin to run until the injury was discovered. Not all states have changed these legislative policies. Some states have changed one or two but not all three; others have not changed any.
The courts that have changed these rules that the legislatures made have actively made public policy. In addition to these changes that state courts have made in legislative policy, courts have altered the established court prescribed policy of tort doctrines, some of which had originated in pre-Revolutionary War English courts. State courts that have been activist in one of these areas have not necessarily been so in each of them. What is the difference between the state courts that are activist and those that choose not to be?

Preview

This study sought to answer that question. I have reviewed the existing studies that touch on the question of judicial activism and have derived a definition of judicial activism that is pertinent to a study of state supreme court decisions. This definition was used to select state supreme court decisions from all of the fifty states in cases in which a court could have chosen the activist judicial role whether or not it did. Theoretical models were proposed to explain the courts' role decision. These models were employed in quantitative analysis by ordinary least squares regression to illuminate that decision. In order to include in the analysis all potentially explanatory factors and as a supplement to the quantitative analysis, a multiple state case study of the decisions in cases in which there was a potential for activism was undertaken. This study included a consideration of the courts' and justices' backgrounds, and the reputation of both the courts and their justices. The supreme courts of Indiana, West Virginia, and Ohio were analyzed. The
results of both the quantitative and qualitative analyses were presented separately and then were analyzed together.

Studies of judicial decision making are regularly identified as being of one of four theoretical approaches: the traditional, according to which individual judges and courts are constrained by legal precedent (George and Epstein 1992; Stumpf 1988); the political, according to which a judge's preference determines the individual vote and, collectively, the court's decision (Rohde 1972; Rohde and Spaeth 1976); and the institutional which focuses on the effect of structural characteristics of the court system on judges' decisions (Canon and Jaros 1970; Glick and Pruet 1986). Recent attention has considered the cumulative effect of the forces on the individual vote that underlie the three approaches and has called it neo-institutionalism (Brace and Hall 1990a; Hall and Brace 1989, 1992). I translated, insofar as was possible, the variables that these studies found had an influence on the individual justice's vote decision to variables that describe an effect on the court's decision and integrated them with other theoretically based variables into models that enlightened judicial adoption of the activist role.

Traditional Policy Allocation

It is helpful to examine briefly the policy making roles originally of the different branches of government and changes that have occurred in these roles, particularly in that of the courts. No attempt will be made to explain judicial policy making at the national level, and, therefore, the activity of neither the U.S. Congress nor the U.S. Supreme
Court is of direct interest. However, the three branches of government in Washington are each a more or less accurate image of the counterpart branch in each of the fifty states and their examination is an ideal focus for an expedited beginning.

The U.S. Constitution describes the traditional allocation of the power to effect public policy. It anticipated that the legislative branch, Congress, would be the chief policy making branch of the national government. Neither of the other branches was expected to make laws although the president was allowed a lesser participation of recommending legislation to Congress and of approving or vetoing acts once passed.

These constitutional grants exhausted the Founders' charge of policy making trust. The third branch of the national government, the judiciary, was not entrusted with any duty or authority to make laws. The judicial power was limited to cases that arose under the Constitution and the laws made pursuant to it by the Congress and the president. It did not include any power to make laws or participate in their making by Congress, nor to approve or veto them prior to their enactment, nor even to make any recommendation to the Congress. The Constitution did provide that the judicial power should include cases "arising under the Constitution" and this constitutional seed of judicial review did grow into the power that subsequent justices would use to justify activist national policy making. The development of this power made possible the Court's economic activism during the 1930s and its civil rights/liberties activism during the 1960s. Similar
provisions in state constitutions were interpreted by state courts to give them the same power in their states.

The judicial role specifically outlined in the Constitution, without judicial review, which the Supreme Court developed later, is the traditional judicial role, the norm for judicial activity, or rather, non-activity, in the policy making sphere. Porter (1982) nicely delineates this norm in her canons of judicial self-restraint in judicial decision making: judges should not rely on their personal preferences in deciding cases; courts should yield to the decisions of the legislature and executive; courts should explain their decisions with cogent and persuasive opinions. This non-activist judicial role is currently espoused by many state courts. These courts limit their decision making to interpretation of policy that has been made by others. The remainder of the state courts that embrace the spirit of judicial review and insist on a substantial role in the governing process are activist, policy making courts.

Definition of Judicial Activism

This trichotomy, executive, legislative and judicial, suggests an equality of importance among the branches of government. However, it would not be unreasonable to conclude that, ranked by the importance of the traditional function of each to government, the executive and the legislative are equally important and the judiciary is of lesser importance. The executive branch is charged with administration of the government, both its domestic and international aspects; the legislative branch is
responsible for deciding policy, both substantive and fiscal. Both branches operate for
the benefit of the whole people. The judiciary, in contradistinction, is charged with
deciding questions in cases between selfishly interested parties, albeit sometimes
important questions and very large and important parties in cases in the U.S. Supreme
Court. Nevertheless, the courts, when operating in the traditional manner, act primarily
in service to less than all the people. Even when courts simply decide disputes they
establish policy and judicial dispute settling is of obvious importance to the maintenance
of social order. However, neither of these functions equals the pervasive, governmental
importance of general policy making.

When the U.S. Supreme Court reviews acts of the Congress or state legislatures
to determine their constitutionality, it rises to the same level of importance in national
government as the other two branches, particularly when it strikes down these acts.
Similarly, activist state supreme courts achieve comparable importance in their states’
government when they exercise their power to review legislative acts and when they
actively develop their common law in policy effecting decisions. They no longer are
limiting themselves to deciding narrow questions that are important only to the parties
and issues before them, the traditional judicial role. When they operate in this activist
manner, they can be considered to comprise an equal branch. What impels some state
courts toward assumption of this equality?
In order to explain this, it is necessary to define judicial activism. In the literature on judicial activism, the facet that is most neglected is precise definition of the term. Canon (1982) notes that "there are almost as many conceptions of judicial activism as there are commentators." He contributed specific definitions of the types of judicial activism that he discovered in the U.S. Supreme Court. Three of these definitions can be applied to activist policy making in state supreme courts: negation of policies democratically adopted, alteration of earlier court doctrine, and making of substantive policy.

When a court changes established doctrine, however originally formulated, it is operating as a policy making equal of the legislature and executive. Common law doctrines, in many instances, antedated the creation of the states and, necessarily, the states' legislatures and executives. Some had been borrowed intact from pre-Revolutionary English common law. The subjects of the common law are appropriate for legislative or executive rule making. The newly established state legislatures could have codified the entire body of the existing common law and in fact, some common law provisions were codified. Similarly, the state legislatures could have changed some of the common law's judically formulated provisions, and some did. It is a recognized canon of statutory interpretation that a legislature will be held to have effectively ratified a decision that it does not change in the legislative session subsequent to the decision (Llewellyn 1964). Accordingly, the entire body of the common law in a state can be considered to have received the imprimatur of the state's legislature. When a state court
makes a change in common law doctrine it exercises power comparable to that which a legislature would exercise in amending its act.

A useful definition of judicial activism for the purpose of understanding state court assumption of an equal policy making role must be more restrictive than the limitations of Canon's three definitions. A state court's decision could accomplish any or all of these three, and still not qualify the court as equal to the legislature and executive if the other branches could not have made the policy that the court had made. Neither the legislature nor the executive has a role in simple judicial decision making and, for this reason, they are, obviously, not important in this function. Conversely, if an outside agency, the legislature, the executive, or a superior court, compels a court to adopt a particular policy, that court's importance in formulating that policy is diminished. An effective definition of judicial activist decision making for the purpose of explaining the assumption of an equal policy making role must accommodate this limitation.

Definition. Judicial activism in state courts is a decision that changes public policy, that is neither required by nor controlled by another agency, and that could have been adopted by the state legislature or executive. An activist decision that satisfies this definition is the result of a court assuming an independent policy making role equal to that of the legislature and the executive.
A current example of a case that has the potential for an activist decision is the existing confrontation in the state of Ohio over public school financing. The Ohio General Assembly has prescribed by statute the way public schools will be financed. A number of smaller Ohio counties have brought an action claiming that the method that the Ohio General Assembly has prescribed violates the Ohio Constitution. If the case reaches the Ohio Supreme Court with this issue intact, the Ohio Court could change Ohio public school finance policy by agreeing with the small counties and declaring the present statutory plan void. Such a decision would qualify as an activist decision because it changes public policy, it would not have been required or controlled by another agency, and the Ohio General Assembly could have adopted it by repealing the existing plan.

Cases involving common law doctrine also may be activist. A case in which a supreme court is asked to allow an action against a clergyman for "clerical misconduct", which action had not been recognized previously in the jurisdiction, would be a case with activist potential and a decision in which the court allowed such an action would be an activist decision.¹ Policy would have been changed; the court was without constraint when considering its decision; and the state legislature could have authorized the action by statute.

Judicial activism and its elusive, but generally opposite counterpart, judicial restraint, are terms that were coined to describe U.S Supreme Court attitudes toward policy making. Interest in the study of Court activism was engendered by the prominence of the Court’s national economic policy during the 1930s and its national civil rights/ civil liberties policy making during the 1950s and 1960s. This prominence raised normative questions of the proper role of the Court. Commentators used the implicit in the term judicial activism is the existence of an alternative. An alternative to judicial activism has been required by several normative theories of judicial decision making. A theory of institutional competence achieved acceptance at the end of the 19th Century. It encouraged courts to defer to the wisdom of the legislature and was founded in the belief that there is a basic difference between legislating and judging; that voters do not evaluate judicial candidates’ talent to decide political or policy questions as they do candidates for legislative office. The result of the application of this theory has come to be known as "restraintism". An earlier theory of judicial decision making was known as "oracular". White (1988) described 19th Century appellate judging as constrained by this theory. The law was thought of as a "mystical body of permanent truths" and the judge's role was as an oracle to find and interpret it. In the usual case where the court's decision is determined by, is "found" to be, the most recently decided case, it is not activist. However, if the "found" law changes the currently applied law, the judicial decision making is activist. Obviously, "oracular" decision making can be either activist or non-activist depending on what is "found." There is, thus, a fundamental difference between "restraintist" or deferential non-activist decision making and oracular, non-activist decision making. By definition, restraintist judicial decision making can not be activist.

However, if either oracular or restraintist decision making constrains a judge's or court's decision making, the result is not activism. Judicial decision making was first recognized to be influenced by factors other than the "law" or deference to the legislature during the 1920s with the emergence of judicial realism and its recognition of the role of judicial preferences, although, undoubtedly, personal preferences had resulted in some decisions of some courts prior to that time (See: George and Epstein 1992). Preferences may be suppressed either because there is an attempt to "find" the law or because deference is made to a greater competence. (See: Preface to the Expanded Edition of White 1988) Activism occurs when neither deference to legislative competence nor an attempt to "find" the law prevents a judge or court from making policy with a decision.
traditional allocation of the policy making function among the branches of government by the Constitution as a benchmark of propriety and described ways the Court departed from this ideal. Their interest was not in explaining the causes of this departure, although there was an underlying assumption that ideological differences with the traditional policy makers was the cause. The exclusive focus on the Supreme Court made an investigation of causes complicated. Perhaps the validity of the ideological explanation of assumption of the policy making role by the Court was so clear that affirmation was of little value. Regardless, the great preponderance of attention to judicial activism and policy making was devoted to description rather than explanation. Canon (1982) makes an excellent summary of this important literature on judicial activism in the U.S. Supreme Court.

It was not until the activism phenomenon in the state courts was studied that the variation between activism and non-activism that exists among the states made it possible to attempt an explanation of causation. Unfortunately, there have not been many of these state court studies, although those that have been made are instructive.

State Court Activism Studies

*Judicial Review.* The power of a court to review legislative acts and decide their ultimate validity is an important component of judicial activism. Its exercise through the years is critical to a complete understanding of judicial assumption of a policy making
role. At different times, different state courts have derived the power of judicial review from a specific grant of power to the court in the constitution, or more generally, from the position of the state's constitution at the apex of the state's legal structure. The Virginia Supreme Court had asserted the right to invalidate laws adopted by the Virginia legislature even before the Constitution of 1789 had been adopted (Nelson 1947) and different state courts struck down state legislative enactments during the next century with increasing frequency until courts of states that were admitted to the union after the Civil War sometimes assumed that judicial review was a "natural part of judicial power" without any constitutional mention of it. Whether by interpretation or assumption, state courts have exercised judicial review during the life of the nation.

There were scholarly studies of state court judicial review earlier in this century that contained some speculation as to what caused courts to undertake it. The earliest (Rosenthal 1916) was apparently undertaken as an aid to a state constitutional convention. It organized a catalogue of cases in which legislative acts had been declared unconstitutional by whether the governmental interest was represented in those cases and the constitutional provisions that the court had used to invalidate the laws. During the middle of the century, judicial review was studied as an institution, consistently with the approach to judicial study at the time. Scholars were interested in enumerating and

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3 The constitutional convention of the state of Washington that drafted its present constitution neither debated the power nor referred to it in that constitution. Sheldon concluded that this reflected the assumption that any reference to it would be redundant (Sheldon 1987).
describing the components of judicial review, e.g. the substance of the invalidated statutes, the number of statutes challenged, the parties to the litigation, and the forms of action used to challenge the questioned laws. However, several speculated as to the causes of the judicial declarations of unconstitutionality. Field (1943) looked at the method by which the courts were selected, the state’s urbanization, its political traditions, the authority of the court to issue advisory opinions, and the length of the state’s legislative session. He was unable to isolate any one condition that could explain the incidence of state court review and concluded that all of these factors should be considered. Nelson (1947) sought an explanation of the votes to invalidate a state law in the individual judges’ backgrounds, particularly their legal training and prior judicial or prosecutorial experience. She concluded that a judge’s background has a substantial effect on the decision to engage in judicial review: "Impartiality must always be sacrificed in some degree to human foibles." Heckman (1954) offered a rough explanation, through the use of simple descriptive statistics, of the effect of the lapse of time between a law’s enactment and the time of its constitutional challenge. He concluded that the longer a law is in effect before it is challenged, the less likely it is that it will be declared unconstitutional. These early impressionistic conclusions suggest that they were related to characteristics of the kinds of cases that were examined.

The most recent study of state judicial review (Sheldon 1987) contains a thorough history of the doctrine of judicial review as well as an exhaustive analysis of its use by state supreme courts. Sheldon concluded his study with a survey of the use by the
Washington Supreme Court of provisions of the state constitution rather than similar or identical provisions of the U.S. Constitution to review acts of the Washington legislature. These studies of judicial review, whether grounded in the state or the U.S. Constitution and whether more or less sophisticated, illuminate one dimension of judicial activism.

Modern Studies of State Court Activism

Individual studies. During the 1960s, judicial scholars were swept into the mainstream of the behavioral revolution; behavioral study of the courts, by and large, replaced institutional study. Earlier, the legal realists had begun to question the traditional explanation that judges did not "make" law but merely interpreted policy established by others. The tension between the traditional, "legal" model of judicial decision making and the emerging "political" model made judicial role perception an obvious subject for behavioral study. The newly popular opinion survey was a convenient method for them. The awesome United States Supreme Court justices were not approachable for interviews or to complete survey instruments but their less imposing state court brethren were readily available. Surveys of the perceptions of these state court judges first suggested possible causes of judicial activism in individual judges' preferences. Becker (1966) surveyed the opinions of the Hawaiian bench to determine their perceptions of the appropriate judicial decision making role. The study was undertaken to demonstrate the validity of the use of survey research techniques in the study of judicial decision making. However, as an incident to this purpose, Becker
concluded that the perceptions of the judicial role were complexly different and that these differing perceptions were related to differences in decision making.

In an era of liberal judicial decisions by judges with reputations for being guided by liberal political philosophy, it was natural that students of role perception would test the correlation between individual justice's liberal ideology and their judicial activism. Glick and Vines (1969) followed Becker with a survey of the judicial role perceptions of the justices of the New Jersey, Massachusetts, Pennsylvania, and Louisiana supreme courts. The authors hypothesized that those who identified themselves as law interpreters, rather than pragmatists or law-makers, would vote in a conservative manner, that those identified as law-makers would be liberal voters and that the pragmatists would be in the middle. A test of their hypotheses failed to support them. The study showed that those who identified themselves as pragmatists proved to be more liberal than those who identified themselves as law-interpreters. The authors concluded that the relationship between ideology and perceived roles was not clear.

Wold (1974) asked the justices of the supreme courts of Maryland, New York, Virginia, and Delaware to describe their perceived judicial role and political-philosophical orientation. His result was no more conclusive of a relationship between liberal ideology and activism than that found by Glick and Vines five years earlier. All of those who identified themselves as political conservatives identified themselves as law-interpreters. However, those who identified themselves as political liberals split their identifications among the different judicial roles.
None of these early surveys of judicial role perception revealed any promising association that could lead to an explanation of the assumption of a justice's activist role. These surveys are the only early studies that can be related to judicial activism by state court justices and they give, at best, a confusing explanation of judicial activism. The evidence for ideology, the most promising explanation, impressionistically, was contradictory and weak. Even the conclusions that the scholars claimed to reach from them has to be qualified by the questionable validity of their small samples. Beiser (1974) was limited to a survey of and interviews with only the five then current members of the Rhode Island Supreme Court. Although he found some evidence that non-activism or judicial restraint was related to the level of judicial agreement among the court's justices he could only suggest, rather than conclude, that a high degree of court integration was causally related to a restraintist or non-activist, non-policy making judicial role. These early judicial survey studies are also suspect, not only because of the very small size of their samples, but because of the limitations in survey methodology for investigating roles. Wold (1974) quoted Robert Peabody's review of Davidson, The Role of Congress: "...(R)ole cognitions (sic) are...only a self assessment of what the [subject] believes he should be doing."

Court level. Baum and Canon (1982) took the lead in studying state court judicial activism at the level of the court rather than at the level of the individual justices and they began using objective, rather than subjective, data. They sought the causes of judicial activism in the decisions of various state supreme courts and concluded that the
activist courts were driven to activism by a "general activist tradition" and by the coincidence of the liberalism of their members and the liberal substance of the activist solution. Consistently, they concluded that restraintism could probably be explained by the judges' conservatism or "ideological disagreement with the liberal tinge of recent tort innovation." In summary, a state's judicial culture and its predominant ideology explained the activism or policy making that was consistent in substance with that ideology.

While Baum and Canon studied judicial activism generally, succeeding scholars limited their attention to the relation of an active policy making role in state supreme courts to activism in specific subject areas. Harrison (1982) was interested in exclusionary zoning, its effects, and the factors that move a court to issue rules in cases in which the plaintiff has charged that exclusionary zoning occurred. He concluded that judicial policy making coincides with ideological sympathy. The conclusion of the Harrison and the Baum and Canon studies were dependent on their use of descriptive statistics and their impressions and background knowledge of the states and their courts.

Three recent studies have been limited to state court activism in one of the three issues area that will be included in this study of state court activism. Their work will be reviewed in some detail because of this overlap. Lawler and Parle (1989) continued the study of a specific legal issue and its relationship to judicial policy making. They were interested in the recent development and expansion of the public trust doctrine in
environmental law and the factors that influenced courts to assume a policy making role by expanding the doctrine. The public trust doctrine is a common law doctrine that has traditionally protected the public’s right to use navigable streams. The foundation of the doctrine as it originally existed is the legal recognition of a trust of the right to navigate such a stream, held by the government for the benefit of the public generally. Recent development and expansion of the doctrine has resulted in activist judicial decisions that applied the doctrine to non-navigable waters and to non-aquatic resources, to include recreational and environmental protection, to allow public access to certain private property, and to authorize courts to exercise oversight over legislative and executive decisions that were related to these areas. Lawler and Parle concluded that two variables had substantial and significant explanatory power of a court’s activism in this legal area: judicial professionalism, which measured a court’s satisfaction of administrative standards established by the American Bar Association, and political culture as described by Elazar (1984) and operationalized by Sharkansky (1969). These variables, as measured and taken together, seem to measure, roughly, judicial culture.

Swinford (1991) continued on the path taken by Harrison and Lawler and Parle. His interest was the equalization of the financial responsibility for public education in a state. A series of recent state court cases have questioned the constitutionality of state systems that provide for locally based funding of public schools when those systems result in wide disparity in financial support between rich and poor school districts. Two general factors, liberalism and activism, proved to be likely explanatory factors for
decisions that held legislative systems unconstitutional. The separate importance of liberalism and activism in his analysis suggest that activism is a characteristic of courts that exist separately from the court's preferences. The independent strength of activism in Swinford's model supports the conclusion that activism is different from liberal ideology even in an issue area such as school finance where the activist result is also the liberal result.

Baum (1989) focused his attention on cases in two areas of tort doctrinal development and civil liberties policy to study the tension between activist state supreme courts and state legislatures. State courts have recently reconsidered established common law tort doctrine and most have abrogated many of the established rules that have made it more difficult for one injured in an accident to maintain and prevail in cases in their courts. Baum recognized that the courts and the legislatures have different relative power in these different issue areas but that some state courts were significant participants in policy making in both areas and concluded that the courts have become "enmeshed...in state political processes" to an unprecedented degree. This study was limited to state courts' decisions that were activist and, consequently, because of the lack of variation, possible causes of this activism could not be investigated. However, Baum did refer frequently to the liberal ideology of the activist state courts and the conservative ideology of the non-activist, which suggests that he had retained the belief he had shared with Canon in 1982 that a court's ideology is an important explanation of the courts' activism.
Further Study of State Court Activism

Judicial activism is not a new phenomenon in state supreme courts, although its appearance has changed because the ideology of its substance has recently changed from moderate/conservative to predominantly liberal (Baum 1989) in part as a reaction to the change in the ideological tenor of decisions of the U.S. Supreme Court and because of the judicial "new federalism," which has resulted in plaintiffs who seek liberal remedies using the state courts to avoid the narrowing conservatism in the federal system. When the relief available to these plaintiffs in the federal system became unsatisfactory, they turned to state court systems where the supreme courts were taking up the liberal-activism from which the U.S. Supreme Court had turned. (Baum 1989.)

State court activism has also been demonstrated in the lower profile common law cases. During the period since 1950, state supreme courts have become activists in issue areas in which they have always been the predominant or exclusive authority. In the common law areas, particularly tort law development, state courts had been virtually alone in developing the law, neither the federal courts nor the state legislatures had played much of a role. Those who sought change in these rules took their demands to the state courts, the only fora in which they could be satisfied. In response, these state supreme courts have reversed protectionistic, pro-business doctrines and are now writing activist pro-plaintiff policy decisions. The state supreme courts have also revolutionized the public trust doctrine, another area of common law development. Activist environmentalists have used these court fashioned changes to fashion requests for uses
of natural resources that benefit the public generally rather than limiting those benefits to the legal title holders.

The combination of the state court activism in the high profile constitutional law cases where policy making has broad general application, and the activism in the areas of tort doctrine and statutory interpretation where individual cases apply to a more limited number of citizens but that control the great majority of the cases in our courts, results in a significant potential to make policy. Baum (1989) recognized that state supreme courts had become "enmeshed...in state political processes. This potential to make policy may be, in aggregate, greater than that of the U.S. Supreme Court's activism and state courts deserves as much attention as scholars have given the Supreme Court. Fortunately, because of the variation in activism among the states, it may be possible to gain a better understanding of judicial activism by study of the state courts than by study of the U.S. Supreme Court. The extant limited studies of state court activism in specific issue areas have contributed to our understanding of their issues and have demonstrated that these courts can be activist. They have suggested some possible causes of this activism.

The work that has been done that is related to judicial activism has suggested a number of different potential causes, the most pervasive being a court's ideology. However, the purposes of these studies were not to explain judicial activism and they were not designed to do so. The Supreme Court studies have defined activism and
described its practice by the Court but they were not interested in causation. The state court studies have been focused on the individual judges and their perceptions of the judicial role that each plays; they have depended on the authors’ impressions of the causes of activism; or they have been limited in scope to activist cases or in subject matter to a single area of the law. The early role studies were of very small samples and utilized the suspect survey method; the impressions were helpful by identifying ideology explicitly as a suspected cause of activism, but did not offer affirmation. The limited studies either could not be generalized or their design precluded the isolation of causes. Perhaps because of the prevalent view that court activism is closely related to a court’s predominant ideology, the equivocal Glick and Vines (1969) and Wold (1974) studies notwithstanding, general causation of judicial activism has been neglected. However, Swinford’s (1991) discovery that ideology and judicial activism are separate characteristics and that activism can exist in a court independently of any one of its decisions, invites a fuller study of this phenomenon as a general court characteristic.

Another Preview

I pursued this study of the judicial activist phenomenon in this and the following chapters. Earlier, in this Chapter I developed a definition of judicial activism appropriate for the study of state supreme court activism. The definitions of judicial activism that Canon (1982) enumerated provided a firm foundation for the definition that I formulated and have presented in this Chapter. I have related this definition to the traditional allocation of policy making power among the branches of government and have reviewed
the other scholarly studies that relate in a useful way to this study of judicial activism in the state supreme courts. These have supported the importance of a better understanding of the factors that drive the activism decisions by state supreme courts.

Chapter II establishes my goals in this study of judicial decision making and relates those goals to the conclusions of the earlier studies. It contains a description of my research design that utilized both quantitative and qualitative analyses to identify and account for the factors that move a state supreme court toward activist decision making and it describes two theoretical models that were tested in the quantitative analysis, the hypotheses that underlie each and the hypothesis that underlies the inclusion of a qualitative analysis. The qualitative analyses of the supreme courts of Indiana, West Virginia, and Ohio were described.

The results of the quantitative analysis are presented in Chapter III. There are separate analyses of the results of the ordinary least squares regression using all included cases decided during the period, using a subset of these cases for each of the calendar decades of the period, and using a subset of cases from each of three distinct legal issue areas.

Chapter IV contains a general description of the states that were individually analyzed and an exhaustive description of activism in the Indiana Supreme Court, particularly its non activist period during the first half of the decade of the 1980s and its
activist period in the last half of that decade. Attention is focused on Justice Randall Shepard's contribution to the Court's assumption of the activist role. A preliminary conclusion is presented that is based on a comparison of the two distinct periods.

Activism in the West Virginia Supreme Court occupies the fifth Chapter. It contains a description of activism in that court, particularly during the years 1977 to 1986 that is similar to the description of activism in the Indiana Court contained in Chapter IV. Special emphasis is given to the effect that Justice Richard Neely had on that Court's activism. No preliminary comparison is possible because the West Virginia Court was uniformly activist during the entire period of analysis.

Chapter VI contains a description of activism in the Supreme Court of Ohio during the period 1981-1991, similar to the descriptions that were contained in Chapters IV and V for Indiana and West Virginia, respectively. The Chief Justice of the Court during the first half of the decade, Frank Celebrezze, is singled out for close attention. Because there were two sub-periods of distinctly different levels of activism during the period, I was able to present preliminary conclusions based on a comparison of the Court's decisions in each period.

Chapter VII presents a comparison of the activism of the courts of Indiana, West Virginia, and Ohio during these similar decennial period and the conclusions that I reached as a result of this comparison.
The final Chapter contains a synthesis of the results and conclusions of the quantitative and qualitative analysis. This synthesis is presented in light of the earlier studies of judicial activism and their conclusions. My musings about the incorporation of the gains this study has made in future attempts to understand the foundations of the judicial decision to assume the activist role concludes this work.
CHAPTER II

TO ILLUMINATE JUDICIAL CHOICE OF THE POLICY MAKING ROLE

The existing studies of state court activism have not tried to explain why courts have chosen or rejected the activist role. The design of this study allowed me to investigate the preliminary decision that every court is required to make that is asked to overrule a legislative act or a rule that has been established in a decision by a predecessor court. Before a court can reach the substantive heart of a policy making case it must first decide whether or not it will assume a policy making role. This decision is necessarily the cumulation of the individual decisions of a majority of the members of the court and the determinants of this cumulation of individual decisions are the explanatory factors of a court’s activist decision. This decision logically comes before a court’s substantive decision to declare a statute unconstitutional or to proclaim a departure from its established common law doctrine. Before a court can make an activist decision must decide whether it will consider making such a decision.

The most recent studies that I reviewed in Chapter I were interested in the substance of the courts’ decisions to throw out exclusionary zoning, to expand the public
trust doctrine, to invalidate local school financing plans, or more generally, in the substance of tort doctrine and civil liberties decisions. The earlier studies that were reviewed focused on the individual justice's activist decisions rather than the court's decision. This study attempted to illuminate the courts' preliminary decision to assume or not an activist role.

In addition to their averted focus, the design of earlier studies would have prevented them from explaining activism had they been inclined to do so. They have been by both single case studies and multi-court quantitative analysis. There are limitations to each approach for the study of state supreme court decision making. The intriguing concept of leadership can not be satisfactorily translated into quantitative form but it can be recognized and accounted for in a qualitative analysis. A large number of cases can not be analyzed in the usual qualitative study, consequently, with such data, the relative impact of any variable can not be weighed nor its effect isolated. A quantitative study overcomes these limitations. It engenders more confidence in generalization based in larger numbers of observations. A qualitative study allows greater breadth for imagination. Either a quantitative or qualitative approach can isolate and illuminate the determinants of judicial activism. A combination of these two approaches is an improvement over one or the other. A design combining the two recognizes and supplements the limitations of each when used separately.
The expanding role of some state supreme courts in state policy making and the importance that these policies have had pleads for a better understanding of the impetus that moves some of these courts to assume this policy making role and of the forces that represses those courts that do not. This study used both quantitative and qualitative analysis to try to understand. Two theoretical quantitative models were proposed. The opportunity model was designed to test whether judicial activism was related to the relative opportunity of the state supreme court and the state legislature to adopt policy. The alternative model, the power model, was designed to test whether judicial activism was related to the absolute power a court has to make policy. A non-theoretical decisional model was created in order to control for certain factors that have been recognized as having explanatory power in judicial decision making.

Many of the variables used herein to define "opportunity" and "power" have not been used previously to analyze judicial decision making and, consequently, they allowed a different perspective on that process. Ideology, a factor that has frequently been nominated for an important explanatory role, was more precisely defined and the range of cases in which it was identified was expanded to allow for the isolation and accounting for its effect. The qualitative analysis utilized case studies of three state supreme courts. It allowed the inclusion of factors that can not be defined satisfactorily for quantitative analysis. These rigorous qualitative examinations also included evaluations of ideology's importance. This combined quantitative and qualitative design exposed the relative importance of the untried factors of the opportunity and power models and the role of
ideology in the judicial decision making process. Underlying the inclusion of a qualitative analysis was my belief that judicial leadership was important for an explanation of a court's decision to assume a policy making role together with a recognition that it was a factor that could not be included in a quantitative analysis because of its complexity.

THE QUANTITATIVE ANALYSIS

The Three Substantive Areas

During the four decades, 1960-1990, state courts made doctrinal changes that have increased the generality of the distribution of benefits and costs of social action or maintenance in the three general substantive issue areas that will be included in the quantitative analysis. The three areas are school finance equalization, natural resource trust doctrine and selected areas of tort law: charitable immunity, parental immunity, medical malpractice discovery and strict liability. The school financing cases transfer the costs of a satisfactory level of public education from the consuming local taxpayers to society more generally through the mechanism of general state taxation. The activist decisions in the tort cases have transferred the costs of injuries from the injured to society more generally through the mechanism of insurance. The trust doctrine cases make privately owned natural resources available for mass recreation and general enjoyment and shift the costs of this recreation from those without property to those who own desirable property. Activism in all three areas has been liberal in direction. Cases
from these substantive areas of the law were analyzed to more fully explain state court activism.

The Cases

Cases were selected in the three substantive areas described above in which a state court had considered an activist solution to the problem of the case whether or not activism was adopted. The array of cases that was analyzed for possible inclusion was obtained from the national legal encyclopedias, Corpus Juris, American Jurisprudence, and American Law Reports. The descriptions of the enumerated cases in these encyclopedias were reviewed to develop a list of cases from the three issue areas in which the court had decided between an activist and non-activist decision. These derived lists were checked against other sources such as articles in professional journals and the data used in the existing studies where it was available in order to ascertain that all the described cases were included. If a case from the three substantive areas appeared in any of these sources, the case was included on a preliminary list for possible inclusion in the study. Each of the cases on this list was reviewed to assure that the deciding court had made its decision on the basis of the substantive issue in which I was interested. If a case from one of the three substantive issue areas had been decided on the basis of a choice between the activist and the non-activist decision it was included in the study. If review indicated that a case had been decided on a base other than the substantive law of one of the three issue areas, e.g. on a procedural issue, it was rejected.
There are two obvious weaknesses in depending primarily on the inclusion of cases in encyclopedias to develop a set of cases for quantitative study. First, cases may have been omitted from the encyclopedias as a result of human error and, second, the definition of the substantive issue by the encyclopedia might not coincide with my definition. However, there is no reason to believe that error by the encyclopedia's staff researcher would be systematic in any way that would jeopardize a study of judicial activism nor is their any reason to believe that the definitions of the substantive areas that would be used by the encyclopediasts to include or exclude cases from their reports varied substantially from my definitions so as to skew my population of cases.

The Method

The quantitative analysis was by regression analysis of all state supreme court decisions in cases during the period 1960-1990 in which the court considered an activist solution to the problem presented by cases in the three substantive areas of the law. The unit of analysis was the court decision. This was appropriate because I was interested in understanding the courts activism and not that of individual justices. Ordinary least squares regression was the principal quantitative method.

The three models were utilized in two combinations, decisional and opportunity and decisional and power. This provided separate tests of the hypotheses upon which the power and opportunity model are based. Similarly, the equation was estimated using the
opportunity-decisional and power-decisional models, separately, with the cases for each of the three decades and finally with the cases from each issue area.

Dependent Variable

The dependent variable in each of the three models was judicial activism and it was operationalized as the percent of judges on a court that voted for the activist solution to the problem of the case. Measurement of the dependent variable by percent of total votes gave a rich variable that allowed statistical consideration of any nascent activism. As a check of the validity of this measurement, the dependent variable was dichotomized and analyzed by logit analysis.

Decisional Model

The literature is rich with explanations of the importance of various factors in the judicial decision making process. The most promising of these were combined in a general decisional model. The purpose of this model was to more clearly define the variables in the two theoretical models. Only the ideology variable of this model is closely associated with the studies of judicial activism. The relation of the variables of this model, except ideology, to the role decision of the court was of little interest. The exceptional interest in the relationship between ideology and activism results from the implicit or explicit assumption that a court’s ideology is a strong determinant of its role decision.
Regardless, this model helped to shed some light on judicial activism. It was developed with a positive relationship to activism. Nevertheless, its basic purpose was to explain as much of the variation in activism in the decisions as possible and to have as many possibly relevant factors available in my analysis so that the effect of the factors that had theoretical interest would be clarified. The independent variables of the general decisional model are ideology, state government participation, and average tenure of the members of the court.

**Ideology.** The effect of the attitude of the individual judge on decision making was the earliest subject of study by the political jurisprudence school of judicial politics. A number of scholars have found that a justice’s political ideology is important in the decision making process of the U.S. Supreme Court (see Baum 1977; Danelski 1966; Schubert 1962; Segal and Cover 1989). The personal preference of the justices assumed central importance in explaining the decisions each made. Others have looked at judicial decision making at the court level and have found an importance for ideology in state supreme court activist decision making (Baum 1989; Canon and Baum 1982; Lawler and Parle 1989; Swinford 1991).

The ideology variable is the most important variable in the decisional model for this project because of the pervasive belief that ideology can account for court activism. The ideology of a court is necessarily the ideology of some composite of its members individual ideologies. Inasmuch as I was interested in a court’s decision that must be made by its majority, a reasonable measure is the ideology of the majority of each
court's members. I had no practical way of ascertaining the ideology of the state court justices who served during the thirty years of this study. I relied on an index whose base was the partisan affiliation of the individual justices. Partisan affiliation has been recognized as a satisfactory surrogate for ideology in state court decision making (Dubois 1988). However, a study of multiple state supreme courts can not rely on the universal conservative-liberal relationship of Republican and Democrat parties in any single jurisdiction. Any comparison of state courts based on partisan affiliation must recognize and account for the normal ideological difference between party affiliates of the same party in the fifty states. A Democratic justice of the Wisconsin Supreme Court can not be equated ideologically with a Democratic justice of the South Carolina Supreme Court. In order to account for this difference, I developed an index of state party ideologies, based on the rating of each state's congressmen by the Americans for Democratic Action. The average of the ADA scores for the states' congressmen of each of the two major parties for the five terms of each decade was determined and these average decennial score became the ideology score for each party in each state.

The variable was scored according to the ideology score for the decade in which the decision was made of the state party with which a majority of the justices of the court were affiliated. If the justices of the court were equally divided because one member of the court was not affiliated with either of the two major political parties and the court was otherwise equally divided the variable was scored as the average of the state's parties ideology scores.
State government. Songer and Sheehan (1990) have shown that participation by the U.S. government as a party or as an amicus curiae increases the chance that the Supreme Court will decide the case in the direction of its participation. Provine (1981) has explained that a "within the beltway" mentality impels the Court to prefer the ascendant presence in that area. The U.S. government's lawyer before the Court has the greatest experience in that Court. The Solicitor General's office is thought to assume responsibility for the quality and importance of the government cases on the Court's docket (Songer and Sheehan 1990). Many of these considerations would apply to the presence of the state government in a case before the state supreme court. State government is usually the predominant activity in the state capitol, it is the overriding interest of those involved with it, and the state supreme court is a significant part of the government milieu. Many of the judges have occupied legislative or executive office before ascending the bench. The offices of the states' attorneys general have become increasingly larger and more professional and can now be ranked with the most experienced and qualified litigators in their states, occupying a position in the state capitol comparable to the position of the Solicitor General's office in relation to the Washington, D.C. bar. Participation by governments other than the state governments was not included in the government variable. The factors that provide theoretical support for this variable at the state level, experience and stature of legal representation, close association of the state supreme court with the other governmental institutions, of judges with other governmental officers, do not exist for local governments.
The variable was scored 1 if the state participated in the case; 0 if otherwise.

*Average tenure of members of the court.* As justices' service on a court extend over a period of time, they have the same or similar issues repeatedly presented to them for decision. As the length of service increases, it becomes increasingly likely that an individual justice will be faced with a question that had been decided in an earlier decision in which the judge had participated. It is likely that justices decide the same issue similarly. Consistently, as the average length of service of the court increases, it becomes more likely that the court will also follow its earlier decision. Judges with extended tenure and courts with experienced memberships are likely to be chronologically older and their decisions are likely to be influenced by a preference for the known, rather than the unknown.

This variable was scored according to the negatives of the actual tenures, in years, of the sitting justices on their courts.

**Opportunity Model**

I first propose an opportunity model to explain state court activism. It is reasonable to assume that a state supreme court will become a policy maker if the state legislature is not capable of fulfilling this role and the court is. The opportunity model is based on the assumption that government, like nature, abhors a vacuum. If one branch of government cannot satisfy the needs of society, another branch will take up the slack.
The model contains variables that are relative to both legislative capabilities and to the capabilities of the judiciary.

The relative capabilities of the courts and legislatures to respond to current societal needs was measured by the length of the legislative session and divided partisan political control of the governor’s office and the legislature or of the two legislative houses. The capacity of the state supreme court to respond to this weakness was measured by the existence of a court administrator who frees the judges from administrative tasks incidental to the court’s operation and attendant to its position as governor of the state court system; the legal sophistication of the court that allows it to consider various alternative solutions to a problem and introduces alternative ideas for solution to contemporary problems; the existence of intermediate appellate courts that give the highest court control of its docket and freedom to respond to the need for policy promulgation; and the relative availability of lawyers in the state.

*Legislative session.* A Legislature that is in session for a longer period of time has a greater opportunity to pass more laws than a legislature that is in session a shorter period of time. A legislature is more likely to pass activist legislation the longer it is in session because a legislature would presumably pass the mundane, ordinary, necessary legislation before considering the more exotic and controversial activist measures.
This variable was scored according to the number of calendar days of the legislative session immediately prior to the subject decision.

*Divided partisan control.* If a government is politically divided, either between the governor’s office and the legislature or within the legislature, there is less opportunity for passage of activist legislation because of the possibility of political deadlock. Ordinarily, if one party does not have control of the legislative machinery the more generally controversial policy measures can not get agreement necessary for adoption.

The variable was scored 1 if the governor was of one party and at least one of the legislative houses was controlled by the other party or if both houses of the legislature were not controlled by the same party; 0 if otherwise.

*Court administrator.* If the court has an administrator and staff that do those things that are unrelated to judicial decision making but are necessary for the continued operation of the court and for the government of the inferior courts of the state, the judges are freed to spend more time and effort considering policy responses to their pending cases.

This variable was scored 1 if the court had an administrator at the time of the decision; 0 if otherwise.
Legal sophistication. A court’s opportunity to make policy is enhanced by the introduction of new ideas that might have had their genesis in other jurisdictions or in scholarly thought. A court that has members who have graduated from national, rather than state, law schools is more likely to be aware of alternative solutions to problems that have been tried in other court systems. Graduates of national law schools are likely to have become comfortable with the idea that there are a number of different solutions to any problem situation while the experience of local law school graduates is more likely to have been limited to the established solutions of their state’s jurisprudence. A judge with a broad legal education who has knowledge of the range of available and acceptable solutions to problems has an opportunity to advocate them. Such a judge on a court would increase the likelihood that the court would use these other solutions to fashion and adopt novel solutions for problems presented. An unrelated effect on a court’s role decision is the leadership potential associated with graduation from these schools. To a degree unmatched in any other profession, the prestigious law schools are held in almost reverential awe by lawyers and their graduates are given the highest respect and deference.

This variable was scored 1 if one of the judges on the court was a graduate of Harvard, Stanford, Yale, or Columbia Universities or the Universities of Virginia, Michigan, or Chicago law schools; 0 if otherwise.
Intermediate appellate court. Numerous studies report the importance of the presence of an intermediate appellate court on decision making (Hall and Brace 1989; Canon and Jaros 1970; Glick and Pruet 1986; Wold and Caldeira 1980). The existence of an intermediate appellate court increases the opportunity for supreme courts to make policy in two ways. Intermediate appellate courts make additional time available to the high court judges by finally deciding the more routine cases that are appealed from the trial courts. A more persuasive reason is that the existence of intermediate appellate courts allows the highest court to exercise discretion over its docket and enables that court to select for its consideration the novel and unusual case for which judicial policy making would be appropriate.

This variable was scored 1 if an intermediate appellate court was present; 0 if otherwise.

Activist bar. The ratio of lawyers in a state to the general population of the state is used to measure the activity of the bar of the state. The practice of law is a series of intellectual exercises and lawyers' success depends on their facility in understanding, applying and developing legal concepts that will work for their clients. A lawyer's professional advancement is related to his success in this competition of concepts. As the number of lawyers in a state increases this competition intensifies, producing increasingly imaginative solutions to the law's problems. The van of the profession is
propelled beyond the settled answers of the established law by the swell of the numbers behind.

The variable was scored according to the ratio of lawyers in the state of decision to the state's total population.

I hypothesize:

Hypothesis #1. State supreme court decision making will be more activist as the legislature is less capability of producing political rules that are demanded by the condition of society and as their internal conditions enable them to take advantage of the opportunity presented to them.

Power Model

Alternatively, I propose a power model. A court may become a policy maker because its institutional characteristics and its internal relationships develop sufficient power to effectively challenge the legislative dominance in the policy making sphere regardless of the legislature's capabilities. The power model assumes that power, once generated and available, will be used. This model does not assume that a prerequisite condition for judicial activism is legislative incapacity. Rather, it assumes that the court will use its power independently of the ability of the other branch to act.
The measures of judicial power to assume an active role in governing are diverse but are more or less related to the court’s independence from the other branches. A court’s power was measured by its control of its budget; its institutional independence; its integration; its authority to make declaratory judgments and to entertain class actions.

*Budget.* If a court has the constitutional power to determine the amount of state resources that will be available to it for its operation, it will feel no compulsion to refrain from entering the active government arena because of institutional fear that either the legislature or the executive will restrict its budget in response. Such budgetary power also emphasizes the constitutional legitimacy of the court’s independent and equal status. A court has the power to determine the amount of its budget if the state’s constitution or laws give this power to it or if the court has decided in a final decision that it has this power.

The variable was scored 1 if the court had power to determine its budget; 0 if otherwise.

*Elected Court.* A court that is independent of the power of the other branches of government is more likely to make activist decisions than one that does not have this independence and the legitimacy of their position is derived from the ultimate democratic source, the voters. Courts that are elected are more independent than courts that are appointed. Institutional legitimacy and individual risk acceptance make activism more
likely by elected courts than by appointed courts. An elected court can rely on its independent election for its legitimacy. It is dependent for its composition only on the electors. An elected court does not have to consider whether the executive or the legislature will disagree with or resent its assumption of a policy making role and retaliate by refusing to select its constituent members at the end of their terms. Elective selection systems confront the aspiring judge with greater risks than the alternatives and, consequently, they recruit more risk acceptant judges. Risk acceptant judges are more likely to depart from the status quo and select novel solutions to problems presented by cases before them (Riker and Ordeshook 1973). An elected court is free to respond to the needs of the state's society; indeed, Hall (1987) and Hall and Brace (1989) offer impressive evidence that the electoral imperative assures that the members of an elected court are responsive to those who elect them.

This variable was scored 1 if the members of the court are elected; 0 if otherwise.

**Judicial term.** A court with a longer term for its members is more likely to assume the extraordinary role of judicial policy making than a court with a shorter term. The longer the tenure of a court's members the more independent of the selecting agency, be it electoral or appointing, and freer to make policy choices without considering the popularity of the alternatives. A court is more likely to take some action if its members are more, rather than less, insulated from possibly negative electoral consequences that might result from unpopular action.
This variable was scored according to the statutorily prescribed judicial term. A term of "life" was scored according to the longest term for a state supreme court justice during the period, 21 years, the term of the justices of the Pennsylvania Supreme Court during the period 1960 to 1970.

Integration. In numbers there is strength. A court is more likely to take an extraordinary step if all of its members participate than if one or more disagree and refuse to join. The integrated court that has accepted a norm of unanimity is more likely to be activist than the fragmented court in which dissent is frequent or routine. There is some suggestion in the literature that the opposite is true, that integration and judicial restraint are directly related. For example, Beiser (1974) suggests that the Rhode Island Court was restraintist because it was integrated. The fragmented but activist, California Court supports this view. However, Tarr and Porter (1989) and Glick and Vines (1969) describe the dissent rates of the activist New Jersey Court as low. Both Tarr and Porter (1989) and Glick (1971) explained the New Jersey Court's assumption of the policy making role, in part, by that court's lack of dissent. Tarr and Porter (1989) suggested that "intracourt consensualism" contributed to the difference between the activist New Jersey and the non-activist Ohio Courts.

This variable was scored according to the percent of dissents from the court's decisions during the decade in which a case was decided.
Declaratory judgments and class actions. The authority to make decisions in cases in which adverse parties are not contesting facts but in which the interests of a large number of citizens are aggregated allows the court to move away from the essentially private role of dispute settlor toward the public role of policy maker. The duty to make a declaratory judgment or decide a question affecting a large number of citizens requires that the court adopt one policy position rather than another. The grant of authority to make decisions in these situations cloaks judicial policy making with legitimacy. A state supreme court that is given the authority to make declaratory judgments or consider class actions has been recognized by its state’s constitution or law as a potential policy maker. The ability of a supreme court to entertain these extraordinary actions is a recognition that it is an appropriate agency to make important policy.

This variable was scored 2 if both actions were authorized; 1 if only one was authorized; and 0 if otherwise.

I hypothesize:

Hypothesis #2. State supreme court decision making will be more activist as the court’s institutional and internal relationships develop more power.
The variables included in the three quantitative models, the way in which each was measured, and the source of the information necessary to create them are contained in Table 1.

**Table 1.** Variables used in the three quantitative models, how they were measured, and the sources of the contained information.

<table>
<thead>
<tr>
<th>VARIABLE</th>
<th>HOW MEASURED</th>
<th>SOURCE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DECISIONAL MODEL</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ideology</td>
<td>Decennial state average of ADA scores for state's Congressmen</td>
<td>Congressional Quarterly, Weekly Reports</td>
</tr>
<tr>
<td>State government</td>
<td>1 if state participated in case; 0 if otherwise</td>
<td>Case reports</td>
</tr>
<tr>
<td>Court tenure</td>
<td>Average of the actual tenures of the court's members</td>
<td>Date of ascension determined from case reports</td>
</tr>
<tr>
<td><strong>OPPORTUNITY MODEL</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legislative session</td>
<td>Calendar days of the session preceding the case</td>
<td>Book of the States</td>
</tr>
<tr>
<td>Gridlock</td>
<td>1 if governor and a house of the legislature were of different parties or if both houses were not controlled by the same party; 0 if otherwise</td>
<td>Book of the States</td>
</tr>
<tr>
<td>Court Administrator</td>
<td>1 if the court had an administrator; 0 if otherwise</td>
<td>Book of the States</td>
</tr>
<tr>
<td>National legal education</td>
<td>1 if the justices had graduated from a national law school; 0 if otherwise</td>
<td>The American Bench, Judges of the Nation</td>
</tr>
<tr>
<td>Intermediate appellate court</td>
<td>1 if present; 0 if otherwise</td>
<td>Book of the States</td>
</tr>
<tr>
<td>Activist bar</td>
<td>Ratio of number of lawyers in state to state's population</td>
<td>U.S. Census Report</td>
</tr>
<tr>
<td><strong>POWER MODEL</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Budget control</td>
<td>1 if the court had control of its budget; 0 if otherwise</td>
<td>Martingale-Hubbell Law directory</td>
</tr>
<tr>
<td>Elected court</td>
<td>1 if justices selected by election; 0 if otherwise</td>
<td>Book of the States</td>
</tr>
<tr>
<td>Judicial term</td>
<td>The statutorily prescribed term (if &quot;life&quot; than 21 years, the longest term during the period of the study)</td>
<td>Book of the States</td>
</tr>
<tr>
<td>Integration</td>
<td>Ratio of dissents to total cases decided in the decade of the decision</td>
<td>Case reports</td>
</tr>
<tr>
<td>Declaratory judgments and class actions</td>
<td>2 if both authorized; 1 if one authorized; 0 if otherwise</td>
<td>Martingale-Hubbell Law Directory</td>
</tr>
</tbody>
</table>
THE QUALITATIVE ANALYSIS

Introduction

The second part of the study was a rigorous qualitative analysis of three state supreme courts that have been activist during at least some period of years in the 1980s, Indiana, West Virginia, and Ohio. The recent limited period was selected to reflect the most recent state court response to the demands for activist decisions in reaction to the most recent U.S. Supreme Court posture and because of a greater availability of information about the states, their legislatures and their courts. A limited period assured that cause and effect were relatively contemporaneous and could be reasonably related. As a result of the selection of the most recent calendar decade the three courts selected were not innovators. Inasmuch as this study was intended to discover the causes of activism rather than innovation, the absence of the innovating states courts should have no, or minimal, effect. This qualitative analysis is a component of the design of this study because I believed that judicial leadership was an important factor in the judicial decision to assume a policy making role and recognized that is could not be included in a quantitative analysis because of its complexity. In addition, I perceive judicial activism to be a long term attribute of a court. It is possible that its determinants would become more apparent in thicker, longitudinal case studies than in a series of isolated cross sections.
The individual state court studies concentrated on the decisions that defined the respective court's levels of activism, the contextual and structural factors that might have influenced the court's activist behavior, and the background, characteristics, experience, and goals of the justices of the courts that might explain the rejection or acceptance of a policy making role for their courts.

The cases. The cases whose decisions were analyzed were identified in annual surveys of developments in the state's courts made by law reviews in the three states. The cases that were included in these reviews that satisfied my definition of judicial activism were included in a preliminary list. The cases on this list from Indiana and West Virginia were reviewed in West's regional reporter and in Ohio in the official reports to ascertain that the cases were accurately described in the law reviews and that no case that satisfied my definition had been excluded. A fuller description of my selection of these cases is contained in the individual state chapters.

The states. The activity of the Indiana, West Virginia, and Ohio courts was examined and described during roughly ten year periods during the late 1970s and 1980s. These three courts were selected for examination because of a coincidence of their activist decision making in the relatively recent past. The states were dissimilar in historical background, economies and partisan politics. The three states presented a distinction between merit and elective systems for selection of justices. All three states had used the same method of selection for a substantial period prior to my study.
Indiana used a merit system and West Virginia and Ohio used elective systems. Both partisan and non-partisan elections were represented in the three courts: both primary and general elections were partisan in West Virginia; in Ohio the general election was non-partisan after nomination was achieved in a partisan primary. The predominant political culture in Indiana and Ohio was individualistic while West Virginia had a predominantly traditionalistic culture although each state’s culture was a composite of all three of Elazar’s political subcultures (Elazar 1984). These dissimilarities of the three states and their high courts are of characteristics that have been found to be important in judicial decision making studies and are significant because they allow the conclusions that were reached on the basis of their study to be generalized.

The three courts were similar, at least during some part of the periods of their study, in the substantial discretion they exercised over the cases that were included on their dockets. The West Virginia Court had absolute discretion and the Ohio Court had considerable discretion during the whole periods. The Indiana Court was allowed a greatly expanded discretion during the last two years of my examination. Although the discretion of the Indiana Court was restricted for eight of the ten years of my study, it had, nevertheless, a sufficient number of cases with activist potential to enable it to achieve activism before its discretion was enlarged. This discretion is important because it allows a court to control the flow of cases to it that have the potential for policy making.
The periods. In Indiana the period of study was from January 1, 1981 to January 1, 1991, which period includes the first five years of an activist period that I identify as beginning in December, 1985 with the Court's first activist decision after the appointment of Randall Shepard to the court, and the previous five years, which I conclude were non-activist. The decision making by the West Virginia Court during the years 1977 through 1986 comprised the most active period in the history of that Court. The period was initiated by the judicial election of 1976 that selected an activist court whose activism continued through the succeeding decennial period. In Ohio, the period of the most significant recent activist decisions of the Supreme Court was by the Celebrezze Court and occurred during the first half of the 1980s decade. The Ohio Court was studied in the five year periods immediately before and after judicial election of 1986 in which Chief Justice Celebrezze was defeated and which terminated that Court, from 1981 to 1991.

The variables. The variables that were considered in the qualitative analysis included the variables of the theoretical models insofar as they operated on the three courts. However, the list of variables was not restricted to those included in the quantitative analysis. It also included variables that seemed to have explanatory power but that could not be satisfactorily operationalized for statistical analysis. An intensive study of the small number of cases allowed a richer, thicker description of the variables that explain a court's assumption of an independent role in state policy making. The leadership effect of a dominant member of the court was a factor that received close
scrutiny because of my belief that it had an important influence on a court's decision to assume an active role and because it was necessarily omitted from the quantitative analysis.

The study. The qualitative study analyzed selected cases decided by the three courts during the periods of their study and others that indicated the court's attachment to judicial activism. It analyzed the opinions of the state's political leaders, of judicial scholars, and leaders of the state's bar together with the newspaper coverage of the state's judicial elections and judicial activity.

The method. The determination of whether a variable has an effect on a court's decision to embrace the activist role and the degree of that effect was made on the basis of its covariance with the presence or absence of activism in the state supreme court whose decision is being analyzed and in other state supreme courts. Generally, I used the "comparative method", combining "most similar systems" and "most different systems" analyses as described by Frendreis (1983). A factor whose influence was absent at the time a court makes an activist decision was determined to have no influence on that decision. It could be neither a necessary nor sufficient cause of the decision. If a factor was present and reasonably influential when a court made an activist decision but had been present when the instant court or another court had made non-activist decision, was considered to be a possible influence on the court's decision to be activist. It could have been a necessary influence in combination with other influences, but it could not
have been a sufficient cause of the activist decisions. The more times a factor coincides with the activist decision and the more times it is absent when non-activist decisions are made the stronger its claim to causation of judicial activism. If a factor was present only when a court (or any court) made activist decisions and was absent every time any court made non-activist decisions, it could possibly have influenced the activist decision. It could also be both a necessary and sufficient cause of judicial activism. These studies included an internal comparison of the factors that impacted its court’s behavior during periods of different activism during the decade. It was impossible to compare the West Virginia Court internally during this period because it was uniformly activist during the whole period. Following the separate state studies there is a comparison and evaluation of the strength and importance of the factors that were present or absent across the three courts.
CHAPTER III

THE LIGHT SHINES DIMLY

The two hypotheses that were described in Chapter II were tested in three sets of ordinary least squares regressions. In the first set all of the activist cases for the years 1960-1990 were used and both the opportunity and power models were run. Neither model nor any of the component variables was able to shed any light on the judicial decision to assume a policy making role. Next, the activist decision was regressed on subsets of cases for the three included calendar decades: 1960-1969, 1970-1979, and 1980-1990. The opportunity model showed a small glimmer when the 1970s decade cases were used. Otherwise the picture remained dark. Finally, the cases from each of the three distinct issue areas of law were used separately. The illumination increased, though it was not blinding. Collectively, the quantitative analyses did rectify the assumption that a court's predominant political philosophy determines its decision whether or not to embrace the activist role. It also suggested that there may be multiple explanations for the activist role decision, depending on the legal question, the time and the court making the decision.
Analysis of Both Models, All Cases

*Statistical interpretation.* When the dependent variable, JUDICIAL ACTIVISM, was regressed on the population of cases for 1960-1990 using both the opportunity and power models separately, each combined with the decisional model, neither model explained any of the substantial variation in the courts' decisions to make policy. The ADJ.R² for both the opportunity and power models was .01. Not surprisingly, only one of the component variables of each model was statistically significant at the conventional level and one of these variables was negatively signed.

*Substantive interpretation.* Even the two statistically significant variables, GRIDLOCK and INTEGRATION, were substantively insignificant. The coefficient for the GRIDLOCK variable (Opportunity model) indicates that if there had been a twenty-five member court during the period, gridlock in its state's government would have moved one justice's decision from total opposition to activism only to marginal support for it. The coefficient for the INTEGRATION variable (Power model) indicates that for an approximately one-half percent decrease in the percentage rate of dissent on a court, the court's vote would be one percent less activist. This would translate to a one vote change on a 200 member. The negative sign of the INTEGRATION variable also tends to falsify my hypothesis that a court with less dissent is more likely to be activist. These are truly unimpressive substantive effects for the only statistically significant variables in the equations. Tables 2. and 3. present the results of the regressions of JUDICIAL ACTIVISM on the power model and opportunity model, respectively.
### TABLE 2
REGRESSION OPPORTUNITY MODEL
ALL CASES (N=232)

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<th>B</th>
<th>STD ERROR</th>
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<th>BETA</th>
</tr>
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<td>62.07</td>
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<td>0.00</td>
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<td>Judicial Activism (DV)</td>
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<td>-</td>
<td>-</td>
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<td>-</td>
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<tr>
<td>Ideology</td>
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<td>0.09</td>
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<td>-0.12</td>
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<tr>
<td>Average Tenure</td>
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<td>0.88</td>
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<td>0.02</td>
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<td>Gridlock</td>
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<td>11.07*</td>
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<td>0.14</td>
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<tr>
<td>Intermediate Appellate Court</td>
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<td>5.95</td>
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<td>Active Bar</td>
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<td>0.00</td>
<td>0.85</td>
<td>0.06</td>
</tr>
<tr>
<td>National Legal Education</td>
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<td>0.48</td>
<td>7.63</td>
<td>5.97</td>
<td>1.28</td>
<td>0.09</td>
</tr>
<tr>
<td>Court Administrator</td>
<td>0.67</td>
<td>0.47</td>
<td>0.34</td>
<td>6.11</td>
<td>0.06</td>
<td>0.00</td>
</tr>
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</table>

* prob < .05  \( R^2 = 0.049 \)  Adjusted \( R^2 = 0.011 \)

### SUM OF SQUARES

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TABLE 3
REGRESSION
POWER MODEL
ALL CASES (N=240)

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<th>VARIABLE</th>
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<td>Constant</td>
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<td>Judicial Activism (DV)</td>
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<td>39.46</td>
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<td>Ideology</td>
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<td>Average Tenure</td>
<td>7.95</td>
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<td>-0.03</td>
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<td>Budget Control</td>
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<td>6.13</td>
<td>-0.17</td>
<td>-0.01</td>
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<tr>
<td>Elected Court</td>
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<td>4.40</td>
<td>-1.38</td>
<td>-0.10</td>
</tr>
<tr>
<td>Judicial Term</td>
<td>9.31</td>
<td>4.22</td>
<td>-0.18</td>
<td>0.68</td>
<td>-0.26</td>
<td>-0.02</td>
</tr>
<tr>
<td>Integration</td>
<td>15.33</td>
<td>10.40</td>
<td>0.52*</td>
<td>0.26</td>
<td>2.01</td>
<td>0.14</td>
</tr>
<tr>
<td>Extraordinary Remedies</td>
<td>1.70</td>
<td>0.56</td>
<td>2.02</td>
<td>4.79</td>
<td>0.42</td>
<td>0.03</td>
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* prob < .05

R²=0.040 Adjusted R²=0.007

SUM OF SQUARES

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<td>Explained</td>
<td>14859.59</td>
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<td>358824.72</td>
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<td>TOTAL</td>
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Analysis of Both Models By Decade

With the exception of the opportunity model and the 1970s cases, neither model makes any improvement when tested with subsets of cases from any of the three decades. The ADJ.R²s indicate that the model did not illuminate the judicial role decision, the variables were not significant and they were often incorrectly signed.

1970s cases, statistical interpretation. Because the number of observations is not large for the separate decades and particularly for the discrete issues cases and because both of the models have at least eight variables, I have reported ADJ.R² rather than R². "R² will always increase...when new variables are added to the equation...." "(A)s the number of independent variables...gets close to the number of cases in the sample...R² will necessarily get close to 1.0" (Berry and Feldman 1985). In using several of these subsets of cases the R² produced was substantial but ephemeral. R²s of .43 and .35 translated to ADJ.R²s of just .03. For this reason it is especially important to disregard R² when considering the results when the models were tested with reduced subsets of cases.

The opportunity model did explain 12 percent of the variation in the activist decisions of the 1970s. This model did cast some dim light on the courts' decision making during the 1970s. In addition to the healthier ADJ.R², three of its variables were correctly signed, GRIDLOCK, NATIONAL LEGAL EDUCATION and COURT ADMINISTRATOR although only NATIONAL LEGAL EDUCATION was statistically
significant. In order to ascertain that the variables in the decisional model were not responsible for the models performance, a separate regression was run using the decisional model variables alone for the 1970s cases. It produced an ADJ.R$^2$ of only -.01, assuring that the .12 ADJ.R$^2$ could be attributed to the opportunity variables.

The brightest point in this analysis of the 1970 cases was the NATIONAL LEGAL EDUCATION variable. It was correctly signed and significant at the .025 level.

1970s cases, substantive interpretation. Substantively, the addition of a graduate of a prestigious national law school to a five member court that did not previously have such a graduate would add approximately one activist vote per decision. Fourteen of the eighty-four cases in this subset were decided in a non-activist way by a one vote margin and the addition of a more sophisticated member could have changed the results in those cases. Table 4. presents the results of the regression of ACTIVISM on the opportunity model using the 1970s cases.
### TABLE 4
**REGRESSION OPPORTUNITY MODEL**  
**1970 CASES (N=84)**

<table>
<thead>
<tr>
<th>VARIABLE</th>
<th>MEAN</th>
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<th>B</th>
<th>STD ERROR</th>
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<th>BETA</th>
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</thead>
<tbody>
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<td>Constant</td>
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<td></td>
<td>-</td>
<td></td>
<td>94.69</td>
<td>22.37</td>
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<tr>
<td>Judicial Activism (DV)</td>
<td>65.37</td>
<td>37.68</td>
<td>-</td>
<td></td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Ideology</td>
<td>37.03</td>
<td>26.50</td>
<td>-0.09</td>
<td>0.17</td>
<td>-0.52</td>
<td>-0.06</td>
</tr>
<tr>
<td>State Gov.</td>
<td>0.24</td>
<td>0.43</td>
<td>-22.77</td>
<td>10.28</td>
<td>-2.21</td>
<td>-0.26</td>
</tr>
<tr>
<td>Average Tenure</td>
<td>7.54</td>
<td>2.92</td>
<td>-1.84</td>
<td>1.36</td>
<td>-1.35</td>
<td>-0.14</td>
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<tr>
<td>Legislative Session</td>
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<td>0.02</td>
<td>-0.83</td>
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<tr>
<td>Gridlock</td>
<td>0.48</td>
<td>0.50</td>
<td>7.03</td>
<td>8.44</td>
<td>0.83</td>
<td>0.09</td>
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<tr>
<td>Intermediate Appellate Court</td>
<td>0.57</td>
<td>0.50</td>
<td>-10.75</td>
<td>9.74</td>
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<td>-0.14</td>
</tr>
<tr>
<td>Active Bar</td>
<td>174.20</td>
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<td>-0.11</td>
<td>0.09</td>
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<td>-0.15</td>
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<tr>
<td>National Legal Education</td>
<td>0.61</td>
<td>0.49</td>
<td>23.25*</td>
<td>9.27</td>
<td>2.51</td>
<td>0.30</td>
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<tr>
<td>Court Administrator</td>
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<td>0.40</td>
<td>10.19</td>
<td>10.90</td>
<td>0.93</td>
<td>0.11</td>
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* prob < .025  
$R^2=0.22$  
Adjusted $R^2=0.12$

### SUM OF SQUARES

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<td>Unexplained</td>
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<td>TOTAL</td>
<td>119275.56</td>
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</table>
Analysis of Discrete Issue Areas Cases

**Statistical interpretation.** The ADJ.R²s for the regressions using these subsets of cases were generally low. Consistently with this low explanatory power there was no variable in either model that reached statistical significance at the conventional level in thirteen of fourteen regression runs. With only one subset of cases did either model produce a respectable ADJ.R². That bright spot was the regression of JUDICIAL ACTIVISM on the opportunity model variables, using the charitable immunity cases. It produced an ADJ.R² of .30. However, it was, at best, weak support for my hypothesis that lessened legislative opportunity increases the likelihood that supreme courts would be activist. Of the two variables that were conventionally statistically significant in this regression, one was signed negatively. The one correctly signed and statistically significant variable did tend to support my hypothesis by showing that judicial activism in charitable immunity cases would increase as the legislature was in session fewer days and thus would have a diminished opportunity to pass activist legislation. The LEGISLATIVE SESSION variable was significant at the .025 level. However, the other significant variable, GRIDLOCK, tended to falsify my hypothesis by showing that when a state was free of gridlock the supreme court would become more activist. The GRIDLOCK variable was also significant at the .025 level.

**Substantive interpretation.** This combination of a positively signed LEGISLATIVE SESSION and a negatively signed GRIDLOCK suggests that there was a preponderance of decisions among the charitable immunity cases in which supreme
courts abrogated the charitable immunity doctrine in states in which the legislature was limited in duration and both the executive and legislative branches of government were controlled by conservative office holders. This suggestion points to the plains and mountain-west states. During the period of this study the length of the legislative session was limited by state constitutions and the governments of these sparsely populated states were predominantly controlled by Republican governors and legislators.

A variable of particular interest. One swallow does not a summer make.\textsuperscript{1} However, in addition to the LEGISLATIVE SESSION variable, the performance of the NATIONAL LEGAL EDUCATION variable persists as a beacon in otherwise murky results. Although NATIONAL LEGAL EDUCATION did not reach conventional significance in any of the seven regressions runs in which it was included in the issue areas subsets, in five of these regression’s results it was correctly signed. This consistency is encouraging as it follows the variable’s positive prediction with the entire data set and the subsets of cases from the 1960s and 1970s. Its performance across the quantitative analyses tends to confirm a conclusion suggested by the qualitative analysis of this study that will be described later.

Ideology

_Diminished expectations._ Special attention must to be given to the extremely poor showing of the IDEOLOGY variable in these statistical analyses because of the frequent assumption that a court's ideology drives its activism decision and the explicit conclusions in serious court studies that ideology has an effect on a court's decision making. During recent judicial history, certainly since the end of the Second World War, state supreme court decisions that have been activist because they changed established common law doctrine or because they reversed legislative policy decisions have been in cases that were, predominantly, liberal substantively.

_Impressionistic explanation._ The coincidence of the liberal substance and activist judicial role has naturally led observers to conclude that there is a causal relationship between them. In making this association observers have looked at only half of the picture. Changes in established doctrine do not spring full grown from Zeus's forehead. An established common law doctrine has rarely, if ever, been overturned by the decision in the first case in which a court could have abrogated the doctrine. The early cases have usually affirmed the established doctrine and as succeeding cases are decided the level of support decreases. These cases are properly included in my study because the courts had an opportunity to make policy by changing the common law. They are properly classified as non-activist: the court had an opportunity to embrace activism and throw out the traditional rule but decided to affirm it. These early decisions for non-activism, if they were made by courts with liberal majorities, would weigh negatively for IDEOLOGY.
The effect of the inclusion of earlier non-activist cases is perfectly exemplified by two cases in which the West Virginia Court considered the doctrine of sovereign immunity. In 1978 the Court held that sovereign immunity protected a local board of education from a suit in tort. In 1982, the Court, comprised of the same members, chose to make policy by abrogating the doctrine for local school boards. The inclusion of both of these cases in a regression analysis would cancel the effect of the IDEOLOGY and every other variable that was included in the regression equations. The negative effect that each variable would have been given as a result of the first case would have been nullified by the positive effect that each would have been given as a result of the second. In both of these West Virginia cases the Court could have decided to be activist, consequently both would be properly included in the cases to be analyzed in this study.

Of similar effect, but more speculatively, when the tide of judicial tort change reached the smaller states' courts, most of these courts, even those with conservative majorities, went "with the flow" and changed their controlling rules as a result either of the bandwagon effect or to avoid being thought backward. These tort doctrine changing decisions were clearly activist: they made a change of policy in the subject tort area. The small, more remote states that were reached by this movement in the last two decades of this study, the 1970s and 1980s, were predominantly more, rather than less, conservative. These activist decisions by conservative courts may have been moved by

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a bandwagon effect, by a desire to be considered modern or some other factor but their effect in a regression analysis weighed negatively for the IDEOLOGY variable. Thus, in these two instances, the weight of the IDEOLOGY variable was decreased. This diminution is the result of properly including the cases in the data for this study and of scoring them as their circumstances dictated.3

I am aware that by analyzing activism decisions at the court level I have aggregated individual justices' activism decisions across the whole of the court and that this aggregation could mask a relationship that might exist between individual justices vote decisions and their ideology. The goal of this study was not to enlighten the individual justice's decision so the relationship between individual justices votes and their ideology is not relevant. The theoretical quantitative models, opportunity and power, and

3 The force of the IDEOLOGY variable in this study is possibly further affected artificially by the one-sided influence that judicial philosophy has. There is a recognized judicial role that prescribes that legislative decisions and established judicial doctrine should not be judicially changed, that courts should decide cases in a non-activist way regardless of the justices' policy preference. Decisions by courts following the dictates of this philosophy would weigh the IDEOLOGY variable negatively for a liberal court and positively for a conservative court. There is no complementary role or type justice that believes that legislative decisions and established judicial doctrine should be overturned at every judicial opportunity, that courts should decide every case in an activist way. Consequently, there would be no corresponding influence on IDEOLOGY solely as a result of the effect of judicial philosophy. This asymmetry would tend to inflate the apparent strength of IDEOLOGY's regression coefficient if the court were conservative and depress its strength if the court were liberal, so that the coefficient for IDEOLOGY may not accurately present its strength. The possible range of the values for IDEOLOGY was between 0 and 100, the mean of this range is 50. The mean value of Ideology for the cases included in this study was 41 (see Table 2.) It is probable that the -.01 coefficient presented in Table 1. is artificially inflated.
the leadership hypothesis that underlies the inclusion of the qualitative study, relate explanatory variables to decisions by courts rather than to individual justices. Consistently with this goal of explaining court behavior, I have based the measure for the independent variable IDEOLOGY on the ideological majority of each court rather than the individual ideologies of each justice of each court.

Statistical support for impressionistic conclusions. The more or less impressionistic conclusions I have reached with respect to the lack of importance of the IDEOLOGY variable are supported by the quantitative analysis of the potentially activist state court cases from the period 1960-1990. A plot of the dependent variable, JUDICIAL ACTIVISM, against the IDEOLOGY variable showed no relationship between the two. This plotting produced a scatterplot of random case-points without even a suggestion of relationship. The visual conclusion of randomness of this plot was confirmed by the correlation of only R = .02 between the two variables. During the course of these quantitative analyses a total of twenty-two regressions were run on the full data set and subsets of the seven issue areas and the three calendar decades. The IDEOLOGY variable was included in everyone of these runs as a component variable of the decisional model and it failed to reach significance at the conventional level in twenty-one of these. This overwhelming failure of IDEOLOGY to achieve statistical significance is solid evidence that it is, in fact, not important in the explanation of judicial activism.
Substantive insignificance. The inconsequence of IDEOLOGY is further confirmed by the substantively insignificant performance of the variable in the exceptional run in which it was statistically significant, the regression of the dependent variable, JUDICIAL ACTIVISM, on the opportunity model using the charitable immunity cases. The coefficient for the IDEOLOGY variable produced by this regression was -0.62 and it was statistically significant beyond the .025 level. Nevertheless, the IDEOLOGY variable was of trivial substance. Its coefficient indicates that for every one percent decrease in a court's ideology score, that court's decision making became six-tenths of one percent less active. On a 140 member court this effect would have moved one vote per decision from wholly committed activism to marginal non-activism. IDEOLOGY's statistically impressively significant coefficient has virtually no substantive importance. Table 5. presents the result of the regression of JUDICIAL ACTIVISM on the opportunity model, using the charitable immunity cases.
#### TABLE 5
**REGRESSION OPPORTUNITY MODEL CHARITABLE IMMUNITY CASES (N=27)**

<table>
<thead>
<tr>
<th>VARIABLE</th>
<th>MEAN</th>
<th>STD DEV</th>
<th>B</th>
<th>STD ERROR</th>
<th>t</th>
<th>BETA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Judicial Activism (DV)</td>
<td>60.96</td>
<td>41.75</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Ideology</td>
<td>40.67</td>
<td>31.22</td>
<td>-0.62*</td>
<td>0.27</td>
<td>-2.31</td>
<td>-0.46</td>
</tr>
<tr>
<td>State Gov.</td>
<td>0.07</td>
<td>0.26</td>
<td>45.82</td>
<td>29.94</td>
<td>1.53</td>
<td>0.29</td>
</tr>
<tr>
<td>Average Tenure</td>
<td>8.26</td>
<td>2.27</td>
<td>-0.74</td>
<td>3.51</td>
<td>-0.21</td>
<td>-0.40</td>
</tr>
<tr>
<td>Legislative Session</td>
<td>223.41</td>
<td>139.90</td>
<td>-0.12*</td>
<td>0.05</td>
<td>-2.32</td>
<td>-0.41</td>
</tr>
<tr>
<td>Gridlock</td>
<td>0.44</td>
<td>0.50</td>
<td>-42.12*</td>
<td>14.97</td>
<td>-2.81</td>
<td>0.50</td>
</tr>
<tr>
<td>Intermediate Appellate Court</td>
<td>0.37</td>
<td>0.48</td>
<td>-1.78</td>
<td>16.37</td>
<td>-0.11</td>
<td>-0.02</td>
</tr>
<tr>
<td>Active Bar</td>
<td>3813.37</td>
<td>18863.62</td>
<td>-0.00</td>
<td>0.00</td>
<td>-1.26</td>
<td>-0.23</td>
</tr>
<tr>
<td>National Legal Education</td>
<td>0.70</td>
<td>0.46</td>
<td>18.35</td>
<td>18.25</td>
<td>1.01</td>
<td>0.20</td>
</tr>
</tbody>
</table>

* prob < .025  \( R^2 = 0.501 \)  Adjusted \( R^2 = 0.279 \)

**SUM OF SQUARES**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Explained</td>
<td>23563.97</td>
</tr>
<tr>
<td>Unexplained</td>
<td>23494.99</td>
</tr>
<tr>
<td>TOTAL</td>
<td>47058.96</td>
</tr>
</tbody>
</table>
During the period when the coincidence between substantively liberal decisions and judicial activism in our appellate courts led observers to conclude that the courts' liberal ideology was driving their decisions to be activist, the statistical evidence is overwhelming that its appearance was verisimilitude. This evidence is consistent with and confirmed, to some extent, by the results of the Glick and Vines (1969) and Wold (1974) studies of judicial activism at the individual justice level. During the period 1960-1990 the predominant ideology of state supreme courts did not move them to adopt an activist judicial role in the seven subject areas of the law of which the data is comprised, although obviously that ideology did frequently determine their subsequent substantive decisions. The appearance of relationship between ideology and decision can not be equated to a statistically and substantively significant coefficient for an appropriately measured and tested ideology variable.

The Models

How do we explain the feeble performances of the two explanatory models? Each of the twelve variables in the two models has apparent validity and each model has a promise of explanatory power. The combinations of selected variables in the two models, one hypothesizing the effect of the relative opportunity of the legislature or the supreme court to make policy and the other hypothesizing the effect of the independent power of state supreme courts on their decision to embrace an activist role, are reasonable combinations based on reasonable theoretical expectations. But, neither was successful across time or cases.
Speculation. The use of cases from different substantive areas of the law suggests an answer to the question why the models generally performed so poorly and suggests a promising approach to the question of explanation. A comparison of the explanatory power of one of the models when it was tested with subsets of cases from the different legal areas suggests the possibility that the judicial decision to embrace activism can be explained by many different combinations of variables, depending on the substantive legal question to be decided in the case. Table 6 presents this comparison. A different combination of the variables of the two models with perhaps the addition of other undefined variables, in various combinations, might explain the activist decision in each of the other legal issue areas. The many possible combinations, the existence of each implying the exclusion of some potentially explanatory variables, reduces the attempt to explain the activist decision by theoretical models to a statistical "crap shoot."

Table 6
Performance of the two models with each issue area.

<table>
<thead>
<tr>
<th>LEGAL ISSUES</th>
<th>OPPORTUNITY MODEL (Adjusted R^2)</th>
<th>POWER MODEL (Adjusted R^2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical Malpractice</td>
<td>.09</td>
<td>.07</td>
</tr>
<tr>
<td>School Finance</td>
<td>.02</td>
<td>.08</td>
</tr>
<tr>
<td>Trust Doctrine</td>
<td>.03</td>
<td>.03</td>
</tr>
<tr>
<td>Charitable Immunity</td>
<td>.28</td>
<td>.07</td>
</tr>
<tr>
<td>Parental Immunity</td>
<td>.05</td>
<td>.07</td>
</tr>
<tr>
<td>Strict Liability</td>
<td>.07</td>
<td>.11</td>
</tr>
<tr>
<td>Pre-natal Injury</td>
<td>.07</td>
<td>.11</td>
</tr>
</tbody>
</table>
The opportunity model was not impotent, but its explanatory power may have been limited to explaining the judicial decision to assume a policy making role in charitable immunity cases. Similarly, Table 6. suggests some potency for the power model in strict liability and pre-natal injury cases. It is likely that other models explain the activism decision in each of the other issue areas. It is even likely that an additional portion of the seventy-one percent of the variation in the charitable trust cases that was not explained by the opportunity model can be explained by the addition of a variable that was undefined in the model.

This quantitative analysis has suggested a correction of the general impression that judicial decisions to adopt the activist, policy making role are driven by the court's ideology, which impression has persisted in most considerations of the question. The evidence is convincing that during the period 1960-1990 these decisions by state supreme courts were not controlled by their dominant ideology. This analysis has not been as successful at defining the factors that do impel a court to the activist decision but it has been able to make some tentative suggestions.
CHAPTER IV

THE COURTS MAKE POLICY, SOMETIMES - INDIANA

The paucity of explanatory ability of the three models with their fourteen component variables leads us to turn to an examination of the operation of specific courts for definite periods during some part of which they assumed the activist judicial role. The decisions of the supreme courts of the neighboring states of Indiana, West Virginia, and Ohio during the 1980s are ideal for this purpose.

Activism flourished during some period of the 1980s in each of these state supreme courts. Each state's court had reached the nadir of activism during the preceding decade. This is the only temporal coincidence among them. Activism did not begin at the same time nor did it exist simultaneously in the three courts except for a brief period during the last quarter of the decade. Nor has activism apparently achieved the same permanence in the three states. It seems to be firmly planted in Indiana; assured of continued, though uneven, flower in West Virginia and may be fading in Ohio.
The reputations of the supreme courts in these states have spanned the range during their histories. Indiana had been among the leaders of state courts in the nation but had slid to mediocrity by 1980; West Virginia was, by some measures, near the bottom of the pecking order, historically and in 1976; and Ohio was plugging along determinedly in mediocrity until the judicial election of 1978. Over much of the judicial history of the states, the Supreme Court of Indiana could have made a strong claim to one of the top rungs of the states' judicial quality ladder. During the attenuated history of West Virginia, its court has done its business with little claim to notice. Ohio, although it has been able to claim leadership among the states in some contributions to the nation's government, can claim only a firm grasp on the middle ground of the states' courts. Mott 1936; Canon and Baum 1981; Caldeira 1983.

West Virginia, Ohio and Indiana form a chain of states across the eastern midsection of the United States from the Blue Ridge Mountains of Virginia in the east to the prairies of Illinois in the west. Although these states are contiguous, their geography, history, economy and politics are distinct. West Virginia can claim a share, with Virginia of the motherhood of many of our earlier presidents, it was born of the strains and wounds of our civil war. Ohio’s claim to the presidency is to later and less distinguished incumbents and its birth was earlier and much more joyful than West Virginia’s, bearing the promise of the Northwest Ordinance. Indiana’s birth could pass unremarked except for the inconvenience of frontier Indian skirmishes and its subsequent experiences have been unremarkable.
The commercial activities and produce of the three are varied: West Virginia produces coal and steel and, as a result, has suffered wild attendant economic fluctuations. The Ohio economy is more varied, and consequently more stable, with basic manufacturing in the Northeast and smaller and more diversified manufacturing and agriculture across the southern and central hills and plains. Indiana also has a relatively stable, predominantly agricultural and service economy and experiences only localized economic dislocation, mirroring the fortunes of its basic industry in its northwest corner.

The successes of the major political parties in controlling each of these states' governors' offices and legislatures has been mixed, Democrats have usually prevailed in West Virginia, Republicans in Indiana, and the parties have taken turns in Ohio. Similarly, Democrats have predominated on the West Virginia Supreme Court, Republicans on the Indiana, and the parties have successively shared the majority on recent Ohio courts, with the Republicans having the historical edge.

INDIANA

Progressive History

The Indiana Supreme Court has an impressive history of progressive decision making which arose out of an independence and willingness to order its statutory and constitutional conclusions against the current of national trends, although it had meager
or ambiguous legislative guidance and faced public opposition. The Court’s present
Chief Justice, Randall Shepard, reviewed the conspicuous examples of his Court’s past
in his forward to a review of progress in the law in Indiana in 1991 (Shepard 1992). He
described the Indiana Court’s championship of the humanity of the slaves and of the
cause of their freedom from slavery at a time when other states’ courts and the U.S.
Supreme Court were basing their decisions on evaluations of slaves as property. The
Indiana Supreme court used the Supremacy Clause of the U.S. Constitution to turn
provisions of the federal fugitive slave act against its slave owning sponsors and to
invalidate an Indiana law that made it a crime to hide an escaped slave.¹

The Chief Justice described three other Indiana Supreme Court cases from its
illustrious past that were important building blocks of public law in this country. The
Court had defied legislative policy to require that the state pay lawyers who had been
appointed to represent indigent defendants in criminal prosecution at a time when only
two other states’ courts (Iowa and Wisconsin) had done so.² At a time when the Indiana
General Assembly had not qualified women to vote, the Court had ignored the implicit
legislative disqualification of women to practice law and relied on its inherent control of
the state’s bar to admit women to the practice of law in Indiana.³ Thirty-eight years

¹ Donnell v. State (1852) 3 Ind. 480.

² This decision undoubtedly contributed to future judicial activism because lawyers
who are paid are more likely to develop innovative defenses and these new arguments
gave succeeding courts alternatives to the traditional doctrines on which to base their
decisions.

³ In re Leach (1893) 34 N.E. 641.
before the U.S. Supreme Court excluded evidence obtained in an illegal search from a criminal prosecution, the Indiana Supreme Court, in the face of adverse public opinion and contrary state laws, adopted that rule for admission of such evidence in the Indiana courts.\(^4\)

A glowing after-light by the Court’s newly named Chief Justice and a showcase treatment of four cases out of more than one hundred and seventy-five year’s experience might be dismissed as chauvinistic pride or judicial puffery. However, the legal and judicial communities have confirmed the impressive former stature of the Indiana Supreme court and have highlighted its former prominence in retrospective highlights from its past.

Prominence and Decline

In 1885 when West Publishing Co. formed its judicial reporting regions, it joined Indiana with New York, Massachusetts, Michigan, and Ohio, whose courts were the leaders of the state benches at the time, in its prestigious Northeast region (Mott 1936). Mott reviewed studies by the West Publishing Company for the years before 1910 and the interim years to 1920 that showed that before 1910 the Indiana Supreme Court was the fifth most cited supreme court in the country and in 1920 it was still eighth most cited. Mott’s study of the relative prestige of state supreme courts in 1936 ranked Indiana fifteenth. The uninterrupted decline of the Court’s reputation continued until

1975 when it had dropped to twenty-fifth in the country (Caldeira). Justice Shepard reviewed Shepard’s Indiana Citations for the more recent past and found that decisions of the Indiana Supreme Court were being cited only by other Indiana courts. He observed that "we were writing to ourselves" (Shepard 1990).

It is obvious that the once lofty reputation of the Indiana Supreme Court had tumbled precipitately. The Court’s loss of its reputation was accompanied by traditionalism in its decision making. The Indiana Court has ranked in the middle of the state courts during this century in innovation in tort doctrine. Canon and Baum (1981) ranked it twenty-fifth in their study of tort doctrine innovation, and this ranking only varied from twenty-second to twenty-fifth at their various temporal checkpoints (Canon and Baum 1981).

By the beginning of the 1980s the Indiana Supreme Court showed no evidence of activism and certainly not the progressive activism of its anti-slavery and feminist decisions. Prestige and activism had, in fact, declined together. Neither prestige nor activism had recovered by the first half of the 1980s; prestige had evanesced and activism was somnolent. During the first half of the decade both activism and legal prestige were

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5 Reputation plus prestige do not necessarily equate to activism and their declines are not necessarily a concomitant of traditional judging. A court might ignore progressive legislation and retreat from an earlier advance in common law doctrine. This would be judicial activism but, as such, it would not enhance a court’s reputation and prestige, nor the likelihood that its decisions would be cited.
robust in both the Indiana courts of appeal and the Indiana legislature\(^6\) but not in the state's highest court.

A combination of legislative activism and High Court non-activism was achieved in a 1982 case in which the court gave a restrictive interpretation to a legislative statute of limitations. The Indiana General Assembly responded immediately. The Court's decision had made workers' compensation unattainable for workers with asbestosis when it ruled that the three year statute of limitations for a worker with the condition began to run on the date of the worker's last exposure to asbestos. This decision negated workers' compensation protection for asbestosis sufferers because of the long period during which the condition develops.\(^7\) The General Assembly quickly changed the law by increasing the limitation period from three to twenty years after the claimant's last exposure to asbestos dust.

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\(^6\) Although it is not within the mission of this project to define or measure legislative activism, Shepard (1992) has suggested that legislative willingness to adopt Uniform Acts is a sign of interest in adopting progressive legislation. The National Conference of Commissioners of Uniform State Law draft statutes on all subjects "where uniformity (among the states) is desirable and practicable" to free commerce between the states, encourage economic and social development and reduce pressure for federal intervention. A legislature's adoption of a significant number of uniform acts would be a rough measure of its activism during any period. By 1991, the Indiana legislature had adopted thirty uniform state laws and in the period 1987-1991, it had adopted an additional six.

The Indiana Law Review included a survey of the developments in Indiana law during the preceding year in one of its numbers each year. The purpose of this survey was to keep Indiana lawyers informed of developments in Indiana’s General Assembly and its courts of appeal and Supreme Court. It summarized those Supreme Court decisions of the previous year that its reviewers considered to be significant. Frequently, this annual survey was accompanied by an article by a supreme court justice with his analysis of the Court’s important cases. I reviewed these summaries and articles to identify those cases that had a potential activist decision. I selected for analysis the potentially activist cases from the areas of tort and workers’ compensation, common law doctrinal development, both abrogation of immunity and recognition of new causes of action, utility rate making and criminal cases involving a legislative acts validity. The kinds of cases were selected to accommodate the availability of like cases in the high courts of West Virginia and Ohio. Finally, I reviewed the Indiana Supreme Court decisions that were reported in West’s Northeast Reporter to make certain that I had not omitted any activist cases that qualified.

1980-1985

Non-Activist Cases

During the first half of the 1980s the Indiana Courts of Appeal were the keepers of judicial activism’s flame. These courts repeatedly moved beyond the limits of the current common law doctrine and did not hesitate to ignore or invalidate legislative
policy if they thought that it was inappropriate. Professor Lieberman reviewed fifteen products' liability cases that had been decided by the courts of appeal during the period June 1, 1979 and May 31, 1980 and called the period one of "most active and significant" for Indiana's appellate courts with respect to products' liability law (Lieberman 1981). He concluded that these courts "may have significantly reallocated product safety risk" to manufacturers and other sellers. The Indiana Supreme Court was to disappoint Professor Lieberman.

During the first half of the decade, commentators in the Indiana Law Review's annual survey maintained a drumbeat of charges that the Indiana Supreme Court had subordinated itself to the General Assembly. In his introduction to the torts section of the annual review in 1982, an Indiana lawyer observed that the Indiana Torts Claims Act was given a "generally restrictive interpretation...in a way sharply limiting claimant's rights." He charged that the Court's decisions in products liability cases "seem to be a result of complete deference to the legislature (Vargo 1982)." Criticism of the Court continued and sharpened in 1984. In the annual review for that year the same analyst charged that "(i)n relation to the traditional goals of tort law...Indiana has taken giant strides backwards in time....In support of its protective policy...(it) has relied upon discredited and outdated rationales"(Vargo 1984).

Another pattern during this period, along with criticism by gown and bar of the Court's subservience to the legislature, was the dissents of Justices DeBruler and Hunter
from the Court’s non-activist decisions. The coincidence of these activism cases and these
joined dissents suggests that a minority of the Court was potentially activist. Although
their disagreements with the majority in cases in which the Court was called on to make
change is apparent, it is doubtful that the source of this disagreement was the justices’
attachment to judicial activism. There is little in the backgrounds or non-judicial writings
of either justice to suggest that they had a particular interest in judicial policy making or
judicial independence. To the contrary, DeBruler’s call for help to the legislature in his
dissent in the Court’s second nude dancing case is evidence of his satisfaction with the
Court’s subordinate role. Any activist inclination they may have had in the early 1980s
was, at most, incipient. However, their regular disagreement with the non-activist, early
1980s Court signalled their potential enlistment in the ranks of an activist leader.

*Products liability cases.* The Indiana Supreme Court had no wish to be a part of
the reallocation that Professor Lieberman envisaged. It refused to consider eleven of the
professor’s notable cases when “transfer”\(^8\) to that court was sought.\(^9\) In these eleven
cases the Supreme Court refused the activist challenge to change the course of common
law products liability doctrine or legislative policy in the way that had been pointed to

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\(^8\) Transfer is the procedure by which the Indiana Supreme Court accepts an appeal
from a court of appeal.

\(^9\) When the Supreme Court refused to act with respect to a court of appeals activist
decision, the activist result prevailed as the law of the case. The plaintiffs got the benefit
of the changes that their appellate court had made in established doctrine or legislatively
ordained policy in their individual cases. However, the change that each of these
decisions fashioned was "the law" only in the deciding court's appellate jurisdiction; their
effect was, at best, persuasive in the rest of the state.
by the intermediate courts. The Supreme Court did order transfer in the remaining four of Lieberman's fifteen notable products' liability cases. In two of these cases, the court reversed the court of appeals on evidentiary or procedural questions without reaching the doctrinal or legislative policy issues. However, in the other two cases it reversed the lower court decision because of its disagreement with the lower court's activism.\(^{10}\) In the area of products liability the Court was non-activist in those cases in which it was willing to face the question.

The substantial difference between the activism of the Indiana courts of appeal and the Indiana Supreme Court that is apparent in products liability cases during the first half of the 1980s was manifested in other areas of the law. The Indiana Supreme Court refused to become involved in cases in two salient areas of the law, abortion and the legal duty of third parties.

\textit{Abortion.} The courts of appeals had marched into the thicket of abortion related regulation and held that an Indiana law that required a first trimester abortion clinic to

be licensed by the state was unconstitutional under the Indiana Constitution. The Supreme Court refused transfer and would not touch the case.

Third party liability cases. The Court also avoided the legal controversy inherent in the question of the legal duty of volunteers and hosts for harm caused by third parties by refusing transfer of two court of appeals cases. One court of appeals had been doubly active in a volunteer case by setting aside a legislative act that had provided that there was no affirmative duty to act to protect another and had judicially adopted as the common law of Indiana the rule that one who has gratuitously undertaken to render service to another is liable for failure to render such service. The Indiana Supreme Court refused to order transfer, so the new doctrine was controlling only in the limited geographic jurisdiction of the court of appeals and even there without the imprimatur of the Court. Another court of appeals departed from the traditional common law principle that one does not have a duty to control the conduct of another and found that a host has a duty to control the conduct of one guest in order to prevent injury to another guest. The Supreme Court ordered transfer of this case and reversed the court of appeals,

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12 Section 324, Restatement of Torts.

thereby returning the controlling law to the traditional common law rule. Justice DeBruler disagreed and dissented.

Criminal cases. During most of the 1980s the Court's docket was overwhelmed by criminal appeals but the number of its decisions in these cases did not produce progressive or enlightened decisions. Constitutional protection for nude dancing in public was a recurring issue during the 1980s in Indiana and the Court repeatedly deferred to the legislature when the validity of legislative prohibition was questioned. In 1979 the Court had held that nude dancing in bars and taverns was not protected by the U.S. Constitution's First Amendment. Justices DeBruler and Hunter disagreed and dissented.

In 1984 an Indiana court of appeals noted that there was a recent line of U.S. Supreme Court cases that suggested that the First Amendment protected nude dancing and, based on the reasoning of those cases, held that nude dancing was constitutionally protected expression. This case arose at a time when activist state supreme courts were beginning to take the extraordinary step of using their states' constitutions as independent sources of protection of civil rights in their individual states in the face of the U.S. Supreme Court's narrowing interpretations of the U.S. Constitution (Collins, Gailie and Kinkaid 1986). The Indiana Supreme Court would not even take advantage of favorable U.S. Supreme Court decisions to protect the citizens of Indiana from a state statute that

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15 *Id.*, p. 1096.

legal commentators described as "incurably overbroad in regulating expression protected by the first amendment." In deciding the appeal the Indiana Supreme Court used only five paragraphs to reaffirm its holding in its 1979 case. Justices DeBruler and Hunter continued the disagreement of their earlier dissent. Significantly, for the state of judicial activism in the Indiana Supreme Court at that time, DeBruler's dissent preferred "in effect a remand to the legislature to ...draw the line between legitimate public nudity and criminal public nudity."

The Court's decisions in product liability, abortion, third party liability and nude dancing cases exemplify the Court's pervasive attitude toward change during this period. However, in the period January 1, 1980 - September 8, 1985, I was able to identify two decisions that would qualify as activist. In both of these cases the Court declared an act of the General assembly invalid: it declared Indiana's Occupational Income Tax unconstitutional because it discriminated against non-residents who earned income in Indiana, and it held a legislative act that allowed both the state and the criminal defendant an automatic change of judges invalid because it conflicted with the Court's...

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19 Id. p.226.

similar rule. With the exception of these small oases of activism, the first half of the 1980s was barren.

1985-1990

Rebirth of Activism

Neither the personal nor professional experiences of the justices who were on the court in 1985 before ascending the High Bench would have nourished an activist spirit and their writings, neither before nor after, contain any hints of budding activism. Justice DeBruler had briefly been an Indianapolis deputy city prosecutor after graduating from the Indiana University law school in 1960 and before beginning his judicial climb through various lower courts in 1963 that quickly culminated in his appointment to the Court in 1968. He was the lone Democrat on the Court during the 1980s. Justice DeBruler had not written anything that was published outside his judicial duties.

Nor was there any promise of judicial activism in the backgrounds of the Republican justices. Justice Prentice and Justice Pivarnik had both practiced law in small Indiana communities before being elevated to the bench, Pivarnik by appointment to an inferior court in 1967 before being appointed to the High Court in 1977 and Prentice by

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22 The justices Biographic information is found in various entries in various editions of *The American Bench, Judges of the Nation*. 
election to the Court in 1971, his first judicial office. Neither had any extra-judicial writing that was published. Justice Hunter had graduated from a local law school in 1937 and served one two-year term in the lower house of the General Assembly. He had practiced law in a town of less than 5,000 people before he began his judicial career in 1948. He was appointed to the High Court in 1967. Justice Hunter had an article published in a law school review that supported change in the structure of the Indiana judicial system and another published in a bar association journal that advocated the adoption of the merit system for the selection of judges (Hunter 1970), but neither of these essays advocated either an activist or a restraintist role for the courts that would result from the reforms they advocated.

The Chief Justice, Richard Givan, had graduated from the Indiana University law school in 1951 and had practiced law in Indianapolis. He had served one term in the lower house of the General Assembly before his election to the Court in 1969. The Chief had the most extensive writing experience of the members of the Court in 1985 but this was the result of the obligatory annual reviews of judicial activity that bar associations and state law school reviews expect of chief justices. None of these routine writing assignments contain an examination of his judicial philosophy except, significantly, a single admonition that the judges' oaths require them to "refrain from transgressing into the proper functions" of the legislative and executive branches (Givan 1983).
Two events occurred during the second half of the 1980s that had the potential to spark the regenesis of the Court's earlier activism. In September 1985 Randall T. Shepard was appointed to the Court as an Associate Justice. Shepard was appointed to fill a vacancy that had been created by the resignation of Justice Hunter, Justice DeBruler's comrade in dissent. At about the same time a drive to increase the Court's discretion over its docket was begun that culminated on Election Day in 1988. In that election the electors of Indiana adopted a constitutional amendment that eliminated the right of direct appeal for criminal defendants who had been sentenced to a prison term of fifty or fewer years. Previously, any convicted felon whose prison term was longer than ten years could have his appeal heard directly by the Court.

*Justice Shepard.* Justice Shepard was from a different mold than his brethren. At the time of his appointment he was thirty-nine years old, the youngest member of the Court. He had left Indiana to attend college. Unlike the other members of the Court, he had not attended an Indiana law school but had gone to the Yale University law school from which he received a J.D. degree in 1972. Shepard did not return to Indiana to practice law directly after law school but went to Washington D.C. to serve as Special Assistant to the U.S. Secretary of Transportation. He returned to Indiana in 1974 to become Executive Assistant to the Mayor of Evansville, population about 140,000. When the Mayor chose not to run for reelection in 1977 Shepard ran unsuccessfully for Mayor of Evansville, Indiana. He had been appointed by the President of the United
Seventeen months after his appointment to the High Bench, the Judicial Nominating Commission named him to succeed Chief Justice Givan as Chief Justice in March, 1987. This appointment was not without controversy. Six months earlier Chief Justice Givan had announced that he would give up the Chief Justice position (although remaining on the Court) if the Nominating Commission would select Justice Pivarnik his successor. The Chief Justice did not give a reason for his condition so we can not know if it was his preference for Justice Pivarnik or his aversion to another justice that occasioned the condition. Regardless, the commission refused to make the "deal" and Givan continued until the "surprise" selection of Shepard six months later.

Randall Shepard's involvement and interest in policy was not limited to national transportation and local urban policy. He has written extensively since his appointment and has displayed a broad ranging interest in judicial policy making. His articles have had such diverse legal subjects as women's rights (Shepard 1991), land use (Shepard 1989), patriotism, abortion and the separation of church and state (Shepard 1990). His

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annual contributions to the *Indiana Law Review*, *state* of the judiciary in Indiana series, have politely made clear his disagreement with the role the Indiana Supreme Court had been playing at the time of his appointment as well as describing the role he preferred the Court to play in state government. Justice Shepard announced his view of traditional judicial decision making when he took the oath as Associate Justice: "I believe that stare decisis is a helpful doctrine in the administration of justice, but that it is not an end in itself, and that judges should not shrink from reexamination of traditional roles" (Shepard 1985). The Court "eschewed considering new matters of common law....(I)n hearing a matter on the merits, it would say of the common law: If you wish to change it, go to the legislature" (Shepard 1991a).

His reluctance to defer to the legislature in common law decision making extended to judicial deference to the legislature in matters of statutory interpretation as well. Shepard refused to join the Court's decision and only concurred in the result in a case in which the Court held that any change in a long standing interpretation of the state's wrongful death doctrine that the Court had made initially, must come from the legislature. Justice Shepard's separate opinion declared that "judges should regard themselves as responsible for the rules they have created." 26 In his first address to the Indiana Bar Association House of Delegates after his selection as Chief Justice, he

prescribed: "The Indiana Supreme Court must start to write more civil law." The "civil law" that he envisaged emanating from the Court was not merely adoption of the innovations that more progressive state high courts had adopted earlier. The extent of the judicial activism that Shepard saw down the road was foreshadowed by the advice he reported that he had received from his former Yale law professor, E. Donald Elliott, shortly after his appointment to the bench: "If you have not touched a subject since 1940...and all you do now is what others did in 1960, you may miss the opportunity to correct the mistakes of 1960. You have to find new solutions" (Shepard 1992).

The only addition to the Court after Shepard in 1985 was the appointment of Brent E. Dickson in January, 1986. Dickson had graduated from Purdue University and from the Indiana University law school in 1968. He had practiced law in Lafayette, Indiana, a city of approximately 40,000, until his appointment to the Court. He had held no public office prior to his appointment. His appointment by a Republican governor continued Justice DeBruler as the only Democratic member of the Court. Justice Dickson had written two articles for professional journals while in private practice, each of which described a specific area of the practice of law and neither of which examined either the policy antecedents or consequences of the state of the law in the particular

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area. There is nothing in his experience that would predict that he would upset established apple carts.

Justice Shepard's search for "new solutions" was not limited to an activist judicial role. He also advocated reform that would make it easier for the Court to decide cases in which policy could be made. He waded into the fight to restrict the appellate jurisdiction of the Court in order to give the new activist role room to develop. In 1985 the Indiana Constitution, Art.7, Sec.4, provided:

Appeals from a judgment imposing a sentence of death, life imprisonment or imprisonment for a term greater than ten years shall be taken directly to the Supreme Court.

This authority allowed the sentenced defendant to by-pass review by the intermediate appellate court. Legislative and sociological changes had generally increased the length of the sentences that were given to convicted felons with the result that the Supreme Court's docket was swamped by these convicts' appeals.

Proposition 2. Art.7, Sec.4, had been adopted initially in 1970 when the addition of these criminal cases to the Court's load by direct appeal was not oppressive. In 1976 the Court wrote only one hundred and thirty-seven of its opinions in cases on direct appeal. By 1985 two hundred and ninety-one of the Court's three hundred and thirteen opinions were written in these mandatory criminal appeal cases (see Table 6.). Measures that had increased the use of habitual offender statutes\(^\text{29}\) had increased the number of

\(^{29}\) Statutes that make it a criminal offense to have been convicted of crimes prior to the immediate offense which led to trial. The penalty for habitual offender status crime is greater than for any single included offense.
defendants eligible for direct appeals to a court-crippling level. These mandatory criminal appeals in the court's lopsided case load required it to take substantially more cases. In 1986 it issued almost two opinions per working day, "the highest number of opinions per (justice of any supreme court) in the country." As a result, the court's discretionary docket was substantially curtailed and "many areas of the civil law go unaddressed." Proposition 2 required the Court to hear an appeal only if the prison term imposed was longer than fifty years. Justice Shepard implored the Indiana Bar Association members to work for the passage of the Proposition (Shepard 1988).

Passage of proposition 2 in November, 1988 and the Court's implementing rule began to change the mix of cases. In 1985, eighty-eight percent of the Court's opinions were written in mandatory criminal appeals. In 1990 opinions in these cases had fallen to sixty-eight percent of those that the Court wrote. Table 7. presents these comparisons. In 1982 the reviewer of Constitutional Law in the Indiana Law Review survey of judicial developments had concluded that one thread running through Indiana cases had been "the preoccupation of the Indiana Supreme Court with criminal appeals (Neff 1982).

\[29\] Id., pp.56-57.
Table 7. Criminal Case Opinions in the Indiana Supreme Court, 1977-1990.

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL OPINIONS</th>
<th>DIRECT CRIMINAL APPEAL OPINIONS</th>
<th>CIVIL TRANSFER OPINIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>206</td>
<td>141 (68%)</td>
<td>51 (25%)</td>
</tr>
<tr>
<td>1989</td>
<td>346</td>
<td>268 (88%)</td>
<td>40 (12%)</td>
</tr>
<tr>
<td>1988</td>
<td>306</td>
<td>268 (88%)</td>
<td>23 (8%)</td>
</tr>
<tr>
<td>1987</td>
<td>363</td>
<td>312 (86%)</td>
<td>32 (9%)</td>
</tr>
<tr>
<td>1986</td>
<td>445</td>
<td>395 (89%)</td>
<td>21 (5%)</td>
</tr>
<tr>
<td>1985</td>
<td>330</td>
<td>291 (88%)</td>
<td>22 (7%)</td>
</tr>
<tr>
<td>1984</td>
<td>327</td>
<td>280 (86%)</td>
<td>19 (6%)</td>
</tr>
<tr>
<td>1983</td>
<td>323</td>
<td>281 (87%)</td>
<td>24 (7%)</td>
</tr>
<tr>
<td>1982</td>
<td>334</td>
<td>285 (85%)</td>
<td>23 (7%)</td>
</tr>
<tr>
<td>1981</td>
<td>304</td>
<td>246 (81%)</td>
<td>38 (13%)</td>
</tr>
<tr>
<td>1980</td>
<td>270</td>
<td>226 (84%)</td>
<td>21 (8%)</td>
</tr>
<tr>
<td>1979</td>
<td>262</td>
<td>211 (80%)</td>
<td>21 (8%)</td>
</tr>
<tr>
<td>1978</td>
<td>275</td>
<td>234 (85%)</td>
<td>21 (8%)</td>
</tr>
<tr>
<td>1977</td>
<td>164</td>
<td>138 (84%)</td>
<td>12 (7%)</td>
</tr>
</tbody>
</table>


The relief that the successful Proposition 2 campaign gave the court eliminated this implied criticism. Its elimination increased the opportunity for the Court to consider the broad range of cases in which policy making is possible. The reduction of the criminal case burden gave the Court the opportunity to grant "transfer" to important cases and the chance to achieve the promise of Shepard’s vision.
Post September, 1985 Activism

However, the Court did not wait until its criminal docket was lightened to turn from the non-activism of the early 1980s. Within two months of Justice Shepard's appointment to the Court, the new court made its first significant activist decision, only its third activist decision of the decade. The Indiana Public Service Corporation had allowed an utility to include the costs of closing plants in its rate making formula. A number of nuclear generating plants around the country had to be closed as a result of citizen protest campaigns and the Court's 1985 case involved such a plant. The Public Service Corporation had approved the rates that had been established by the traditional formula that had been utilized through repeated sessions of the General Assembly, thus giving that body's implicit approval. In the first important activist decision of the decade, the Court reversed the long standing interpretation by the Public Service Corporation and eliminated close-down costs from the rate structure. Justice DeBruler wrote the court's opinion and was joined by Justices Shepard and Pivarnik.\(^3\) Chief Justice Givan and Justice Prentice dissented charging that "rate making is a legislative and not a judicial function."\(^3\)


\(^3\) More interesting than Givan's desire to "buck" a tough salient issue to the legislature for decision, is the coincidence of Shepard and Pivarnik in the majority, which put both of the candidates to succeed Givan as Chief Justice together in this activist decision.
During the remaining years of the 1980s the court reached ten other activist results. The eleven activist decisions in the slightly more than four years was a significant increase over only two that the Court had reached in the decade's first six years. The Court eliminated from Indiana jurisprudence rules and doctrine that had disqualified or seriously restricted plaintiffs who sought damages for their injuries. It adopted a new rule for Indiana trial courts to use in selecting the law that trial courts would apply in tort cases from among conflicting states' laws. In a remarkable burst of common law activity the Court created five new common law causes of action and suggested a sixth in a related workers' compensation case.

Elimination of restrictive doctrine. Previous Indiana Supreme Court decisions had affirmed the doctrine of sovereign immunity and defined it so that the government was not liable for injury caused by a decision that required its choice or judgment. The post 1985 Court switched the prevailing emphasis so that the government was liable for all decisions except those that involved "fundamental policy." An earlier court had held that a tort claim against the State of Indiana is barred unless the claimant personally sends a notice of injury to the state Attorney General even though the Attorney General had otherwise received the notice. The court, in an opinion by Justice Dickson in which Justices Shepard and DeBruler joined, swept away this long standing and formalistic

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interpretation of the notice statute. The Court concluded that the policy behind the notice statute was to allow prompt investigation of claims and that this policy was served by "substantial, if not actual, compliance." Chief Justice Givan and Justice Pivarnik, continued to look to the legislature for any changed direction in statutory policy. 35

Chief Justice Shepard crafted an opinion that created a negative common law doctrine in an important area of commercial law. The reviewer of developments in Indiana commercial law in 1990 described Indiana policy on the admissibility of evidence of commercial agreements as "a conservative one...the courts have consistently adhered to a conclusive presumption...that if a written agreement appears to be complete on its face, it contains the entire agreement of the parties." 36 This is the parol evidence rule. 37 In the same year Justice Shepard, writing for the Court, emasculated the parol evidence rule by holding that evidence is admissible to explain or supplement a written agreement that is incomplete in any respect. 38 Since virtually no written commercial agreement is a complete statement of every term of the agreement between the parties, the decision leaves the parol evidence rule with no practical application. This opinion


37 The parol evidence rule is a rule of evidence that applies in cases in which there is a written agreement that excludes any evidence that is not contained in the writing. This rule was encompassed in the Indiana statutory law when the Indiana legislature adopted the Uniform Commercial Code.

38 Travel Craft v. William Mende GmbH (1990) 552 N.E.2d 443. After Travel Court every member of the Indiana Supreme Court had embraced activism at least once.
effectively eliminated the anti-consumer parol evidence rule and established common law doctrine in an important area of the law that had previously been controlled by statute.39

Conflict of laws. Over one hundred years of precedent in the Indiana Court had established that Indiana courts applied the law of the state in which a tort occurred in a trial of the resulting cause of action. The new Court overruled this body of cases40 and adopted the modern rule from the Restatement (Second) of Conflict of Laws41 that required the trial court to apply the law of the state having the "most significant contacts" with the tort and the parties to the action.

New common law causes of action. The Court considered six cases in which it was requested to approve causes of action that had not been recognized previously in Indiana and it approved five of them. In the sixth case, the Court demonstrated that it was truly an activist court although its decision in that case was non-activist.

In the first of these cases the recently invigorated Court disregarded a legislative act and overruled a four year old case to allow a traffic victim to bring an action against a "dramshop" operator. In 1984 the Court had held that because the legislature had

39 Justice Givan found himself part of this activist court majority although he had been in the non-activist majority in the next previous parol evidence case that the Court had decided.


41 Restatement (Second) of Conflict of Laws, Section 145 (1971).
enacted a criminal statute that prohibited a bar owner from selling an alcoholic beverage to a customer who was known to be intoxicated, there could be no common law action against the bar owner for injuries caused by the intoxicated customer. Just four years later, the Court overruled its earlier decision and found that there was a common law cause of action that was separate and independent of the statutory law. Justice Pivarnik, in dissent, sounded the battlecry of the entrenched non-activists: "Where the legislature has established the standard of care required, the court...cannot apply common law principles."

Next, the unanimous Shepard court carved out an exception to the common law rule that an employer may discharge "at will" an employee who does not have a contract and recognized a new cause of action against an employer who had discharged an employee in retaliation for that employee's refusal to commit an illegal act. It was necessary for the Court to overrule an one hundred and seven year old case that had absolved Indiana landlords from any duty to make repairs to leased premises in order to recognize the next new cause of action. The unanimous Court adopted the Restatement (Second) of Torts rule that a tenant has a cause of action against a landlord for injury caused by the landlord's failure to repair premises that the landlord had agreed to

repair.\textsuperscript{45} In the fourth case, the Court found that children who had been left in an institution’s care had a cause of action against the institution for sexual assault by its employees. The imposition of a non-delegable duty on the institution was a "wide sweeping change" and Justices Givan and Pivarnik dissented, repeating their charge that the legislature should make such changes.\textsuperscript{46} In a workers’ compensation case, the Court departed from the traditional rule and approved a claim for mental injury that was not accompanied by a physical injury.\textsuperscript{47} The Indiana civil law did not recognize a similar cause of action for mental without physical injury and this decision might presage a similar decision in the civil law (see Spengler 1988).

The distance along the road of activism that the Indiana Supreme Court had travelled during the five years since September, 1985 is demonstrated in a 1990 opinion in a case in which it had an opportunity to establish a new common law cause of action for loss of a parent’s services, society and companionship.\textsuperscript{48} Justice Dickson, writing for the Court, reviewed the policy considerations that militated for the alternate decisions and concluded that a policy evaluation of the question warranted against allowing the action. However, the court did not believe that the policy question should be left to the


\textsuperscript{46} Stropes et al. v. Heritage House, etc. et al. (1990) 547 N.E.2d 244.

\textsuperscript{47} Hansen v Duprin (1986) 507 N.E.2d 573.

\textsuperscript{48} In the eight states that have recognized this cause of action it is known as parental consortium. Twenty-three states have refused to recognize it. See Villareal v. State Department of Transportation (Ariz. 1989) 774 P.2d 213.
legislature. "We find the question whether the common law should recognize a child’s action for loss of parental consortium to be entirely appropriate for judicial determination (emphasis, the writer’s)."\textsuperscript{49} The court had faced the question of the propriety of a judicial determination whether a cause of action should be created and had decided that it was not only proper but preferable to a legislative determination. Though the Court’s decision did not result in an activist change in the law, that decision was made by a court that recognized activism as an acceptable role. It had come a long way from 1982 when it "would not infringe on the legislature’s sole responsibility."\textsuperscript{50}

When Randall Shepard went to the Court in 1985 he prescribed an activist role for it. At that time he was also concerned about the Court’s reputation and prestige. After only six years on the Court he was able to note, in 1992, that cases that the Court had decided since 1985 had been cited by other state high courts sixty-three times (Shepard 1992). Shepard was clearly alluding to his earlier observation that the Court had been "writing to ourselves." Indiana’s sister courts had recognized the change in the quality of its decision making and were again using its decisions to help them to decide their cases.

Closer to home, the Bar in Indiana had recognized the enhanced quality and reputation of the Court’s work. A member of a prominent Indianapolis law firm,

\textsuperscript{49} Id., p.1136.

reviewing the Court's 1991 activity observed that "(t)oday the Indiana Supreme Court has returned to ...(its earlier) tradition of progress and excellence" (Betz 1992). The choice of Randall Shepard had not been without design: at least one member of the Judicial Nominating Commission had believed that the appointment of Justice Shepard would shake up the stodgy, early 1980s court. Sara Davis, a member of the commission that had named Randall Shepard Chief Justice, accurately judged the effect of the Commission's choice. "The Commission voted for a change from the status quo."  

EXPLANATION OF CHANGE

There was a sharp bifurcation of the decade of the 1980s in the Indiana Supreme Court. In the first half of this period the court was a traditionalist, law interpreting, state supreme court. Activism did not fuel its decision making. The Court's decisions uniformly affirmed policy that had been devised by its predecessors. When it had an opportunity to participate in policy making it turned its back. In the second half, the Court began to decide cases in the "Grand Style" (Llewellyn 1960). It seemed to seek out opportunities to join the state's policy makers. There are several circumstances and events that might have detonated this activist explosion. The fortuitous temporal juxtaposition of the two sharply differentiated attitudes present a natural laboratory in which we can examine the different aspects of activism and come to some tentative conclusions.

Structure and Systems

Indiana had joined in the judicial reform movement that had swept the United States in the 1960s and 1970s, by adopting an amendment to its state constitution in 1970 that, among other changes, added an intermediate appellate court to the state judicial system and a merit system for the selection of judges. Either or both of these provisions created a condition that could arguably explain the court’s late 1980s activism. The interposition of the intermediate appellate court provided the court with a filter that removed appeals in cases that demanded only routine examination and decision making from the system. The elimination of these cases from the stream of cases flowing to the Supreme Court could free that Court from the burden of considering the everyday cases and allow it to concentrate its time and energies on the more significant case that posed alternative policy conclusions. The addition of the third layer of courts could have resulted in greater activism in the highest court because of the greater number of cases with policy making potential that the court could choose to have before it, and because of the increased time that could be used for considering policy.

The pattern of reform and activism in Indiana during this decade of the 1980s diminishes these expectations. The intermediate courts were in place during the inert first half of the decade and they failed to move the Court. Whatever judicial time and energy their presence freed up was directed by the Supreme Court down different avenues. Even when these intermediate courts took it upon themselves to move into the activist arena and presented the Court with repeated opportunities to join them, the
Court's response was either to refuse to "order transfer" of the policy making case and thus ignore them altogether, or to consider them and re-impose the legislative or traditional common law solutions.

The adoption of Proposition 2 in 1988 returned to the Court some control over the balance of cases on its docket. The increase in the percentage of discretionary civil cases and the resulting decrease in the percentage of mandatory criminal cases allowed the Court to take a greater number of significant cases whose decisions would likely make policy. (See Table 1.) This increase in judicial discretion had the potential to free the Court's time and energy for policy making just as the addition of the intermediate appellate courts had earlier. There are two conditions that tend to persuade us that it did not cause the Court's second half activism. The first, and conclusive, is that the proposition was not adopted until November, 1988, and could have had but little effect on the case mix or load during 1989 and yet the Court had embarked on its activist path more than three years earlier, in November, 1985. The Court's increased discretion in choosing the cases it would hear could not have had an effect before it existed.

Further, although the court wrote only twenty-one opinions in civil cases in 1980 and twenty-two in 1985 it is doubtful that there were more than these numbers of potential activist cases in the Indiana judiciary system that the Court could have heard and decided. The fact is the Court wrote twenty-one and twenty-two mundane and deferential opinions in those two years, not because it had to write two hundred and
twenty-six and two hundred and ninety-one criminal case opinions in those years, but because these mundane and deferential opinions were consistent with its preferred judicial role. The Court chose to be non-activist in its decision making in the cases within its limited, but nevertheless probably adequate, discretion before the success of Proposition enlarged it.

The 1970 constitutional amendment that had added intermediate appellate courts had also adopted a merit system for selection of the state's Supreme Court justices. The Indiana system is the generic system of appointment of a justice by the governor from a panel of three candidates that have been nominated by a nominating body that has been selected by the state bar association. The appointed candidate is required to appear on the ballot in a non-competitive retention election within two years of appointment and, if successful, is allowed to complete a ten year term. Although studies of the effect's of different methods of judicial selection have failed to reveal any substantial resulting differences in courts differently selected (Atkins and Glick 1975; but see Glick and Emmert 1986), the effect of different selection methods on judicial activism, per se, has not been studied and it is arguable that justices who are not the product of a partisan political system and who need have no fear from the electorate would evince an independence¹ that would find outlet in judicial activism. Unfortunately for the

¹ But see DuBois (1980), who showed that as a result of resignations of judges during terms a preponderance of supreme court justices were initially introduced to the high bench by appointment regardless the prescribed selection system.
argument that the merit system is efficacious in producing an activist court, the Indiana experience during the 1980s does not offer any support.

Three of the five early 1980s incumbents had been selected for the court by the merit system (Givan's and Prentice's selection antedated it). All five had been "retained" on the court as a result of non-competitive elections and during the 1980s none of the five had to anticipate a contested election to retain his seat. Although the merit system had operated for the fifteen years prior to 1985, it had not produced an activist court nor had it produced individual justices with any apparent policy making interest. Just as the failure of the intermediate appellate court to cause the Supreme Court to embrace activism in the first half of the decade dims its luster as an explanation of the late 1980s activism, the same failure of the merit system detracts from its promise as an explanation of late 1980s' activism. However, in late 1985 the merit system did produce a justice who was likely to advocate judicial activism and who had the potential to carry the Court along on his activist course. It is reasonable to look at this activist accomplishment of the merit system as well as at its failures. Through this lens, the merit system can and should be allowed moderate explanatory power. Nevertheless, the merit system is clearly not necessary nor sufficient, by itself, to explain the phenomenon.

Gridlock

I have hypothesized that when the same political party controls both houses of the legislature and the governor's office, the legislative-executive law making machinery
would be free to make policy and the number of the Supreme Court's activist opinions would decrease. Conversely, when there is a legislative-executive gridlock created by each party having control of at least one of the three component branches, a policy making vacuum is created and the number of Supreme Court activist opinions increases to occupy that vacuum. The 1980s Indiana situation does not offer support for my hypothesis. In the years 1981 through 1985 the Republican party controlled the three components of the legislative-executive machinery and the activist output of the Court was meager. However, the unified control continued during the years 1985 through 1988, when the Court's activist output increased to five activist decisions in 1988, the highest level of activism in the decade. In the years 1989 and 1990 in which legislative-executive gridlock existed, the Court's activist case output decreased, rather than increased. Table 8. presents the comparison between the gridlock in the Indiana government and the activist output of the Indiana Supreme court. The years 1986 through 1990 tend to disprove rather than support my hypothesis.

<table>
<thead>
<tr>
<th>YEAR</th>
<th>GOVERNOR</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>ACTIVIST DECISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>1</td>
</tr>
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<td>1983</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>0</td>
</tr>
<tr>
<td>1984</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>1</td>
</tr>
<tr>
<td>1985</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>1</td>
</tr>
<tr>
<td>1986</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>1</td>
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<tr>
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<td>D</td>
<td>R/D</td>
<td>R</td>
<td>2</td>
</tr>
</tbody>
</table>

Leadership

With the appointment of Randall Shepard to the Court in September, 1985 the merit selection had produced a justice with a strong belief in judicial activism and the likelihood that he would occupy a leadership position on the Court. Shepard's legal education at a prestigious national law school qualified him, by default, as the intellectual leader of the Court. A legal education at a national law school is more likely to familiarize the lawyer with alternative solutions to problems that have been tried in other court systems and make him comfortable with the idea that there are a number of different solutions to any problem situation. A legal education at a local law school is more likely to have emphasized, to the exclusion of more progressive thinking, the established solutions of the local state's established jurisprudence. Justice Shepard's broader legal education and familiarity with a range of acceptable solutions to problems
qualified him as a legitimate advocate of new ideas to his brethren on the bench and, from his elevated position, to the bar of the state.

The time he spent in political office prior to his ascension to the High Court enabled him to both develop and appreciate the policy component of decision making. His public service and political candidacy had both been at the executive level where policy development was a requisite for the job. His appointment to the National Citizen's Advisory Committee was a high level recognition of his interest and ability in policy development. Shepard's service in political office, particularly in the national government, would have been impressive to his brethren on the High Court bench whose pre-judicial professional backgrounds were small town legal practices and attenuated service in the state legislature. His participation in the concededly partisan Nixon administration at the sub-cabinet level could not have failed to impress the three other Republican members of the Court.

My conclusion that Justice and later Chief Justice Shepard was a leader for activism on the Court is supported by the change in support for activist decisions from a minority to a majority position. After his appointment only one of the other justices had given any evidence of an activist bent, Justice DeBruler. Shepard replaced the other justice with activist potential, Justice Hunter. When Shepard replaced Hunter his vote combined with DeBruler's created only a minority on the five member court and yet, from the time of his appointment, activism was the dominant role when the court was in
a position to make policy and Justice Shepard was a member of the majority in every activist decision. The activist promise of his educational, professional, and political background was confirmed by his speeches and writing immediately upon his appointment. His written opinions as a member of the Court regularly considered the policy ramifications of the alternatives before the Court and that was a substantial departure from the formalistic opinions that had been de rigueur for the Indiana Supreme Court prior to his appointment.

INDIANA CONCLUSION

Of the four factors that could have moved the Court from its 19th century decision making style to its late 1980s activism, three of them, the presence of intermediate appellate courts, the existence of a merit system for judicial selection and the reduction of the number of criminal appeals on its docket, are only weakly persuasive, either because they were present with no activist effect in the activist wasteland of the early 1980s, or because the Court had embraced activism before the factor was present. Only the appointment of Justice Shepard excites a strong belief in its causative validity. The appointment was within a reasonable time prior to the renascence of activism in the Court and his service on the Court has been contemporaneous with activism’s flower. The temporal relationship between Shepard’s service and the Court’s recent policy consciousness, his policy making background and potential for leadership and change, as well as the credit for the Court’s shift that others
have given him are compelling evidence of his significant effect on the reversal of the dominant judicial role in the Indiana Supreme Court. The activism experience of the West Virginia and Ohio Courts provide other comparisons of activism of different intensities in different structures and environments and will enable a more complete explanation of the causes of activism.
Activism in Historical Perspective

The West Virginia Supreme Court of Appeals was historically a conservative court with a reputation for "passivity in matters of public policy" (Hagan 1986). This reputation is confirmed by the combination of separate studies of its innovation and of its reputation among the other state courts. Canon and Baum (1981) ranked the Court forty-sixth among the state high courts in innovation based on their study of trends in tort law innovation between 1945 and 1975. Caldeira (1983) ranked the Court forty-third in reputation among the state courts for 1975 measured by standardized frequency of citation of its opinions by the other state courts. Although neither innovation nor reputation is the same as activism, in a period of doctrinal innovation the similarity of a state court's rank for innovation and its rank for citation is a rough gauge of the level of its independent policy making or activism. The combined rankings of the West Virginia Court describe a conservative court that was mired in inferiority.

John Hagan, a West Virginia lawyer and political scientist, has described the West Virginia high court during the period 1930 to 1977 as moderately conservative in tort and
worker's compensation cases and moderately deferential to the other branches of state
government (Hagan 1986). This conservative, deferential court experienced an abrupt
change in 1977. The judicial election in 1976 completed a renovation of the court that
had begun with the election of 1972. That election in 1972 included two contests for the
high court. The two seats that were contested in the 1972 judicial election had been
occupied by justices who had been appointed by a Republican governor, an exception in
this preponderantly Democratic state. Each incumbent was beaten by his Democrat
challenger, Richard Neely and James Sprouse, respectively. The 1972 judicial election
had selected two new justices for the High Court. This was also exceptional for West
Virginia. In the previous forty years, only two other justices had been selected initially
by election (Hagan 1986).1

1976 Election

The Republican governor remained in the Statehouse until early 1977 and after
the 1972 election he filled two more high court vacancies with Republican justices.2
Both of these seats were contested in the 1976 election, along with a third seat that was
occupied by a retiring Democrat. All three of these contests were won by the Democrat

1 West Virginia was only an extreme case of the experience of most states with
elected courts. A large number of the incumbents are initially appointed as a result of
resignations during term (DuBois 1986).

2 One of vacancies was created by the resignation of Justice Sprouse who resigned
to accept appointment to the federal bench.
candidates, Sam Harshbarger, Darrel McGraw, and Thomas Miller. These justices joined Democrat Justices Neely who had won in 1972 and Fred Caplan who had been first appointed to the Court in 1962 (Hagan 196). This election accomplished a shift in the Court's judicial philosophy along with "one of the most momentous transfers of power in the state's history," (Rogers 1981) the consequences of which were "found throughout the state" (Hagan 1986). The Court's reputation as a conservative and deferential court was about to be converted to a reputation "for dramatic intervention in public policy disputes" (Hagan 1986). An oft-quoted feature article on the Court in the state capitol's leading newspaper, the Charleston Gazette, described the Court's newly adopted attitude:

West Virginia's activist Supreme Court kept trying to mold state government in its own image in 1983. The Court issued decisions making or reinterpreting law across a wide expanse of public issues....³

By 1979 the court had won the Outstanding Appellate Court Award that is made annually by the American Trial Lawyers Association, an organization of predominantly plaintiffs' lawyers that would reserve its highest praise for activist judicial behavior (Frey 1985). The Court's conservatism and deference were, at least for the present, things of the past. In 1988 a national reporter concluded that the "court (had) wrought great changes in once-stagnant West Virginia law and pulled it into - and in some cases ahead of - the mainstream."⁴

³ Charleston Gazette, January 1, 1984, p.1B.

John Hagan systematically analyzed the Court's activism from 1930 to 1985. His work enabled me to make a comparison of the level of activism before and after the wellspring election of 1976. Part of one of Hagan's table describing the temporal comparison of the level of activism\(^5\) in the West Virginia court is reproduced here to show the substantial increase in the overall level of activism after 1976 ("A-Level"), the significantly high levels at which the Court disregarded its established common law during the period 1973-1976 ("A-Precedent"), and the extent it relied on the state constitution during the period 1977 through 1985 (A-Constitution\(^6\)). Table 9. presents the Hagan survey of activism in the West Virginia Supreme Court of Appeals.

The Charleston *Gazette* article noted that the court’s activism played in a broad range of issue areas, encompassing social welfare, education, criminal law, women’s rights, consumerism and intergovernmental relations.\(^6\) In addition to the areas that the newspaper found interesting, the Court also manifested activism in the development of common law doctrine, particularly in tort/worker’s compensation law. Each annual

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\(^5\) Hagan measured the level of judicial activism as the percentage that "activist" decisions were of a random selection of ten percent of the cases decided by the Court. His "activist" cases were (1) those in which the Court decided against a non-judicial government party, and (2) those in which the Court expressly overruled, disapproved, or discarded its own precedent. His level of activism was calculated according to a weighting formula that gave a value of one to a case that was decided against a governmental actor and a two to a ruling disregarding precedent. He had earlier determined the activism levels of other state high courts, presumably by the same measure, and concluded that the level of activism of the West Virginia Court from 1977 to 1985 was comparable to the activism of the California, New Jersey, and Michigan courts during their activist periods (Hagan 1986)

\(^6\) Charleston *Gazette*, id.
volume of the West Virginia Law Review that was published during the period contained a "Survey of Developments in West Virginia Law" that vetted the decisions of the West Virginia Supreme Court of Appeals and of lower state courts as well as developments in the state legislature, to advise the West Virginia bar of important current developments that would be helpful to it. The "Survey" included practically, if not all, cases in which the high court might have assumed an activist role. I reviewed these "Surveys" from 1977 to 1987 to develop a set of cases by which the level of the court's activism could be measured so that I might analyze the cases and compare the Court's activism to the activism of the Indiana and Ohio courts of about the same time. I selected all cases that had an activism potential and that were decided in the areas of tort/worker's compensation, power contests between branches of state government, common law development and public education financing. After culling those cases that met my


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<th>PERIOD</th>
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<th>A-PRECEDENT(^2)</th>
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<td>1930-1937</td>
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<td>1977-1985</td>
<td>211</td>
<td>.421</td>
<td>.185</td>
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\(^1\) A-Level is proportion of activist cases to total cases  
\(^2\) A-Precedent is proportion of activist cases that overrule precedent  
\(^3\) A-Constitution is proportion of activist cases that rely on the West Virginia Constitution  

Source: Hagan 1986
criteria, I reviewed all the cases decided by the Court for the period that were reported in West's Southeast Reporter in order to assure that I had included all significant activism cases that satisfied my requirements.

Newly Found Activism

A substantial part of the Court's activist policy making during this period was in the related areas of tort and worker's compensation. At the beginning of the period the prevailing doctrines and rules in these areas were those that had been developed and had prevailed in the forty-eight state courts before the Second World War. After the "new" West Virginia Court asserted the legitimacy of its role in modifying common law principles, it quickly channeled West Virginia's court-generated body of law into the mainstream of progressive tort and workers' compensation doctrine. Prior to the watershed 1976 election, plaintiffs in West Virginia either fit their claims into old doctrinal bottles or they went uncompensated. The new court did not hesitate to create new causes of action if it discovered a right without a remedy.

The West Virginia Court had begun to chip away at the common law doctrine of sovereign immunity prior to the 1976 election but the doctrine was reinforced by a constitutional provision, that, on its face, protected any defendant that could qualify itself as "the state." Nevertheless, after a sputtering start, the new Court suggested, in dictum, that it might even overrule the state constitution!
The Court did not avoid areas where activism would draw it into more direct conflict with the other branches of government. It took up the challenge to discover state authority to assure equal funding for public education in West Virginia after the U.S. Supreme Court slammed the federal equal protection door shut on the issue. The late 1970s and the 1980s was a period of recurring turf fights among the three branches of state government. The Court did not falter in asserting the primacy of its rights when the legislature encroached upon them and confidently delimited the powers of the other branches when they collided. These decisions redounded to the ultimate aggrandizement of the court's own power and enhanced the judicial activism that engendered them. Although the new Court seemed very activist to local observers, its activism was neither unbounded nor unanimous. The Court limited itself in some cases and in some of the cases in which it acted its members were not in a policy making lock-step.

*Common law powers.* The Court settled any lingering doubt that it had authority to change the common law of the state in a case in which a defendant argued that the West Virginia Constitution, by providing that the "common law...shall continue in force..except in those respects wherein it was altered by the General Assembly before the 20th day of June, 1963...", deprived the Court of the power to alter or amend the common law. The Court held that "the courts always had the historic power to evolve and alter the common law which they created." However, when the Court was asked to use its common law power to alter the crime of murder it stopped short of asserting

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its right to make judicial amendment of the criminal law. The Court, in an example of self denial, concluded that, although the Court has the power to evolve common law principles in tort law, an area in which the common law "has traditionally functioned", it did not have the same authority in criminal law, an area "in which the legislature has the primary or plenary power." Two dissenting justices would have taken the extraordinary step of creating a common law crime of murder of an unborn child, an exercise of judicial power that only two other state courts had assumed.

Products liability doctrinal change. The post-1976 Court expeditiously brought West Virginia's common law of products liability in line with that of its more progressive sister states. Traditionally, products liability law required injured parties to prove that the manufacturer's negligence in the product's manufacture or design had caused their injuries and that they had a contract with the manufacturer. Justice Neely, writing for the court, "found" that the prevailing doctrine in West Virginia, when fully understood, was not greatly different from the progressive "strict liability in tort" that did not require the injured party to prove either negligence or privity of contract. The Court's decision required a plaintiff to prove only that the defect in the product caused the injury. The Court was even more favorable to injured plaintiffs in dangerous instrumentality cases. Justice Neely found that West Virginia law makes a person who uses a dangerous

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instrumentality or who engages in a dangerous activity strictly liable to one who is injured by the dangerous instrument or activity. Although Justice Neely had "found" the progressive doctrines in existing law, these "discoveries" would be more accurately described as innovations.

Workers' compensation doctrinal change. Workers' compensation was the result of a compromise by employers and employees and was established to enable workers to be compensated for damages related to their employment without being required to prove that their employer had been negligent. The compromise assured workers a simple procedure and protected employers from civil suit by their employees. In West Virginia, the state constitution guaranteed employers this immunity unless an employee's injury resulted "from the deliberate intention of his employer to produce such injury or death." The Court had earlier held that this provision required "a specific intent...to injure." The post-1976 Court held that the less rigorous standard of "willful, wanton, or reckless misconduct" by the employer was sufficient to allow an employee to bring a civil action and held that the employer's culpability was a question for the jury. The Court's decision both eased the standard that allowed employees to maintain civil suits and gave them a generally plaintiff-friendly institution, the jury, to apply it.

11 West Virginia Constitution, Art. 4, Sec. 2.
In two of its activist decisions the Court moved well beyond the prevailing
doctrine in even the most progressive states. The schedules that provide time limitations
for each step of the workers' compensation process are notorious pitfalls for claimants.
In every state, except Arizona, the time limitations for appeals are treated as
jurisdictional requirements and any deviation from their prescriptions effectively
disqualifies a claim. The West Virginia Court intrepidly walked with Arizona down the
other side of the street. Justice Neely writing for the Court overruled numerous earlier
decisions in the Court's opinion to hold that the violation of the prescribed time limits
for workers' compensation appeals did not require automatic dismissal of the employee's
claim. Prescribed time limits are still important in West Virginia, but as a result of this
very progressive decision, in the appropriate case the court will accept an excuse for
failure to comply with them.¹⁴

*Judicial comparative negligence.* The Court was as resolute in its ordination of
comparative negligence in the West Virginia common law. The doctrine of contributory
negligence defeats an injured party's claim if his or her own negligence contributed in
any part to the injury. Comparative negligence ameliorates the Draconian effect of
contributory negligence and allows a party to be compensated at a proportionately
diminished rate for the harm caused by the other party, even though his or her own
negligence may have been partially responsible. In a negligence based system of
compensation the plaintiff either gets the total amount of the jury's valuation of the injury

or nothing. There is no conceptual continuum that spans the middle ground. This makes it very difficult for courts, whose stock in trade is concepts, to move from contributory to comparative negligence and is the reason that comparative negligence had replaced contributory negligence by judicial decision in only four states before the West Virginia Court was asked to adopt it. The unanimous Court took the uncommon judicial step and declared that "(t)he history of the common law is...adjustment of the case law to fit the changing conditions of society," and concluded that fairness favored allowing a party to recover for his injury "to the extent he is not at fault."  

New causes of action. As appropriate cases presented the Court opportunities to "find" new common law causes of action, it fashioned relief when a new situation required it. Advances in medical science have created circumstances that present courts with claims for damages for "new" injuries and have created expectations that the courts had to address. Another "new situation" has been created by the legislative practice of defining personal rights without providing a concomitant remedy; this situation screams out to the courts to finish the job. The West Virginia Court moved with the times and has generally, though not always, ordained a cause of action to fill these voids.

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15 Alaska, California, Florida, and Michigan. See Shapiro (1970) where he suggests that courts can shift policy only when a "doctrinal basis for the shift" exists in the court's earlier position.

Medical science has enabled physicians to maintain some injured persons in permanent coma-like states whom they could not restore to full function. The Fourth U.S. Circuit Court asked the West Virginia Court whether the law of West Virginia recognized that one in such condition has a cause of action for "impairment of capacity to enjoy life." The West Virginia Court concluded that it was the policy of tort law in West Virginia to compensate a permanently injured party in such a way as to make him a "whole man" and that West Virginia law did allow the novel cause of action.

The general availability of sterilization procedures, the legalization of abortion and the ability of medical science to predict birth defects created related new medico-legal situations that required the local U.S. District Court to certify three questions to the Court. The first was whether an action for "wrongful pregnancy," an action by the parents for the subsequent birth of a child against a physician who had performed a sterilization procedure on one of the parents, was recognized in West Virginia. The second was whether the Court recognized an action for "wrongful birth," an action by the parents of a child who had been born with a birth defect, against a physician who had failed to give them genetic information that was necessary for them to make an informed choice whether to begin or to continue an existing pregnancy. The third questioned cause of action was "wrongful life," an action by a child who has been born with a birth defect, against a physician who had failed to give its parents genetic information necessary for them to make an informed choice whether or not to have an abortion. In its answer to the federal court, the West Virginia Court approved the addition of the two
new torts of wrongful pregnancy and wrongful birth to West Virginia's jurisprudence, but failed to approve an action for wrongful life.\textsuperscript{17} Although the Court did make the activist decision in response to two of the three questions, it failed to ground its decisions in policy considerations. In concluding that parents had a cause of action for "wrongful birth" while the defective child did not have a cause of action for "wrongful life" in the same situation, the court relied on legalistic reasoning based on "rights" and "duties" and failed to address the policy questions of who should have the responsibility for the correction of the defect and support of the defective child.

The implied causes of action doctrine allows courts to create civil remedies for violations of statutes for which the legislature has not provided relief (Bauman 1978). The West Virginia legislature had defined a novel civil right: "no person shall be deprived of any civil right solely by reason of his receipt of services for mental illness...,\textsuperscript{18} but provided no remedy for its enforcement. The Court fully utilized the statute and held that a person who had received mental health services had a cause of action against one who denied him/her employment because of those services.\textsuperscript{19}

\textsuperscript{17} James G. v. Caserta (1985) 332 S.E.2d 872.

\textsuperscript{18} W.Va. Code, 27-5-9(a).

\textsuperscript{19} Harley v. Allied Chemical Corp. (1980) 262 S.E.2d 757.
Sovereign immunity. The new court took a roller coaster ride on sovereign immunity, in part propelled by Article 6, Section 35, of the West Virginia Constitution that provides:

The State of West Virginia shall never be made defendant in any court of law or equity....

Despite this constitutional provision, the trend of decisions by the West Virginia Court had been to abrogate the common law governmental immunity from liability in tort actions. Early in the new court's life, it interrupted the trend toward abrogation and held that constitutional immunity protected a board of education. Consistently, the Court's analysis was grounded in legalistic reasoning that depended on the source of the board's funds and the kind of function it performed, rather than policy concerns such as the relative ability of the board and the injured child to bear the loss and the effect of the decision on the encouragement of safety. However, in the next case in which the Court had an opportunity it eliminated the immunity of school boards from suit in tort, an unanimous court concluded in the second case that continuation of the doctrine could lead to governmental irresponsibility and that its abolition might have "positive redistributive and allocative effects."

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Most recently, the ride has continued with a remarkable case that unfortunately has not been reported. The Court suggested, in dictum, that the state university would be liable for tort damages only up to the limits of its liability insurance coverage.\textsuperscript{23} Two questions are suggested by that decision: Would the university avoid all liability if it had no liability insurance? More significantly, is the Court prepared to take the super-activist step of overruling the state constitution's provision that the "state...shall never be made defendant" if there is insurance?

Public school finance. The West Virginia Court was among the early state high courts that found independent state constitutional grounds for invalidating a public school finance system that maintained school districts what were substantially unequal in funding. The Court concluded that the provisions of the state's Constitution may, in certain circumstances, require higher standards of protection than afforded by the Federal Constitution\textsuperscript{24} and held that the state constitutional standard of a "thorough and efficient education" required substantially equal funding for all of the state's school districts. Justice Neely dissented, with "reluctance...not because I am less outraged...about the condition of West Virginia schools, but because I am neither Governor nor the entire legislature." He noted that both other branches of state government were actively

\textsuperscript{23} \textit{Pittsburgh Elevator Company v. Board of Regents} No. 15438 (June 30, 1983).

\textsuperscript{24} \textit{Pauley v. Kelly} (1979) 255 s.e.2D 859.
working on state support for public education "while taking cognizance of other compelling yet competing imperatives" for state resources.\textsuperscript{25}

The Court’s activism continued to favor local school districts by making more tax money immediately available to the local boards of education. Revenue generated by the real property tax is the main support for the State’s public education system. A West Virginia law authorized local tax assessors to assess property "at 50 to 100 percent of its appraised value."\textsuperscript{26} The Court invalidated this legislative system of tax assessment and ordered that the assessment of all real property in the state should be increased to 100 percent of its value.\textsuperscript{27} Justice Neely, in dissent, labeled the determination of the level of tax assessment a "political question" that he would leave to the legislature and then, significantly, supported the status quo with policy arguments based on the evils of regressive taxation and benefits of attracting new industry.

\textit{Inter-governmental power tension.} From 1969 to 1977 the government of West Virginia was politically divided: the governor was a Republican and both houses of the legislature were controlled by Democratic majorities. Prior to the judicial election of 1976 the Court had been dominated by Republican appointees of the Republican governor (Hagan 1986) and, in any dispute between the legislature and the governor, it routinely

\textsuperscript{25} It may be of interest that Justice Neely reportedly entered his son in Eton shortly after his birth. Darcy Frey, op. cit., at 105-107.

\textsuperscript{26} West Virginia Code Sec. 18-99-11.

\textsuperscript{27} \textit{Killen v. Logan County Commissioners} (1982) 295 S.E.2d 689.
found that the governor had the ultimate power. During this period, power struggles between the governor and the legislature frequently ended in the Court. After the election of 1976 the governorship and both houses of the legislature were controlled by Democrats. Democratic ascendancy in both the governor's office and the legislature should have eliminated resort to the Court to settle disputes between them. However, resort to the Court to settle state governmental power disputes may have become institutionalized. These power disputes continued to end up in the court but, with the identity of partisan control of the three branches, the Court could no longer make its decisions by reference to partisan politics. Activism achieved the significance that had previously belonged to party.

Two of the Court's cases involving inter-governmental power were disputes between itself and the legislature. This Court was not diffident when one of its prerogatives was threatened or when a legislative act was menacing. West Virginia is one of only two states in which the budget request of the judiciary is constitutionally protected. In response to action by the legislature that had decreased five items of the Court's judicial budget, the Court ordered the legislative Clerk to replace the five

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29 The other is Wisconsin. See, West Virginia Constitution, Article 6, Section 51, subsection B(5).

30 Four of the five members had recused themselves, only Justice McGraw was on the Special Panel that was appointed to hear the case.
amended items in the state's budget with the Court's five original requests in their original amounts\textsuperscript{31}

A conflict between Court rules and legislative acts ended in the Court for resolution. Both the court's rules\textsuperscript{32} and a law passed by the state legislature\textsuperscript{33} excused graduates of the West Virginia University College of Law from passing an examination in order to be admitted to the practice of law, known locally as the "diploma privilege." Tension was created between the legislature and the Court when the legislature repealed the law. The Court's majority saw the legislative repeal as a threat to the Court's exclusive domain and held that the West Virginia Constitution had vested the Court with sole power to admit lawyers to the practice of law and that the legislative repeal of the diploma privilege was invalid.\textsuperscript{34} Although the Court's decision was an activist decision, its analysis and support were pedestrian. Justice Neely did not join the majority opinion; he concurred with an opinion that offered policy support for the diploma privilege: "I despise bureaucratic requirements that demand that people perform vain acts. In a state like West Virginia where we have a competent law school specializing in West Virginia law, a bar examination becomes nothing but a nuisance."\textsuperscript{35}


\textsuperscript{32} Practice of Law Rule 1.020.

\textsuperscript{33} W.Va. Code Sec. 30-2-1.

\textsuperscript{34} State ex rel. Quelch v. Daugherty (1983) 306 S.E.2d 233.

\textsuperscript{35} Id., pp. 236-237.
The Court had assertively denied the legislature power to reduce the amount of the Court's requested budget. It had moved with alacrity to head off any attempt by the legislature to control admission to the bar. It did not back down when the dispute was between the other two branches and its own power was not directly threatened. In two cases in which power between the legislature and the governor lay in the balance, the Court invalidated an attempted exercise of power. The West Virginia legislature had attempted to provide for a "legislative veto" over rules adopted by the administrative agencies of the state's bureaucracy by creating a legislative review committee with power to invalidate administrative rules. The Court held that this grant of power was an unconstitutional invasion of the executive's powers. The ultimate, though perhaps unintended, effect of this activist decision was to leave the Court as the final authority of the validity of rules promulgated by the bureaucracy. In another case in which the Court acted as referee, the result of its activist intervention was, similarly, to transfer the power at issue to itself. The 1981 recession was aggravated in West Virginia by a disastrous coal strike that had substantially reduced the state's income. The state's expenditures had to be reduced. The Governor complied with a legislative mandate and ordered a proportionally equal reduction of all state expenditures. The Court invalidated the Governor's proportional cuts and held that public education enjoyed a "preferred status" in the state and that the Governor would have to demonstrate that any cuts were

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"factually necessary" before he could make any cuts in the education expenditures.\textsuperscript{37}

By denying the legislature the power to review rules made by administrative agencies, the Court established itself as the only agency that could invalidate such rules. At a time when state legislatures had begun to outline problems but leave their definitions and solutions to administrative agencies, the result of the Court's apparently simple mediation of the executive-legislative conflict was a potentially greatly expanded judicial power. Similarly, but with more limited consequences, if the governor's power to make only reductions in educational expenditures is limited to those that are "factually necessary", the Court becomes the final arbiter of the level of such expenditure because it will ultimately decide the factual necessity of any cuts. A greatly expanded policy horizon became a bonus for the Court's original activist decisions.

During the 1980s, courts, particularly federal district courts, intervened in the operation of state executive departments and substituted their management decisions for those of the state bureaucrats. Prisons, mental hospitals and school systems were subjected to court management. The West Virginia Court did not go so far as to take over the operation of a state institution but, in a remarkable arrogation of the right to amend a legislative act, it added an entirely different class of beneficiaries to the legislature's protection. The House of Delegates passed a law that authorized the state welfare department to provide protection and services to adults who were mistreated by

their caretakers, "persons who by reason of physical, mental or other infirmity are unable to independently carry on the daily activities...necessary to sustaining life and reasonable health." In response to a petition by "street people" the Court found that street people were "incapacitated by the recurring misfortunes of life" and ordered the Welfare Department to provide for street people generally. The legislature had neither specifically mentioned nor clearly described street people and had apparently intended that the Welfare Department should not provide for them. The Court invalidated this inherent, negative prescription when it ordered the department to take care of them. It is clear that the Court was anxious to become an important part of the policy making structure in the State. The disparity between the legislative purpose and the judicial "interpretation" confirms the Charleston Gazette's opinion that the Court was "trying to mold state government in its own image"

Judicial Structure and Activism

There were no structural changes in the West Virginia Court or judicial system during the period 1977-1986. The system is an unreformed traditional state court system. West Virginia is one of a minority of states that does not have an intermediate appellate court between its trial courts and its high court. However, it is the only state high court that has absolute control of its docket. Unlike the Indiana high court that


40 West Virginia Constitution, Article 8, Section 4.
was required to hear the appeals of the vast majority of convicted criminal defendants, the West Virginia Court hears only those cases it wants to decide. Despite this control, its docket has ballooned. In 1976 the Court heard and wrote opinions in 98 cases while by 1986 the number of opinions it wrote had increased to 213.\textsuperscript{41} Ordinarily, a more than one hundred percent increase in the level of court activity in a ten year period would create a diminution of the court’s effort and time available for policy making decisions. However, the increased activity when joined with absolute control over its docket suggests that the court may have been including cases in which there was a potential to make policy.

Unlike the appointed Indiana court, the justices of the West Virginia Court are elected at large in partisan elections, after they have been nominated in party primaries. Their twelve year terms are among the longest for the state courts that have definite terms. The chief justiceship rotates annually among the five justices which allows each justice at least two, separated, one year periods in the position during the course of each 12 year term.

During the period 1977-1987, the West Virginia Supreme Court was controlled by Democratic justices and that control was unanimous. Similarly, during the entire

period the governor's mansion and both houses of the state's legislature were also dominated by Democratic members. The pervasive Democratic influence, particularly over the legislative-executive law making machinery, obviates partisan gridlock and any consequent deterrence of cooperative policy making. There was no partisan policy vacuum for the court to move into that could explain the burst of activist decision making after the 1976, election.

Inasmuch as judicial activism continued at a steady level throughout the period 1977-1987 and as the Court's structural and institutional characteristics and personnel remained virtually unchanged during the period (with the exception of the last two years when there was one new justice) it is not possible to make reliable comparative explanation of the causes of the Court's activism from these factors. However, these characteristics of the West Virginia Court and the West Virginia political alignment during this period of heightened activism will provide illumination when they are compared with similar and dissimilar characteristics of the Indiana and Ohio Courts.

Composition of the Court

During the period 1977 through 1986 the backgrounds of the justices of the West Virginia Court and the Indiana court during the 1980s were, on balance, similar. During these periods each court had one justice who stood out because of his educational background, his willingness to indorse the validity of judicial activism and his recognition by others as an agent for change on his court. Only one of the justices of the West Virginia court had attended a national law school. Before the start of their judicial
careers the justices of the West Virginia Court had practiced law in somewhat larger communities than their Indiana brethren so their backgrounds were somewhat more cosmopolitan but the West Virginia bench had written and published fewer articles than their Indiana counterparts, so less is known of their philosophy and beliefs. Both courts had a continuing partisan complexion during the period, the West Virginia court was exclusively Democratic and the Indiana Court was predominantly Republican. Except for their prominent members, the composition of neither the West Virginia Court nor the Indiana Court, is remarkable.

The membership of the post-1976 election Court was the result of three disparate, somewhat conflicting conditions: the traditional predominance of the Democrat party in state politics, a reform movement that had swept over the state in the 1960s and 1970s (Hagan 1986; Pierce 1975), and the Republican appointments to the Court that had encouraged Democrat candidates to run against them. Two members of the "new" Court were sitting on the court prior to the 1976 election. Fred Caplan was a traditional Democrat who had first been appointed to the Court in 1962 and who had served continuously. Justice Caplan had graduated from the University of Richmond law school in 1941 and after military service in the Second World War, had been associated with state government before his accession to the high bench. He had been a member

42. The justices biographic information is found in various editions of The American Bench, Judges of the Nation.

43 The American Bench, Judges of the Nation 1978
of the West Virginia legislature from 1949 to 1952 and an Assistant Attorney General from 1953 to 1961. Simultaneously with the first years of his service on the Court, he served as a member of the West Virginia Public Service Corporation from 1961 to 1967.  He has not written for publication in either professional or academic journals nor has he produced any book length publication. Richard Neely was the other justice who was sitting before and after the 1976 judicial election. There will be more about him later.

The judicial election of 1976 added three new members to the Court. That election had arrayed two appointed Republican incumbents against two Democratic challengers for two incumbents' seats and a Republican versus Democrat for an "open" seat that had been created by the retirement of a veteran Democratic justice. The three Democratic candidates were successful. Their Democratic labels undoubtedly helped their election prospects, but their guiding principles would have been foreign to many of their party supporters. West Virginia had become a state because of the rugged individualism of its citizens and their staunch opposition to the secession of Virginia, its mother state, from the Union. But the modern day border state West Virginians and their Democratic political leaders bear a close resemblance to their Virginia cousins. Their senior U.S. Senator is a former Ku Klux Klan member who voted against civil rights laws during his service in both the U.S. House and Senate (Barone and Ujifisa 1986). The ordinary West Virginia Democrat tends to be at the conservative end of the

44 Id.
ideological spectrum, except in labor matters. The three new Democratic members of the West Virginia Supreme Court of Appeals were not based in this traditional wing of the party but had emerged from the reform wave that had swept the state in the 1960s (Hagan 1986).

These new Democratic justices were relatively young for state high court justices: at the time of their election; Justice McGraw was 38, Justice Miller was 45 and Justice Harshbarger was 50 years old. They were similar in other respects and were, collectively, unremarkable except for their judicial office. Each had graduated from the West Virginia University Law School and none had run for nor been appointed to a government office prior to the 1976 election. Neither Justice McGraw nor Justice Harshbarger had any published non-judicial writing. Justice Miller had one article published. The 1987 volume of the West Virginia Law Review, in celebration of its 90th anniversary, had invited the Court justices to contribute an essay. Justice Miller summarized "The New Federalism in West Virginia," the court's use of state, rather than similar federal, constitutional provisions. The essay was a summary of the Court's constitutional decisions rather than a prescription for decision making, and gave no indication whether the justice endorsed or deplored the practice (Miller 1987). Two of the new justices would lose their jobs in future Democratic primaries, probably because of decisions that were driven by their progressive views.45 There was no suggestion of

a potential for judicial activism in their backgrounds. Although each stood out in some contrast to his party, they were an unremarkable collection of high court justices.

Richard Neely

Richard Neely was a Democrat and had been selected initially for the Court in the judicial election of 1972. Neely had attended Yale University Law School and had received its LL.B. degree in 1967. After military service in Vietnam, he had practiced law in Fairmont, West Virginia, a community of approximately 25,000, and, prior to his election to the Court, had served in the state legislature from 1971 to 1973. Early in 1972, Justice Neely had announced his candidacy for nomination for the U.S. Senate in the Democratic primary for the seat held by the popular incumbent, Senator Jennings Randolph, whom he believed would not run for reelection. Neely's grandfather, Mathew M. Neely, had been a popular governor and U.S. Senator from West Virginia and had made the Neely name an enormous electoral asset. The Neely name "ranks next to God in West Virginia," which makes Neely's decision to seek the U.S. Senate seat not unreasonable, although possibly premature, by a thirty year old political neophyte. He was surprised when Randolph announced that he would run for reelection and quickly switched his candidacy to the race for the West Virginia Supreme Court of Appeals where his name and Democratic affiliation virtually assured his election against the appointed Republican incumbent.

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46 Darcy Frey (1985) "Jurist Provocateur, American Lawyer 7(June):105-107.
Justice Neely stood out on the 1977 West Virginia Court just as Justice Shepard was to stand out on the 1985 Indiana Court. Both were graduates of a prestigious national law school. Both had shown an interest in a Washington policy making role, Shepard had occupied one and Neely had aspired, briefly, to another. Both recognized that judicial activism is a characteristic of a court that is independent of individual preference, partisanship or ideology but there is a significant difference in their approval of activism as a legitimate force in judicial decision making. Shepard's activism was a bulldozer that moved aside the accumulated detritus of traditional judging while Neely's was more like a pair of pruning shears that selected the most promising blooms for activism's vase.

Neely described his understanding of and attachment to judicial activism in an interview that was published in a magazine for trial lawyers (Neely 1984). He clarified his belief in the distinctiveness of judicial activism: "Arguments about activism are not the same as...about loose v. strict constructionism or conservatism v.liberalism." He had earlier described his approach as "pragmatic or structural, based on the strength and weaknesses as policy makers of the three branches of government. Judicial activism is appropriate in an issue area that does not have enough interest to secure a place on the agenda of the other branches"(Neely 1981). Tort law was his example of an area in which the courts are strong and the legislature is weak and that lacks sufficient interest to get the attention of the legislature. Regulation of the economy and mental health are other areas that he believes are appropriate for judicial activism. On the other hand,
public school financing and the validity of a death penalty are not appropriate because each generates enough independent public interest to get the attention of the legislature and the executive (Neely 1981). He believes it is improper for courts to make policy in these issue areas.

Justice Neely recognized the extremes of the activist-restraintist dimension and carved out a stretch in the middle of which he approves. He observed that "(a)ll this is fine in theory where we are dealing with genuine routine, technical issues, but ambitious courts and energetic judges expand the definition of 'routine' and 'technical' to anything which interests them, while modest courts and lethargic judges find security in sedulously following precedent regardless of its wisdom" (Neely 1981). Like Justice Shepard, Justice Neely has had more of his writings published than is usual for a state court justice. His philosophy of judicial activism is more fully described in his published books, particularly How Courts Govern America (Neely 1981).

There has been substantial confusion about Justice Neely's location on the philosophical continuum. In a confusion of political ideology and judicial philosophy a national commentator has described his early opinions on the Court as "some of the Court's most liberal opinions," but concluded that he had become a "voice of judicial restraint"(Frey 1985). As early as 1981, he was "viewed as the most conservative member of the West Virginia Supreme Court of Appeals" by a prominent West Virginia barrister (Rogers 1981). In 1985, he described himself as "farther to the right than
Jimmy Carter and farther to the left than Ronald Reagan" (Frey 1981). His descriptions as the most conservative member of the later Court and the most liberal member of the earlier Court may both be accurate for they depend on the philosophical position of the Court's other members. It is clearly incorrect to describe his as a "voice of judicial restraint."

Whether or not a justice is restaintist or activist in any case depends on the outcome he or she prefers in that case and whether he or she accepts activism as a legitimate judicial role. If a justice prefers a decision that is not activist, that justice's decision will probably be non-activist regardless whether the justice endorses activism as a legitimate judicial role or not. This non-activist decision might suggest that the justice is a restraintist. However, this decision could have been the result either of the justice's philosophical attachment to non-activism or of the justice's decisional preference. One, or even a number of, non-activist decisions do not support a conclusion that a justice is not an activist. Activism and restraintism are not symmetrical in that respect because one activist decision can be evidence that the decision maker accepts activism as a legitimate judicial role; failure to decide any particular case in an activist way is no evidence of restraintism. Justice Neely's understanding of the place for activism in judicial decision making resulted in his non-activist decision in cases in which the Court's majority was reaching activist results. His activist decision making qualify him as an activist. His non-activist decisions do not disqualify him.
Viewed from this perspective, there is ample evidence that Neely is a judicial activist. In two tort cases in the year before the formation of the new Court, Neely advocated adoption of two novel common law rules. In one case he was not willing to go as far as the Court went, which was the abrogation of the doctrine of parental immunity from suit. However, in his concurring opinion, he advocated a novel rule that would have continued parental immunity as the governing rule except in cases in which the parents have insurance coverage.\(^{47}\) He valued the policy considerations of family harmony and parental discipline that he believed are promoted by the rule of parental immunity and would have protected them with parental immunity except when liability coverage eliminates a threat to them. In the other case, the Court routinely affirmed the prevailing rule that monetary claims for future medical expenses and for pain and suffering must be supported by proof that they will be incurred.\(^{48}\) Justice Neely argued persuasively, in dissent, that improvements in probability theory and statistics had removed the fear that an award for future damages would be merely speculative.\(^{49}\) In both of these cases his proposal would have changed existing doctrine: in the first the Court went further than he would, while in the second, he proposed a change in doctrine that the Court would not accept.


In the decade after the Court was reconstituted by the 1976 election, Justice Neely's vote was for the activist decision in nine of the seventeen cases in which he participated and in which there was a potential for an activist result. Significantly, Justice Neely agreed with the Court's two activist decisions during the period that were revolutionary: the adoption of comparative negligence and the relegation of time limitations in worker's compensation cases to procedural, rather than jurisdictional, status. In the latter case Justice Neely wrote the opinion of the Court. In all of the cases in which he wrote an opinion he supported his decision with policy considerations, unlike the opinions of the other members of the Court whose decisions, while frequently more activist in result than his, were supported with tired, traditional legalistic reasoning.

His education and recognized intelligence qualified him as the intellectual leader of the Court. The Editor of the Charleston Gazette described him as "exceptionally bright and articulate....". However, he would not qualify as either Daneleski's "social or task leader"(Danelski 1960), roles that Randall Shepard may have assumed on the Indiana Court. The Charleston Gazette's editor continued: "He's shot in the ass with himself." The other members of the Court are his "fiercest critics" because of this arrogance and his personal publicity seeking. Neely's self importance created problems even at the level of his relationship with his secretary. He was forced to resign

50. Frey, id.

51. Frey, id.

52. Frey, id.
the Chief Justiceship in 1985 because he was embroiled in a dispute with his secretary over her role as babysitter for his four year old son. His idiosyncratic personality is exemplified by his affectation of a cape that can not fail to get him public notice in rural West Virginia, and his request that a state highway patrol escort walk several paces behind him, presumably to de-emphasize his slight, five foot, six inch stature.

John Hagan, in his analysis at the end of the 1977-1986 period of the Court's activism, identified Justice Neely as a "primary catalyst in the Court's transition to a more active role in the public process. (His) style...is markedly different from the traditionalistic tone of his predecessors on the court - strong doses of history, sociology, and economics...which present arguments from the realm of public policy and political philosophy" (Hagan 1986). Neely's educational background, his intellectual acumen, his published delineation of appropriate judicial activism and his support for activism as a legitimate judicial role, together with policy rather than "legalistic" support for his decisions, paradoxically, made him a leader of activism of a court that was more activist than he was.

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54 Id.
CHAPTER VI

OHIO

The Ohio Court in History

The justices of the Ohio Supreme Court have been nominated in partisan primaries and elected in non-partisan general elections for most of this century. Ohio is the only state to employ this hybrid selection system which was the product of the success of the efforts of the progressive movement of the early 20th Century to eliminate partisan politics from government (Barber 1971).1 Paradoxically, the attempt to remove the influence of partisan politics from judicial selection resulted in a strongly partisan judicial selection system, albeit uni-partisan, not bi-partisan.

Prior to 1978, the membership of the Supreme Court bench whether initially selected by gubernatorial appointment or in non-partisan elections had been "overwhelmingly Republican" (Barber 1971). Republican judicial candidates regularly

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1 The progressives prescribed the partisan primary as the vehicle for nomination of all elected officers, including judges, in order to avoid the selection of candidates by political bosses; they chose a non-partisan contest for final selection in order to eliminate the "non-democratic influence of partisan politics."
won statewide judicial elections in Ohio and Democrats regularly lost. The pattern was true for judges who were initially appointed as well as those initially elected. Republicans who had been initially appointed to the High Court were usually elected in the next judicial election while appointed Democrats had usually failed to retain their seats (Barber 1984).

During the first three-quarters of this century, the Ohio Court did not make waves on the doctrinal seas and avoided undue attention to its work by its sister courts. It was satisfied to sail along unnoticed and unremarked in the wake of its more progressive counterparts. Although in 1885, West Publishing Company had included the Ohio Supreme Court in its prestigious Northeast region, by 1910 its reputation was only tenth among state high courts (Mott 1936). Caldeira (1983) found that its reputation had slipped to twenty-third by 1920, and had moved only to twenty-first in 1975. Similarly, the Ohio Court neither developed nor was quick to adopt new tort doctrine but was satisfied to follow along and accommodate the "new law" once other courts had defined it and demonstrated its usefulness. Canon and Baum (1981) ranked Ohio's alacrity in introducing new tort doctrine thirteenth in the pre-World War II period, eighteenth in the post-War period and sixteenth for the entire period.

Barber has explained this phenomenon by the characteristics of the Republican voter, higher income and education, which lead them to vote in greater proportion in the remote, low information and relatively cue-less non-partisan election. Their greater education enables them to develop cues that enable them to identify the Republican candidates.
These separate rankings of the court’s reputation and innovation confirm Kathleen Barber’s view that the pre-1978 Ohio Court’s orientation reflected the traditional jurisprudence and that "(i)ssues on the cutting edge of social change have tended to evoke a negative response" (Barber 1986). Unlike the Indiana Court, the Ohio Court did not have a prolonged deterioration, and unlike the West Virginia Court, it did not bring up the rear. It moved steadily along in the middle. It did not have the characteristics of either a strongly activist or a strongly non-activist appellate court.

The results of High Court elections since the birth of the Republican Party, roughly the time of the Civil War, until 1978, reveal a substantial preponderance of successful candidates who had been nominated in Republican Party conventions or in Republican primaries.\(^3\) The regular success of Republican candidates has led observers to describe the pre-1978 Ohio Court as "dominated" by "old stock Republicans" (Tarr and Porter 1988). While this description is accurate, it is more illuminating to describe it as a conservative court that shared its values with "small town and rural Ohioans, with business and industry" (Tarr and Porter 1988). The exceptional Democratic justice who sat on the Court was either there as a result of appointment by a Democratic governor and was doomed to be defeated at the next election (Barber 1986), or was philosophically indistinguishable from the majority Republicans and was willing to be mistaken for one

\(^3\) After 1851, and until 1911-1912, Ohio Supreme Court justices were nominated by party convention and elected in partisan elections; since the Ohio Constitutional Convention in 1912, they have been nominated in partisan primaries and elected in non-partisan elections (Barber 1986).
in the non-partisan general election.\textsuperscript{4} This nondescript, conservative Court changed radically as a result of the 1978 judicial election, a change that was to augur a short period of unique and intense activity.

The long running Republican control of the Court had been broken briefly during the period 1960-1962, when the Democrats achieved a four - three advantage. The judicial election of 1962 reestablished the Court's Republican majority, which increased to seven - zero in 1970, before gradually declining during the 1970s. The Democrats again gained a majority, four - three after the 1978 election. This majority was to increase to five - two after the 1980 election and six - one after the 1982 election. A casual examination of the general elections in the late 1970s yields no explanation of the reversal of Republican fortunes. It is unlikely that it was related to state-wide non-judicial partisan politics. Former Republican Governor James A. Rhodes had broken a four year Democratic hold on all state-wide offices by recapturing the governor's office in the 1974 election and he was reelected four years later. Rhodes return to the Statehouse was politically lonely, however, as the four other elective statewide offices were retained by their Democratic incumbents.

It is more likely that the Republican judicial candidates were on the wrong side of the incumbency and familiar name advantages. Although incumbency has less

\textsuperscript{4} Tarr and Porter (1988) report that a thirty-four year Democrat veteran member of the Court was frequently mistaken by his friends as a Republican.
advantage in judicial than legislative and executive races because of general inattention to the personnel of the courts, it does help in fund raising, and money was a factor that was assuming a greater importance in Ohio High Court races at the end of the 1970s. Incumbency does add to a candidate’s name familiarity, which is always important in relatively low information judicial contests (Barber 1986). The most likely nemesis of the Republican candidates in these years was the familiarity the judicial voter had with the Democrats’ surnames, Sweeney, Celebrezze, and Brown. In the name game, Republican candidates Marcus, Dowd, Harper, Krupansky and McCormac were mismatched against Democrats Sweeney, Celebrezze, and, particularly Brown, whom the persistent Republican judicial voter could easily have confused with one of "their candidates."

Changes in the Court

The change in the Court shaped by the 1978 election was abrupt. Overnight the quiet, conservative, rural Ohio and business oriented Court became "pro-labor and highly urban" (Tarr and Porter 1988). This switch was manifested in activity in the six year period from 1981 through 1986 that exceeded in volume that of the comparable period of judicial activism in Indiana in the late 1980s and the longer period of activism in West

5 Sweeneys had run on the statewide ballot repeatedly in the 1960s for attorney general and congress-at-large; Frank Celebrezze ran for election to the Supreme Court four times and James Celebrezze once between 1972 and 1982; Brown was a popular name for Republican statewide candidates, probably because of the regular and popular candidacy of longtime Secretary of State, Ted W. Brown. The association of Supreme Court Justice Paul Brown with the popular Cleveland Browns and Cincinnati Bengals football coach of the same name undoubtedly added to his, and the name’s popularity.
Virginia, both of which have been examined. From 1981 through 1986, the Court abrogated four common law tort immunity doctrines, eliminated three significant limitations on workers' compensation awards, recognized, judicially, comparative negligence and struck down other legislative acts or overruled its own decisions to "shake-up" the somnolent Ohio jurisprudence.

This frenetic activity, though greater in volume, was neither as broad nor as opportunistic as the similar behavior of the Indiana or West Virginia Courts. Activist decisions during the period 1981-1986 predominantly benefitted the economic underdog at the expense of his upperdog counterpart and facilitated the redistribution of societal assets. However, activism can drive decisions outside the class dimension. The Indiana and West Virginia courts made activist decisions with redistributive effects but in these states activism also flowered in unrelated areas of the law. The Indiana Court's activist decisions modified the Indiana criminal and commercial law; the West Virginia Court's activism reordered school finance and the power relations of the state government. Unlike these courts, the Ohio Court's activist decisions were limited to cases in which its decision would benefit the working class. The Court ignored its opportunities to equalize state-wide school financing, to implement the attractive nuisance doctrine, and to recognize new common law criminal defenses. The Court's eagerness to discard outmoded precedent, to embrace new doctrines, and to innovate in economic cases, was not matched "by a similar enthusiasm in . . . civil rights and liberties cases". The
Democratic Court's decisions in non-economic cases were "in keeping with the spirit of deferential Republican courts..."(Tarr and Porter 1988).

This brief, though intense, period of judicial activism was terminated by the 1986 judicial election that eliminated the short-lived Democratic majority and retired Chief Justice Frank Celebrezze. The successor court, during the period 1987-1991, retreated from the frontiers of sovereign immunity and workers' compensation carved out by the Celebrezze court and refused an opportunity to recognize a new redistributive common law cause of action. However, its retreat was from the Celebrezze Court's outposts but not to the settled backwater of traditional Republican courts. In its retreat this Republican dominated court was not as active as its predecessor but was more varied; it did recognize a new and controversial criminal defense that its predecessor had rejected, as well as making activist decisions that benefitted the working "underdog."

The Ohio Northern University Law Review dedicated one number of its annual volumes during the period 1982-1992, to a "Survey of Ohio Supreme Court Decisions." This annual survey of the Court's decisions during the preceding year was published for the elucidation and assistance of the Ohio practicing lawyer and was accompanied and introduced by an article by the Chief Justice of the Ohio Supreme Court during the years Frank Celebrezze held the position, and after 1989, by his successor, Thomas Moyer. These introductory articles highlighted the cases that the chiefs considered to be the most significant cases decided by the Court during the preceding year. I reviewed these
introductory articles and annual surveys for the period to determine the cases that had a potential for judicial activism. After completing this review I reviewed the official reports to assure that I had not omitted any significant cases. Using the same criteria that I used to select cases of the Indiana and West Virginia Courts, I selected a set of the Court's decisions that I analyzed to establish the Court's level of judicial activism during the period to be used in a comparison of activism across the three courts.

1981-1986

Activism in Economic Cases

*Common law immunities.* The Court's attention to the interests of the Ohio working man and woman channelled its activism into economic rather than social regulation. The common law of Ohio had the full range of doctrines that historically have provided immunity from suit for governments, parents, spouses, and charities. The new Court took the controversial cases in which plaintiffs urged that these traditional common law immunities be eliminated. Elimination of the traditional tort law immunities allows the costs of an injury to be transferred from an underdog victim to an upperdog insurance carrier.

Canon and Baum (1982) had placed the Ohio court in the second rank of state high court, tort innovators. The vanguard states in the tort revolution of the 1960s and 1970s had excised the disqualifying common law doctrines from their jurisprudence. In
the first half of the 1980s the Ohio Court caught up with a vengeance. In just four years, 1982-1985, the Court abrogated sovereign immunity, interspousal immunity, parental immunity, and charitable immunity, thereby wiping out the foundations of traditional common law tort jurisprudence.

Workers’ compensation cases. Workers’ Compensation was another fertile ground for the underdog’s judicial champions. The "small town and rural Ohio values" and the "business and industry orientation of the Court" had shaped Ohio workers’ compensation law during the seventy years of its life. The general compromise between labor and industry on which workers’ compensation was founded had limited the injured worker’s recovery for work related injuries to the schedule of benefits that the legislature had prescribed. In a period of skyrocketing personal injury awards, this compromise looked like a bad deal to the injured workers. They looked enviously at their employers’ presumably deep pockets. Expeditiously, the Celebrezze Court created an exception to the body of workers’ compensation law that allowed injured workers to enjoy the juries’ munificence if they could successfully maintain that their employer had intentionally

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8 Kirchner v. Chrystal (1984) 15 Ohio St.3d 326.

injured them.10 The Court’s largess did not end when it opened the door for a worker to pursue the civil action pot of gold, it went further and allowed them to collect both worker’s compensation in addition to whatever was available in the civil action.11

The judicial rules that the earlier Ohio courts had attached to the legislatively created workers’ compensation had created a series of ever higher hurdles that the injured worker had to clear. These courts had adopted and approved judicial rules that had limited the right of workers to share in the compensation pool depending on the nature of the injury they suffered. One of the rules that the Court had engrafted on the system required that the injury had to be physical and that the injury had to immediately follow the trauma that caused it. The newly constituted Ohio Court overturned this venerable pillar of the system and held that a worker could recover for an injury that had developed gradually as a result of job related duties12 and for mental or emotional injury that could be related to the job.13 The Court had established that a worker could not receive compensation for an injury received while traveling to or from the job. The Celebrezze Court carved an exception that allowed the worker to receive compensation for an injury that occurred while the worker was turning into an employer’s parking lot if the turn caused the employee to have a greater risk of injury than the general public and then


concluded that the necessity of regularly turning into the parking lot was such a greater risk!¹⁴

**New causes of action.** The Ohio Supreme Court had recognized only a limited number of tort causes of action and that forced injured persons to bear the whole cost of their injuries if the cause had not been recognized. Every new cause of action that allows the responsibility to be transferred makes it likely that the cost will ultimately be borne by an insurance carrier who will spread the cost among the large number of its policy holders. The Celebrezze court accelerated its predecessors' deliberate pace in recognizing new torts that allowed individuals to recover. Chief Justice Celebrezze proclaimed that "...Ohio is rapidly being recognized as a national leader in providing appropriate remedies to meet the...issues...(of) modern society"(Celebrezze 1985).

Historically, parties could not maintain civil actions for emotional distress unless they also suffered physical injury. In 1983, the Court overruled its controlling 1908 case to allow recovery for emotional injury that is not related to a physical injury.¹⁵ The Court created a parents' cause of action for negligent injury to a viable fetus that is subsequently stillborn.¹⁶ Physicians, particularly obstetricians, and their malpractice insurance carriers were the immediate victims of this new right to sue but automobile


drivers and their liability carriers were similarly burdened. The Court shifted the economic burden of the tragedy of the adoption of a seriously handicapped and impaired infant by creating a right in the adopting parents to sue the adoption agency for their damage caused by any misrepresentation of the infant's background and condition that caused the adoption. 17

The Court overruled the long standing principle that railroads do not have a common law duty to give warning to the public of a locomotive at a highway crossing. 18 The historic adversary of the working man was a likely mark for the "people's Court." The creation of the railroads duty to warn motorists concomitantly created an action against the offending railroad for the motorist who was injured at an unguarded crossing.

During the early 1980s, the Ohio General Assembly passed legislation that eliminated the tort defense of contributory negligence and adopted comparative negligence for Ohio. When the Ohio court was presented with a case that had occurred prior to the legislation's effective date, which made the legislation unavailing to the plaintiff, it found that comparative negligence was the common law of Ohio for cases that arose prior to the legislation's effective date. 19 Although the life of this judicial

17 Burr v. Board of Commissioners, et al. (1986) 23 Ohio St. 69.


19 Wilfong v. Batsdorf (1983) 451 N.E.2d 1185. See Viers v. Dunlap (1982) 438 N.E.2d 881, decided a year earlier and before Justice Krupansky, who was in the majority in Viers, was replaced on the Court by Justice James Celebrezze, who was in the majority in Wilfong.
comparative negligence was attenuated and therefore did not have the significance of the West Virginia Court's similar decision it did have a redistributive effect during the period in which it was applicable.

**Statutes of limitations.** The traditional interpretation of statutes of limitations for actions involving physical injury was that the statutory period began to run at the time the act that caused the injury occurred. This judicial interpretation caused problems for plaintiffs in medical malpractice cases because the physician-patient relation of dependence and trust frequently continues past the expiration of the statutory period. The "time of injury" rule was particularly harsh for asbestosis sufferers because the slow development of that condition would almost always outlast the statute. In response to these hardships the Celebrezze court adopted a rule that the statute of limitations for medical malpractice actions and for asbestosis related actions began to run when the injured party discovered or reasonably should have discovered the injury, the "discovery rule". The Court considered that the legislative statute of limitations that incorporated the "time of discovery" rule was not fair and held it unconstitutional. When the Ohio General Assembly failed to adopt a new statute of limitations for minors in the three years after the Court's decision which struck down the legislature's original statute, the Court itself drafted and prescribed a "fair" judicial statute of limitations.

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Utility rates. In its most direct redistributive effort, the Court refused to allow utility companies to make consumers pay for programs that did not benefit them directly. The Court said "no" when an electric company attempted to pass on to its customers the costs of an abandoned nuclear power plant and when another public utility tried to force its customers to cover its charitable contributions. In one of the most publicized incidents of the Celebrezze Court's years, the Chief Justice literally redistributed the wealth. To effectuate a court order that directed public utility companies to make refunds to its customers, the Chief sent the utilities customers their shares of the refund by checks over his own signature and in Court envelopes.

Social Issues Cases

The 1980s decisions of the Ohio Supreme Court while Frank Celebrezze was Chief Justice in cases that had an activist potential can be neatly divided into two groups: activist decisions in which economic issues were joined and court activism would benefit working men and women and non-activist decisions in cases in which social issues were in the balance and the activist decision would have threatened family values. There is one case that falls outside this dichotomy. In that case the Court overruled the common law disqualification of a spouse's testimony in a criminal trial. This activist decision


25 Court ordered refunds of utility payments were not unique; the personalization of the refund method was.
defies categorization: it was outside the activism pattern of the Celebrezze Court because it was not redistributive, it threatened the stability of marriage, the Court's opinion was written by Republican Justice Krupansky, the majority needed two Republican justice's votes, and Chief Justice Celebrezze dissented. With the exception of this case, however, the Celebrezze Court did not reach activist decisions if doing so would have offended the social values of the working men and women voters of Ohio.

It is generally believed that these middle America voters valued local control of their public schools, support for the police and law enforcement generally, and support for charitable causes. The average Ohioan was not thought to be sympathetic to feminist defenses of wives who killed their husbands, criminals escaping "justice" on legal technicalities or by psychiatric excuse, and they believed that the state had unlimited license to prevent the sexual exploitation of their sons and daughters. The decisions of traditionalist Ohio Court prior to 1978 were compatible with these voter's values and the activist early 1980s Ohio Court would do nothing to menace them.

Criminal law. The Celebrezze Court demonstrated most clearly the similarity of its approach to social issues cases to that of its predecessor courts in the area of criminal law. The Court's most interesting deference to the working voter's values and rejection

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26 State v. Mowery (1982) 438 N.E.2d 897. Although Chief Justice Celebrezze both concurred and dissented, it is clear that he favored the result but objected to the Court's activist method of achieving it. He would have required a legislatively approved rule change.
of activism was its refusal to allow the admission of expert testimony to establish the "battered wife syndrome" defense to a murder charge against the wife.\textsuperscript{27} The Court's traditionalistic decision angered the women's movement, a vocal, though relatively small, component of the Democrat electoral coalition. It did not, however, disappoint the solid, conservative Ohio Democrat voter (Fenton 1984), a less vocal, but more numerous, electoral factor. In other non-activist decisions, the Court refused to invalidate an Ohio law that effectively denied criminal defendants their constitutionally guaranteed right to face their accuser;\textsuperscript{28} allowed the prosecutor to use wiretap evidence that the police had obtained in violation of Ohio law;\textsuperscript{29} refused to allow a severely mentally deficient defendant to use this "diminished capacity" as a defense to a criminal charge; and, not surprisingly, refused to protect the First Amendment right of privacy of a defendant who was caught with photographs of minors engaged in sexual activity in violation of Ohio law.\textsuperscript{30} The votes of criminal defendants and their supporters do not decide elections.

\textit{Other middle class values.} The Court did not embrace the "new federalism" and did not utilize the Ohio Constitution's guarantee of a "thorough and efficient" system of schools to equalize the funding of the state's public schools although it recognized that

\textsuperscript{27} \textit{State v. Thomas} (1981) 423 N.E.2d 137.

\textsuperscript{28} \textit{State v. Madison} (1980) 415 N.E.2d 272. The statute in question, Section 2945.49, Revised Code, allows recorded testimony to be admitted in a criminal trial if the accuser is not available at trial. See, Ohio Constitution, Section 10, Article I.

\textsuperscript{29} \textit{State v. Geraldo} (1981) 429 N.E.2d 141; see Section 4931.28, Revised Code.

\textsuperscript{30} \textit{State v. Meadows} (1986) 503 N.E.2d 697. This decision was announced twenty-four days before the 1986 judicial election in which the Chief Justiceship and two other Democrat seats were at stake. Although the decision is not inconsistent with the Court's pattern, the timing probably eliminated any vestige of hope the defendant held.
their educational opportunities were unequal. It specifically relied on the middle class "value of local control of schools."\textsuperscript{31} In another activist decision the Court joined its redistributive efforts and sensitivity to the values of the ordinary voter when it invalidated an Ohio statute that codified the common law rule of mortmain.\textsuperscript{32} The Court's decision allowed charities rather than a testator's heirs to receive property that the testator had left to it. The Court preferred the redistributive effect of charitable giving to the enrichment of heirs.

In a balance between the redistributive effects of the creation of a new cause of action and the solid middle class value of the rights of property, the Court came down on the side of the middle class Ohio voters' values. It refused to recognize that trespassers have a cause of action against property owners when they are injured by an artificial condition that the owners of the property maintain on their property, such as a swimming pool.\textsuperscript{33} The Court preferred to let property owners enjoy their land free of any obligation to unlawful intruders rather than force them to protect themselves by

\textsuperscript{31} \textit{Board of Education etc. et al. v. Walter} (1979) 390 N.E.2d 813.

\textsuperscript{32} Mortmain is, literally, "dead hand" and refers to the potential control of most real property in a country by a pervasive charity, such as the pre-reformation Roman Catholic Church in England, and the fear that this caused in civil government. In order to reduce this potential threat, various restrictions were imposed on charitable property rights under the general designation, mortmain. The Ohio statute in question, Section 2107.06, Revised Code, invalidated charitable bequests made shortly before the testator's death. The legislature repealed this statute while the case was pending in the Court.

\textsuperscript{33} \textit{Elliott v. Nagy} (1986) 488 N.E.2d 853. This is an "attractive nuisance" case. An attractive nuisance is an artificial condition on real property that lures trespassers and causes their injury.
purchasing liability insurance. There are, undoubtedly, more property owning voters than tort-plaintiff voters.

1986-1991

The judicial election of 1986 returned control of the Ohio Court to the Republicans, four-three. Chief Justice Celebrezze was replaced by Republican Thomas Moyer, while an incumbent Republican justice was reelected and one Democrat Brown, Herbert, replaced another, Clifford. This election continued the reversal of Democrat fortunes that had begun with the 1984 election in which the two Republican candidates defeated incumbent Democrats, James Celebrezze, the Chief Justice's brother, and a Democrat candidate with the surname of a former Republican justice.\textsuperscript{32} See Table 4. The 1984 and 1986 election campaigns were exceptional for Supreme Court races in Ohio: candidates attacked each other personally, the candidates were uniquely visible as a result of extensive media coverage, and the candidates spent large amounts of money, particularly in 1986. Much of both campaigns was waged over the direction the Court's decisions had taken and the proper role of the Court in policy making (Tarr and Porter 1988).

\textsuperscript{32} Although the name was the same as the previous Republican justice, it was a name that many voters would think was Democrat, Corrigan. Thus is the Ohio "name game" confusing.
The reestablishment of a Republican majority with substantial financial electoral support from interests that had suffered as a result of the activist decisions by the Democrats (see Baum 1989) led to speculation that the new Court would reverse wholesale the changes wrought by its predecessor. This did not happen. The Moyer Court initially chipped away at the abrasive edges of several of the Celebrezze Court innovations to make them more acceptable to the interests that had helped it to get elected. The new Court was not receptive when new causes of action were advocated. However, it was to embrace activism as often as it rejected it. When it did its range of activism was broader than its predecessor and included both economic and social cases. It was not complaisant when the General Assembly attempted to reduce the amount of potential recovery in tort actions and it did reverse the decision of its predecessor and came down on the side of protection of the interests of abused wives that the Celebrezze Court had ignored.

Economic Cases

In response to the Celebrezze Court’s decision allowing workers to maintain civil suits against their employers for intentional torts, the Ohio General Assembly had amended the workers’ compensation law to require injured workers to bring these actions within the workers’ compensation system.1 The new Court refused to allow an injured worker who had received an award against his employer in a civil suit to collect the

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1 See Blankenship v. Cincinnati Milicron, supra, note 19.
award from the Workers' Compensation Fund.\textsuperscript{34} This generally pro-business decision was followed shortly by a pro-labor decision in which the Court invalidated the legislature's attempt to force workers to try their intentional tort claims in the workers' compensation system with its low maximum recovery rather than to a civil jury with the potential for a bonanza. The Court concluded that a suit for intentional tort was a common law action, rather than a workers' compensation matter and threw out the legislature's attempt to limit recovery.\textsuperscript{35}

The explosive upward spiral of judgments against health care providers in medical malpractice cases had sent them and their insurers to the legislature for relief. The Ohio General Assembly had responded to these organized cries by placing a cap of $200,000 on medical malpractice jury awards. Similarly to its reaction to the legislature's attempt to limit recovery for an intentional tort, the Court responded by tearing the cap off and decided that the limitation was unreasonable, arbitrary and unconstitutional.\textsuperscript{36}

The Celebrezze Court had abrogated sovereign immunity except for governmental planning and policy making activity.\textsuperscript{37} The Moyer Court made a slight retreat from its predecessor's activism and extended this limited immunity for a "reasonable time" after

\textsuperscript{34} \textit{State ex rel. Carpenter v. Industrial Commission} (1990) 552 N.E.2d 645.


\textsuperscript{37} \textit{Enghauser Manufacturing Company v. Erikson Engineering Ltd.}, supra, note 19.
the government had made its policy decision in order to allow the policy to be implemented. In its most pro-labor decision, the post-Celebrezze Court freed Ohio workers from judicially implied assumption of the risk of their employment. The common law doctrine of assumption of risk included a corollary that provided that workers assumed the risks of injury that were necessarily encountered in the normal performance of their job duties and responsibilities. The post-1986 Court abrogated this harsh, anti-labor doctrine but balanced its tilt toward the worker by getting rid of one of the Celebrezze Court's anti-business workers' compensation decision. The Celebrezze Court had allowed compensation for a worker who was injured while attempting to park in the employer's parking lot. In 1991, the Court overruled the Celebrezze precedent and excluded injuries workers suffered while parking. Democratic Justice Herbert Brown concluded that such risks were not greater than the general public encountered on crowded and congested streets.

No new causes of action. The Court hesitated to approve novel theories of relief. It refused to recognize a cause of action by a building contractor against an architect for economic damage suffered by the contractor as a result of the architect's faulty design. The Court's legalistic majority relied on the lack of a contractual relationship between


40 See Littlefield v. Pillsbury Co. supra, note 27.

the contractor and the architect to refuse to find a cause of action in tort.\(^2\) Similarly, it refused to recognize the controversial "clergy malpractice" cause of action when a divorced husband sought to collect damages from a clergyman who had sexual relations with his wife while he was acting as a marriage counselor for the couple.\(^3\) The Court found this cause of action too close to alienation of affection, an action that is in general disrepute. The non-activist approach to these cases was probably welcome to the Republicans' electoral supporters but it seems meager repayment, in itself. It is likely that the Court's business and other backers were satisfied that the activist Celebrezze Court was now only a bad memory.

*Eclectic activism.* Although the post-1986 Court was not as activist as its predecessor, during the succeeding five year period it did reach activist decisions in five out of the ten of its cases that had an activist potential and these five decisions have been in significant cases. One of its Republican members joined the three Democratic members to remove a long-standing limitation on workers seeking compensation benefits. This bi-partisan bloc overruled a seventy-one year old judicial doctrine that had denied benefits to the worker unless the injury had been caused by a work hazard which was "different or greater than the general public encounters".\(^4\) Labor was undoubtedly pleased that another hurdle had been removed from the path of the injured worker and,


\(^4\) *Griffin v. Hydra-Matic Division etc.* (1988) 39 Ohio St.3d 79.
on the other side of the coin, business must have been disappointed that a justice they helped to elect had provided the necessary vote to their disadvantage.

After the flood tide of activism in the first half of the 1980s, activist decisions continued to flow from the Court, but the stream returned to its banks after the Moyer Court convened. In another activist decision the new Court overruled the Celebrezze Court and allowed the battered wife to introduce evidence of the "battered wife syndrome" to support a claim of self defense.\(^4\)\(^5\) The Court’s protection of a battered wife’s civil liberties would not have been of substantial interest to the big 1986 contributors on either side but was unquestionably satisfying to militant women.

Composition of the Court

The backgrounds of the members of the Ohio Court from 1981-1991, were substantially different from those of the members of the Indiana and West Virginia Courts. The educational and professional lives of the Ohio justices were more cosmopolitan than their eastern and western high court neighbors.\(^4\)\(^6\) More than a third of the Ohio justices who served during the decade had received their legal education at

\(^{45}\) State v. Koss (1990) 551 N.E.2d 970. The Court still refused to recognize the "battered wife syndrome" as a new and separate defense.

\(^{46}\) The justices biographic information is found in various entries in various editions of The American Bench, Judges of the Nation.
a national law school. All, except one, had practiced law in a metropolitan area with a population in excess of 500,000 people. This was consistent with the Ohio practice of selecting its High Court justices from its large cities. Twelve of the fourteen justices were initially selected in competitive elections which is similar to West Virginia where all had been initially elected but unlike Indiana where only two of the seven justices had been initially elected.

In keeping with the partisan political reputation of the Ohio Court, the justices had occupied varied political roles prior to their ascent to the Bench. Two of the justices had been candidates for Governor of Ohio and two had served as the highest policy adviser to Ohio governors. One justice had been appointed and served as Ohio’s Attorney General while one had been the mayor of Ohio's largest city and another had been a

Republican: Craig Wright, Harvard.

48 Democrats: Frank and James Celebrezze and Ralph Locher, Cleveland; William B. Brown, Honolulu, Hawaii; Alice Resnick, Toledo; A.W. Sweeney, Youngstown; Herbert R. Brown, Columbus.
Republican: Paul W. Brown, Youngstown; Andy Douglas, Toledo; Blanch Krupansky, Cleveland; Robert Holmes, Thomas Moyer, and Craig Wright, Columbus.
The exception was Clifford Brown who practiced law from 1938-1964 in Norwalk, Ohio, a community of about 40,000.


50 Ralph Locher had been Secretary to Governor Frank Lausche and Thomas Moyer had been Administrative Assistant to Governor James A. Rhodes. Although the title had been changed, they performed the same function, that of personal counsel and chief of staff, and in fact, their offices occupied the same space in the governor’s suite of offices.

candidate for the post.\textsuperscript{52} Two of the justices had served in the state legislature prior to their service on the court and one had occupied leadership positions.\textsuperscript{53} One of the justices had been a resident of Hawaii prior to its statehood and had been appointed Territorial Treasurer by President Truman.\textsuperscript{54} One of the High Court members had been a city councilman prior to his election to the Court and has been mentioned as a possible candidate for mayor of his hometown while sitting on the Court.\textsuperscript{55} All except two had participated in a partisan election prior to their initial runs for their High Court seats.\textsuperscript{56}

None of these justices of the Ohio Court has published an explanation of his or her preferred activist or non-activist judicial role comparable to Shepard's and Neely's elucidating articles and books. As a matter of fact, these well educated justices have written very little at all. Their remarks when sworn in as a member of the Court, when welcoming a group of lawyers newly admitted to the bar, and when addressing an important professional meeting were usually recorded in a bar association publication but they are the earnest but bland description of the Court and its workings that are generally expected on these occasions.

\textsuperscript{52} Ralph Locher - mayor; Frank Celebrezze - candidate.

\textsuperscript{53} Frank Celebrezze, Ohio Senate; Robert Holmes, Majority Leader and Speaker of the House of Representatives.

\textsuperscript{54} William B. Brown, 1949.

\textsuperscript{55} Andy Douglas, Toledo.

\textsuperscript{56} Democrats A.W. Sweeney and Herbert R. Brown were elected to the High Court on their initial venture into elective politics.
**Democratic Justices.** Justice Clifford Brown provided an exception to the justices' spare publication record. He wrote two articles for Ohio law journals. These articles are aggressively pro-labor, anti-business. He noted that the Celebrezze Court had "shown sensitivity to the plight of the employee" and had "come a long way toward supporting the rights of workers" (C. Brown 1984). Although the title of one of the articles is "Judicial Activism," it does not shed any light on his preferred judicial, as distinct from political, philosophy. In that article, Justice Brown failed to distinguish between judicial activism and liberalism ("a judicial activist, i.e. a judicial liberal") but did reveal a class-based view of judicial decision making: "The judicial conservative(s) purpose: to give short shrift to the rights of the common man and woman" and the judicial liberal's purpose (and his own) was "to make...advanced, enlightened and common sense precedents..." that made the Ohio Court "truly a people's court" (C. Brown 1987). The other Democratic justices, Herbert Brown, William Brown, Sweeney, James Celebrezze, Resnick, and Locher were without any publications outside their judicial duties. 57

**Republican justices.** While the Democratic justices of the Celebrezze Court flaunted their class based political philosophy and neglected to describe their judicial philosophy, the new Court's Republican justices loudly proclaimed their judicial philosophy and suppressed their political philosophy. It is perhaps characteristic of their different positions and different constituencies: the working men and women wanted to

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57 Justice Herbert Brown has had a novel published.
hear that the court intended to change the decades of judicial neglect that they felt they had experienced while business longed to hear that the status quo was going to be maintained.

Chief Justice Moyer did not delay in making clear the difference between his predecessor's activism and his restraintist judicial philosophy: "(T)he new Chief Justice understands that judges are not legislators in robes....it is the legislative branch that is best suited to determine the policy of the law" (Moyer 1987). As befits a justice of a "partisan" court, one justice expressed his judicial role philosophy in a political ad. In his 1984 judicial election campaign, future Justice Craig Wright "aired some tough television ads complaining of the court's attempts to 'legislate'." Republican Justice Holmes's background and consistent dissent from the Court's activist decisions give solid evidence of his non-activist predilection. The position of the remaining Republican, Justice Douglas, in the activist-non-activist tension is uncertain. He received substantial electoral support from interests that are certainly opposed to judicial activism that results in a substantively liberal decision and particularly, in economic cases. However, his recent decisions have been the activist in these cases.

In the Court's recent activist workers' compensation decision, Justice Douglas was in the majority and his decision has been activist in every case that had an activist

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potential in which he has participated since the Republicans regained a majority on the Court in 1987. Coincidentally and significantly, each of these cases has been an upperdog-underdog case in which the activist decision was also pro-worker. Toledo, Ohio, Justice Douglas’s hometown, is a medium-large Ohio city that is dominated by the glass manufacturing industry and is considered to be an union town. It is not an electoral arena in which a potential Republican candidate for mayor could afford to brag about a pro-business, conservative voting record. Justice Douglas’s background is not exceptional except for the speculation that he might leave the Court to run for mayor of Toledo and the apparent conflict between his financial backing for his judicial electoral campaigns and his votes against his contributor’s interests. His apparent activism may be of the third or partisan political level, similar to that of Chief Justice Frank Celebrezze (see below, at pp. 181 & 182).

*Frank Celebrezze.* As in the other two courts, there was one member who stood out from the rest of the Court but in Ohio his prominence was not because of his education or his endorsement of judicial activism. He was educated in a law school in
Table 10.
Electoral History of the Justices
Who Sat on the Ohio Supreme Court, 1981-1991

<table>
<thead>
<tr>
<th>YEAR</th>
<th>SEAT #1 (CJ)</th>
<th>SEAT #2</th>
<th>SEAT #3</th>
<th>SEAT #4</th>
<th>SEAT #5</th>
<th>SEAT #6</th>
<th>SEAT #7</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988 (election)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Sweeney (D)</td>
<td>Resnick (D)</td>
<td></td>
</tr>
<tr>
<td>1986 (election)</td>
<td>Moyer (R)</td>
<td>Holmes (R)</td>
<td>H. Brown (D)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1984 (election)</td>
<td></td>
<td>Douglas (R)</td>
<td>Wright (R)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1982 (election)</td>
<td></td>
<td>J. Celebrezze (D)</td>
<td>Sweeney (D)</td>
<td></td>
<td>Locher (D)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1981</td>
<td></td>
<td>Krupansky (R)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1980 (election)</td>
<td>F. Celebrezze (D)</td>
<td>Holmes (R)</td>
<td>C. Brown (D)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1979</td>
<td></td>
<td>Holmes (R)</td>
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<td></td>
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<tr>
<td>1978 (election)</td>
<td>F. Celebrezze (D)</td>
<td></td>
<td>W. Brown (D)</td>
<td>P. Brown (R)</td>
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<tr>
<td>1976 (election)</td>
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<td></td>
<td></td>
<td>Sweeney (D)</td>
<td>Locher (D)</td>
<td></td>
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<tr>
<td>1974 (election)</td>
<td></td>
<td>F. Celebrezze (D)</td>
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</tr>
<tr>
<td>1972 (election)</td>
<td>F. Celebrezze (D)</td>
<td></td>
<td></td>
<td></td>
<td>P. Brown (R)</td>
<td></td>
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</tr>
</tbody>
</table>

1 Appointed by Republican Governor James A. Rhodes to fill vacancy created by the resignation of Justice Paul Brown.
2 Appointed by Republican Governor James A. Rhodes to fill vacancy created by the resignation of Justice Frank Celebrezze upon his election as Chief Justice.
3 Associate Justice F. Celebrezze ran to fill the unexpired term in the Chief Justice seat created by the death of Chief Justice William O'Neill.
4 Election to fill the unexpired term created by the death of Justice Mathias.

his home town and his interest in judicial activism was only in its service to his political goals. His prominence came as a result of his ambition and partisanship and his judicial concern for the interests of his chosen constituency.
Frank Celebrezze’s electoral experiences and two facets of his political personality explain his significance to the activism of his Court. He was the first of the Democrat justices who were to serve on the High Court during the period of high activism in the first half of the 1980s to be elected to the Court. His elevation to the Court resulted from his victory over an appointed Republican incumbent in a 1972 judicial race to fill the remaining two years of an unexpired term (Barber 1986). In 1973 he joined a court on which the other six justices were Republican. He was not joined by a Democrat for four years, during which time he won the 1974 election for the full six year term. It was not until 1977 that other Democrats, Sweeney and Locher, joined him.

The status that he earned by being the Democrat ground breaker was enhanced by his greater electoral experience and successes. As a result of Ohio’s election laws he had been required to run in four statewide High Court elections by 1981. Chief Justice O’Neill had died during term and the Republican governor had appointed a caretaker Chief Justice who declined to run in the election of 1978.59 In that year Justice Celebrezze was in the middle of a six year term as Associate Justice and was able to run for the vacant Chief Justice’s seat without risking his continued tenure on the Court. In the 1978 election Celebrezze defeated Associate Justice Thomas Herbert, the candidate who had been nominated in the Republican primary and who had, perhaps, the most

59 The caretaker appointment had probably been made because neither the agreed Republican candidate, Associate Justice Thomas Herbert, the Republican governor, nor the Republican party wanted to risk Herbert’s continued tenure on the court by his resignation to accept such appointment.
popular Ohio Republican electoral name of the era. It was necessary that Chief
Justice Celebrezze run for the full term of Chief Justice in 1980, which he did
successfully. The electoral history of Frank Celebrezze and the other members of the
Ohio Supreme court during the period 1981-1991 is contained in Table 9.

Frank Celebrezze's political ambition directed his preference for activist decisions
that benefitted the working man and woman and non-activist decisions that protected
middle class social values. This ambition was born of his desire to be the Governor of
Ohio. Justice and Chief Justice Frank Celebrezze had maneuvered for the Democratic
nomination for Governor of Ohio twice after he ascended the High Bench in 1972. In
1978, prior to his successful race for Chief Justice, he had unsuccessfully sought the state
Democratic organization's screening committee endorsement for a race in the Democratic
primary for governor, and only turned to the race for Chief Justice after that endorsement
was denied. In 1982 he resigned from the court and announced his candidacy for
governor only to change his mind after one day. He revoked his resignation and
resumed his official and effective leadership of the court. The Democratic nomination

60 Justice Herbert’s father, Paul Herbert, had been elected Lieutenant Governor in
the 1950s and to the Court in the 1960s. Another Ohio Herbert, Thomas, had been
elected Governor of Ohio in 1946, had run, unsuccessfully, for reelection in 1948, before
being elected to the Court. Governor Herbert’s son, John, had been elected Treasurer
of State twice in the 1960s and was the Republican candidate for Attorney General in
1970. Thomas Herbert had been elected to the Ohio Senate before twice being elected
Associate Justice.

61 Mary Ann Sharkey, "Celebrezze Longs for Acceptance," The Plain Dealer, April
23, 1983.

62 Id.
that year went to Richard Celeste who was elected in the general election and, as the incumbent, was virtually certain to be renominated in 1986. Celebrezze's indecision in 1982 eliminated what would have been his last realistic opportunity to be the Democratic candidate for governor. The Celeste victory in 1982, coupled with his own defeat in 1986, removed him as a viable candidate. However, the Chief Justice could not have known that his ambition was doomed as he and the Court approached the high water mark of the Court's activism. His last defeat was in the future in 1984 when the campaign manager of his aborted 1982 venture offered an evaluation of the Celebrezze ambition: "(O)ne cannot discount his dream of being governor of this state for the last quarter century."63

The phrase "people's court" was first applied to the Celebrezze Court by the Chief Justice in an article introducing Ohio Northern University Law Review's summary of the Court's 1983-84 term decisions (Celebrezze 1985). Its use indicates the Chief's populist bent and his belief that the Court's decisions should serve populist goals. In an earlier introductory article he had explained that the Court's judicial activism, "its willingness to depart from precedent," reflected its "progressive attitude" toward protection of the individual (Celebrezze 1984). In his concurring opinion in the Court's landmark decision that allowed an injured worker to maintain a civil suit against an

63 Steven Avorkian, quoted in Mary Ann Sharkey and W. Steven Ricks, "A Law unto Himself," The Plain Dealer April, 22,1984, p. 20A.
employer for an intentional tort, the Chief branded the dissenters as "anti-worker" in contrast to his and the Court majority's pro-worker stance.64

Chief Justice Celebrezze was silent on the question of the appropriate judicial role, activist or restraintist, of the state's highest appellate court. His judicial and extra-judicial writings defy a simple description of his preferred role. His opinions and his non-judicial writings leave no doubt that he believed that a state high court's decisions should be used to advance the interests of workers. During his tenure on the court this required overruling precedent and legislative enactment; consequently, he was clearly an activist but his activism was not across-the-board. His decisions in non-economic cases that had an activist potential negate an interest in activism aside from his political ambition. His activism was limited and selective.

Frank Celebrezze was regularly and generously supported in his judicial races by organized labor (Barber 1986) and his leadership of the Court in its 1981-1986 class based decision making fairly repaid their support. The Celebrezze - union cooperation did not interfere with his socially conservative decisions that were an expression of his yearning "for an America...of high minded moralists, hard working and independent."65 His moralism and restraintist decisions in social cases gave rise to a reputation for conservatism. A political observer opined that "(h)e is conservative as a northern

64 Blankenship v. Cincinnati Milicron Chemicals, Inc., supra, note .

Democrat can get."66 These two facets of his political personality, pro-labor, urban populism with a strong dash of middle class social responsibility, explain the unbalanced record of activist decision making of the court under his leadership. His activism and the activism of the 1981-1986 Court was of the partisan political variety. Tarr and Porter (1988) recognized that the economic liberalism and social conservatism that drove his court was the outline of a gubernatorial platform that "would reach out to and cut across many constituencies and voting blocs.

Frank Celebrezze was generally recognized as the leader of "his" Court, the Court majority composed of the other Democratic justices. Justice Clifford Brown expressed the Democratic members' feelings for their Chief in remarks he delivered to a meeting of the state bar association: "Frank Celebrezze is perhaps the best Chief Justice the Ohio Supreme Court has ever had.... His leadership...has rubbed off on all of us, his associate justices" (C. Brown 1985). Tarr and Porter (1988) consistently identified the early 1980s Court as the "Celebrezze Court" and concluded that "Frank Celebrezze's partisan ideology...spurred the change on Ohio's court." The interests that contributed more than $400,000 to his opponent's election campaign in 1986, and the labor unions that contributed $350,000 to his campaign in the same election expected to change more than one High Court vote with the election's result. Both were interested in Frank Celebrezze as the effective leader of the Court's majority.

66 Id.
There are three possible philosophical bases of judicial activism. The most abstract is that in which the activism of Justices Shepard and Neely is grounded. These judicial leaders are proponents of activism as activism. They advocate an active role for the appellate court in governmental policy making, regardless of the ideological direction of the result. There is no necessary correlation between their ideology and their activism. A more utilitarian judicial activism is exemplified by the post-war California Court and the Michigan Court of the 1960s and 1970s. This activist philosophy advocates high court activism when it serves the court's preferred ideology; for the California and Michigan courts it was liberal policy (Baum 1989). Ideally, these court's ideology and activism would be correlated. The third possible manifestation of judicial activism supports the partisan political goals of the court's members. Devotees of this variety of activism would embrace activism, whether the direction of the decision was liberal or conservative, that furthered the majority's political goals but would eschew activism if its expression threatened them. This last brand was the activism of the Celebrazze Court and its Chief and it probably describes the philosophical underpinning of the judicial activism of Justice Douglas. This partisan based activism would exhibit a substantial, but less than perfect, correlation with the court's ideology.

These manifestations of judicial activism with different philosophical explanations can reasonably have different durations. Activism supported by a philosophy of judicial role might become a permanent attribute of the court. As a court that has traditionally deferred to the state legislature and to its own prior decisions is exposed to activism by
a justice who believes that the court has a proper role in making policy, it might incorporate policy making as an acceptable judicial pursuit. This role might become institutionalized with continued practice. This course seems to have been traced by the New Jersey Court in the second half of this century (Tarr and Porter 1988). The deference of that Court to the state legislature and to its established common law was interrupted by the introduction of an activist philosophy by the accession of Justice Vanderbilt. The adoption of Vanderbilt's philosophy and the resulting flow of judicially made policy gradually changed the Court's culture and eventually transformed the state's legal culture, which transformation survived the retirements of Vanderbilt and his original disciples. Judicial rule making by the New Jersey Court is now an integral part of the state's governing apparatus (Tarr and Porter 1988).

This type judicial activism is not as likely to experience opposition as the other types. Opponents do not have a powerful popular focus. As long as the court's policy is not made exclusively on one side of the political divide the partisan political leaders are not offended and reserve their energies for the more immediate, and personally rewarding, contests for electoral gain. The possibility of institutional opposition by the legislature or the governor would as likely be neutralized by relief that the court had eliminated a potentially difficult decision as it would be to become actively hostile to the court as an institution. It is possible that this judicial role would excite opposition by a conservative legal organization, such as the state bar association. However, without help from more involved allies, the opposition of a state bar association is, at best, a voice
crying in the wilderness. Because of the lack of substantial opposition this pure judicial activism would have the greatest chance for permanence.

Judicial activism that serves the ideology of the court's majority seems to accurately describe the post-Celebrezze Ohio Court. The long term prospect of such judicial activism would seem to be more precarious. The ideology of the majority can be reversed when the majority is replaced. It is not unlikely when the majority is replaced by an insurgent former minority that the new majority would embrace a role of judicial restraint in reaction to its predecessor's activism. The majority of the Ohio Court immediately after Frank Celebrezze's defeat seemed to be poised to reject judicial activism: the new chief justice, Moyer "underst(ood) that judges are not legislators in robes"; Justice Wright had based his election campaign on opposition to the previous court's attempt to "legislate". However, that Court continues to be activist, albeit not on the Celebrezze scale. Because Justice Douglas has proven to be, at least moderately liberal in his decision making, for the present the Ohio Court can continue to play an active role, now in service to its moderately liberal majority.\(^{67}\) In this guise, the Ohio Court seems to be emulating the U.S. Supreme Court's policy making role, to make governmental policy consistently with the location of its ideological balance.

The least stable institutional activism would likely be based in the partisan political goals of its members. The judicial tenure of a politically ambitious leader is ended by both success and defeat. It is unlikely that an ambitious justice would remain

\(^{67}\) That majority was H. Brown, Resnick, Sweeney, and Douglas in 1989.
on a court very long without experiencing either the success of moving to another, higher office or failure in an attempt to make such a move. Since prompt removal of the politically ambitious justice by either is likely, the partisanship would be eliminated. Very few, if any, state high court would have another politically ambitious, potential leader in reserve. Elimination of the partisan political goal would remove activism's raison d'être. The Ohio Court's activism escaped this threat by the fortuitous compatibility of Justice with the Court's three Democratic members.

Explanation of the Ohio Court's Activism

The level of activism in the Ohio Supreme court in the period 1981-1986 was higher than it was in the succeeding five year period. The first period was marked by consistency in the Court's approach: it decided all economic activism cases in an activist direction and it decided civil liberties activism cases in a non-activist direction. The direction of the Court's decisions was determined by the Chief Justice's and the majority's political goal. The second period was inconsistent, half of the activism cases were decided in a non-activist direction and only four of the nine economic cases were decided in favor of redistribution. It is difficult to characterize the post-1986 Court as either activist or non-activist. It was divided: three justices regularly decided cases in an activist manner68 and three justices just as regularly reached a non-activist result.69

This left Democrat Herbert Brown as the swing vote. Justice Brown participated in nine

68 Douglas, Sweeney, and Resnick.

69 Moyer, Wright, and Holmes.
of the ten potentially activist, post-1986, cases and was in the majority eight times. He has been in the majority in all five of the activist decision that the court made in the years 1987-1991.

**Structure.** There were no structural changes in the Ohio Court or judicial system during the period 1981-1991. The Court had seven justices who are nominated in statewide partisan primaries and who ran for election without party designation in general judicial elections. The system had an intermediate appellate court that reduced the Supreme Court's caseload by filtering out the routine cases and allowed it considerable discretion over its docket\(^70\). The filter of an intermediate appellate court and discretion over its docket gave the Court freedom to use its available time to consider the kinds of cases it wanted to decide. This control of the court's docket created a caseload in 1986 of ninety-one pending cases for each justice that compares favorably with the caseloads of the West Virginia and Indiana caseloads of ninety-nine and one hundred forty-three, respectively, for the same year.\(^71\) Unlike the West Virginia and Indiana courts, the Chief Justice position was a separate and distinct seat on the court that is filled in a regularly recurring judicial election. The judicial elections that were held in 1980 and

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\(^70\) The Court must hear direct appeals from decisions of the state's Board of Tax Appeals and Public Utilities Commission, and trial courts in cases in which the death sentence has been ordered.

1986 for the full six year term beginning January 1, of the succeeding year were for the Chief Justice seat and were won by Frank Celebrezze and Thomas Moyer, respectively.

The structure of the Ohio judicial system with its intermediate appellate courts and the separate elections for its Chief Justice was unchanged from prior to the adoption of Ohio's Modern Courts Amendment in 1964 and was the same during the Court's traditionalist, pre-1978 election period, during the frenetic 1981-1986 period, and the following period of reduced but significant activism. The constant influence of the same structure and system on the Court's decision making negates structure as an explanation of the changes that occurred.

**Gridlock.** Unlike the Indiana and West Virginia courts, the Ohio Court, for the ten year period, was not controlled by justices who were members of one political party. The Ohio Court was dominated by Democrat members and a forceful Democratic Chief Justice during the first half of the period and had a Republican majority and a Republican Chief Justice during the latter half. Similarly, during this period the governor's office was split between the parties, a Democrat was governor for the eight years from 1983 to 1991 and a Republican was governor in 1981 and 1982 and 1991. This is unlike West Virginia where a Democrat occupied the Governor's Mansion for the entire ten year period, but is similar to Indiana where a Republican was governor for the years 1981-1988 and a Democrat was governor for the two years 1989 and 1990.
The legislature and the executive branches of Ohio's government had been divided between the two political parties for nine of the eleven years from 1981 through 1991. The Democrats had controlled the lower house of the legislature during the entire period and the Republicans had dominated the upper house during the last seven years, and had held the governor's office during the first two years. Only in 1983 and 1984 did the same political party, the Democratic, control both houses of the legislature and the governor's office. It was only during this two year period that the executive and legislative branches would have been free of partisan political deterrence to their policy making.

State-level political gridlock could have created a policy vacuum that the Celebrezze Court filled, explaining its exuberant activism, and contributing to an explanation of the continued, though lessened, activism of the later period. However, this explanation is negated by the coincidence of the unified Democratic control of the executive-legislative axis in 1983 and 1984, when the Court's activism was at its zenith. Table 1. presents the relation between gridlock in the Indiana government and activism in the Indiana Supreme Court. Partisan gridlock existed for the years 1981 and 1982, and 1985 through 1991. The gridlock and the attendant difficulty or impossibility of the level of legislative-executive cooperation that is necessary to produce policy change could have encouraged the Court to move into the vacuum with activist decision making. The Court did make a total of thirteen activist decisions during these nine years, or about one and one-half per year. However, during the two years in which the legislative-executive
machinery was controlled by the same party and was, therefore, free of partisan strife, 1983 and 1984, the Court made thirteen activist decisions, or six and one-half per year. Rather than being energized to activism by the vacuum and enervated by its lack, the Ohio Court reacted in just the opposite way. The freedom from partisan strife that could have created a favorable atmosphere for legislative-executive policy making did not deter the Court from its independent policy making in 1983 and 1984. If anything, legislative-executive unity propelled it to higher levels of activism.

Partisan elections. The two periods of differing levels of activism are not as sharply distinct in Ohio as they were in Indiana and this reduces the potential for explanation of the causes of the Court's activism by. Ohio's partisan election system is one possible explanatory factor. Hypothetically, it increased the likelihood that the justices selected would be risk takers who would be willing to try new solutions for the problems presented by the Court's cases. The greater likelihood that the political parties would produce candidates for the state's highest court greatly increased the risk that justices would have to run in a contested election over the certainty in the merit system selection system states that they would not have to. Ohio's system, although it utilizes a non-partisan general election, retains much of the partisan character of partisan systems (DuBois 1980). The partisan election selection system's production of the violently activist court of 1981-1986 promised to explain that activism. It did produce the 1981-1986 court and its leader, Chief Frank Celebrezze. However, the same system had produced the less activist court of the latter years and the even less activist courts that
preceded the 1978 election. Its influence is clearly not necessary nor sufficient, by itself, to explain the Court's varied levels of activism.


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**Leadership.** The leadership of Frank Celebrezze and his partisan political activism are more promising explanations. The variable that was absent prior to, and was present after Frank Celebrezze became the leader of the Court in 1978, was leadership that advocated activism in the service of a partisan political goal. Frank Celebrezze supplied the partisan goal, his quarter century goal to be the Democratic Governor of Ohio; he supplied the agenda in his obvious, but unannounced, platform of redistributive activism and social restraintism; and his fellow Democratic associate justices supplied their sympathetic preferences and the votes that gave their Chief his
majority. This early 1980s Ohio High Court activism demonstrates that an effective leader with a partisan activist agenda is sufficient to cause judicial activism. However, activism in Ohio during the decade 1981-1991 does not provide sufficient variation to warrant an opinion on its necessity.
The foregoing qualitative analyses have examined the Indiana, West Virginia, and Ohio supreme courts for approximately ten year periods beginning on various dates in the late 1970s or early 1980s. Each of these courts had a period of activist decision making during the period in which it was examined. This intensive study illuminated the level of activism that a particular court manifested at different times during the decade. In the Indiana Court, the activist period followed directly a period that was virtually barren of activism. In Ohio, a period of hyper-activism was followed by a period of less, though significant, activism. The Supreme Court of Appeals in West Virginia maintained a consistently high activist output during the entire decade.

The separate studies of the three courts uncovered ten factors that might have had an influence on one or more of the courts and their decisions whether to assume a policy making role in its state. These factors are enumerated in Table 6. There are three structural factors: the degree of control a court had over its docket, whether the state’s judicial system had an intermediate appellate court and whether the court’s justices were chosen by an elective or merit selection system. There were three environmental factors:
whether the state's executive and legislative law making machinery was afflicted with political gridlock, whether the court had a Democratic or Republican majority and whether the court's members were all of the same political party. Some of these factors were present and could have influenced a court during both its activist and non-activist, or less activist, periods. None of these six structural and environmental factors was present in all of the three courts during their activist periods. This investigation did reveal one factor that was present during the activist periods of all three of the courts and that was absent when activism was absent, an activist leader.

A factor that had the same influence on a court during periods of both activism and non-activism or during both strong and less strong activist periods can not explain either the existence of a court's activism or its intensity. Obviously, a constant influence can not explain both the presence and non-presence of the same condition. Similarly, the same factor can not logically explain both why a court is highly activist and why the same court becomes less active. In the three courts whose activity during the 1980s I have examined, there are several factors whose explanatory potential is negated because their effect remained constant while the level of judicial activism changed.

Structure

Intermediate appellate courts. The structural systems of two of the three courts are among such potential factors that are disqualified by their constancy. The judicial system of Indiana was three tiered during both the non-activist first half of the decade
as well as during the activist second half. As in Indiana, the intermediate appellate court remained in place, unchanged, in the Ohio system during the existence of both the activist Celebrezze court and during the subsequent, less active Moyer Court. In West Virginia there was no intermediate appellate court and the Court was activist during the entire period. The existence of the intermediate appellate can not explain, by itself, the change to activism in Indiana nor the change to reduced activism in Ohio. In combination with other factors it can perhaps contribute to such explanation.

**Mandatory appeals.** There were two structural factors that determine a court's ability to control the cases it hears and decides that demand further consideration: in Indiana the scope of the mandatory criminal appeal was reduced by the passage of Proposition 2 during the period examined and in West Virginia the Court had an unique control of its docket. Passage of Proposition 2 substantially increased the Indiana Court’s control of its docket and gave it more time to consider and devise new policy solutions for its pending cases. Theoretically, the reduced docket had potential to increase that court's activism by freeing time and effort that would otherwise have been required by deciding mandatory cases. However, the adoption of Proposition 2 can not explain the rebirth of activism in the Indiana Court. Proposition 2 did not become effective until three years after judicial activism was reborn. Furthermore, Proposition 2 only increased the court’s discretion; it did not initiate it (see fuller discussion above).

**Docket control.** The discretion that a court has to consider any case that is appealed to it is related to the degree of control that it has over its docket. The absolute
control that the West Virginia Court has over its docket is unique among state supreme courts. The other forty-nine courts are required, either by state law or constitution, to hear certain classes of cases. The necessity for Proposition 2 in Indiana emphasized the Indiana Constitutional requirement that the Indiana court had to consider most criminal appeals. Ohio law requires the Ohio Supreme Court to hear appeals from the state’s Public Utilities Commission and the Board of Tax Appeals. The coincidence of the West Virginia Court’s extraordinary activism during the late 1970s and 1980s with its unique absolute discretion during this activist decade, suggests that absolute docket control can explain that activism. However, it’s necessity is obviously negated by the constraints on the Indiana and Ohio courts’ discretion. Neither of these courts had unlimited docket control during the periods of their activism. More obviously, while the West Virginia Court’s control is unique it is not the only state supreme court to have been activist; other courts that do not have the West Virginia Court’s control, e.g. Indiana’s and Ohio’s, do make policy decisions. Nor is complete docket discretion a sufficient cause of activism. The West Virginia court had absolute control of its docket during the period antedating 1972 when it was without any claim to activist credentials. Here again, various factors of docket control may contribute to the activist decision in combination with other factors but they are not sufficient by themselves to cause the activist role decision.

Selection systems. The method by which the justices were selected in all three states, merit in Indiana and election in West Virginia and Ohio, continued unchanged
during the entire decade. The justices of the Indiana court during the 1980s were insulated from the necessity of running in a contested election in order to retain their seats. The merit system had been used to select a majority of the members of that court who served in both its activist and non-activist periods, only two of the six incumbents during the decade initially ascended by election, and even these two had been insulated from the requirement of running in a contested election by the adoption of the merit system after their initial election and before the Court’s period of activism in the 1980s.

If risk takers who are willing to engage successively in two contested elections to gain and retain a high court seat are more likely to comprise a policy making court, that likelihood can not explain court activism. Eleven of the thirteen Ohio justices who served during the decade of the 1980s and a majority of both the activist and non-activist courts had been initially selected by a partisan nominating election and non-partisan, though contested, general election. One justice who had initially been appointed\(^1\) had been required to run in a contested judicial election in 1980, before the activist period being examined began, and the other appointed justice\(^2\) had been on the Court only briefly before her defeat in the general election of 1982. The same selection system that produced the early 1980s Court with its intense activism also produced the late 1980s

\(^1\) Justice Robert Holmes.

\(^2\) Justice Blanche Krupansky. Because she served on a court with six other justices, each of whom had participated in a general election for their seats and, more significantly, because she was regularly part of the minority Republican bloc that ineffectually opposed the early 1980s Court’s activism, her non-election would have had no significant effect on the Court’s activism.
court that was significantly less active. Selection systems can contribute in combination with other variables but can not be sufficient of themselves.

Environment

Partisan division. Like the structural factors, partisan division of the Indiana and Ohio courts remained constant during the decade. In Indiana, the court was split with Republican justices being in the majority for the entire time and the Democrats being in the minority. The Ohio Court was also divided by party for the decade of the 1980s. Until 1987 Democrats controlled the court and the court had a Republican minority; during the succeeding four years Republicans had a majority and the democrats were in the minority. If the dynamism that results from partisan political division can drive an appellate court to activism, it is, nevertheless, not sufficient by itself to explain the presence, absence or level of activism in either the Indiana or Ohio Court during the 1980s. The West Virginia Court that was made up exclusively of Democratic justices during the period demonstrates that activism can co-exist with political unity.

One party control. The majority of the justices of the Indiana Supreme Court were Republicans during the non-activist early years as well as during the later activist years of the 1980s, which disqualifies Republican control as a sufficient prerequisite for activism. The inefficacy of Republican control as an explanation is reinforced by the existence of the activist behavior of the West Virginia Court that had no Republican members during its decade of activism. Nor is exclusive Democratic tenure a
satisfactory explanation. The Republican control of the Indiana Court in the late 1980s, when activism in that court reached its modern zenith as well as the Republican majority on the post-1986 Ohio Court, deny the necessity of Democratic control of the court in order that the court make policy.

_Gridlock._ Both the legislature and governor's office in West Virginia were controlled by the same political party, the Democratic, for the entire period of activism, 1977-1986, assuring that the legislative-executive law making machinery was free of the gridlock that could have created a policy vacuum. Although I have hypothesized that such a vacuum would increase the likelihood that the Court's activism would increase and its converse would decrease its policy output, the late 1970s and 1980s performance of the West Virginia Court demonstrates my hypothesis' weakness. Rather than decreasing the High Court's policy involvement, the freedom of the other branches to adopt policy coincided with high level of court activism, higher than in the immediately preceding period of divided control. The shifting partisan strengths in Indiana and Ohio reinforce the conclusion that the absence of legislative-executive gridlock does not deter a state's highest court from greater activism. In both Indiana and Ohio, the courts reached their highest level of activism during the years when both houses of the legislatures and the governors' offices were controlled by the same political party (see above for more particular consideration of the Indiana and Ohio gridlock.)
Activist Leadership

Table 12 illustrates the effects of the various factors that might have explained an activist judicial decision by the three courts during the periods of their greatest activism. In that table the variables that had some potential effect on any of the three courts are listed in the first column, and their apparent effect is indicated in the second, third and fourth columns. None, save one, was present during the activism of all three courts and, because they had this limited effect, none except that one is potentially a necessary concomitant of judicial activism. The exception is that each of the three courts had a justice who, during the periods of the respective courts activism, was a proponent of judicial activism and who was also a leader of his court. Justices Shepard, Neely and
had a justice who, during the periods of the respective courts activism, was a proponent of judicial activism and who was also a leader of his court. Justices Shepard, Neely and Celebrezze were leaders of their respective courts and each was a strong proponent of judicial activism for his court.

**Shepard.** Justice Shepard wanted his court to regain or exceed the eminence that he had found in its history and he identified the failure of the Court to make policy as an important cause of its slide. In his many and varied non-judicial, published articles he did not circumscribe the limits of acceptable judicial activism and his activist decisions on the Indiana Court were wide ranging, from tort doctrinal innovation to utility rate making. Justice Shepard’s educational background, political experience and publication record set him off from his fellow justices and qualified him as the Court’s leader. His leadership together with his written advocacy of judicial activism have given it a legitimacy that it did not have during his predecessor’s leadership of the court.

**Neely.** Justice Neely’s attachment to judicial activism seems to have had its origin with his policy interests and his confidence in the correctness of his conclusions. He observed that "the advantage which I brought to the...judicial scene was that I had the perspective of both an economist and politician rather than a lawyer (Neely 1981)." Unlike the apparent universal span of Justice Shepard’s acceptable judicial activism, Justice Neely endorsed judicial policy making only within rather narrow borders. His approval of judicial activism extended only to its use in those areas of the law that he
believed were unable to excite the interest and gain the attention of the legislature and the executive. The activist decisions he has made on the Court are correspondingly more circumscribed than Shepard's and have been generally confined to tort doctrinal innovation. Justice Neely's leadership of his court is clearly intellectual rather than social or personal. Although the liberal Democratic court majority that was elected in 1976 has carried activist decision making beyond the bounds of Neely's acceptance, the earlier activist decisions he reached on the court from 1973 to 1977, prior to the election of the liberal Democratic majority, together with his published advocacy of his activist philosophy and the popular acceptance that his books have received, established judicial activism as a legitimate, though not universally accepted, judicial role. This role was embraced by the post-1976 justices in their transcendent activist decisions.

Celebrezze. Justice Celebrezze's advocacy of judicial activism was not of activism intrinsically but rather was of specific substantive decisions that were coincidentally activist. His judicial decision making was driven by his political goal of being Governor of Ohio and by the pervasive, but unstated agenda that would advance that goal. The range of his activist decisions was truncated but not, as with that of Justice Neely, by the confines of a philosophy of activism but rather by a gubernatorial platform that counted economic activism an advantage but social activism a detriment. Unlike Justices Shepard and Neely, Justice Celebrezze did not have the advantage of a legal education at a prestigious national law school and he did not reveal any interest in judicial activism aside from its product. He was interested in the political ramifications
of his decisions and this political concern made him the leader of "his" court, the majority of which was of other Democratic justices.

Judicial activism continued in the post 1986 Ohio Court, at a lower, but still significant, level without the leadership of Frank Celebrezze. The post 1986 Court was decidedly bi-polar with the Democratic justices reaching activist decisions and three of the four Republican justices continuing the traditional non-active course. It is clear that the legitimacy that partisan political judicial activism had achieved under the leadership of Chief Justice Celebrezze survived its master in some form, at least with the Democratic justices. The addition of activist decisions in social issues cases to the economic issues cases that were the limit of the Celebrezze Court’s activism may signal a change from partisan political activism to ideological activism. Chief Justice Celebrezze interrupted the Ohio Court’s traditional jurisprudential repose to serve his political purpose and mustered a majority from his fellow Democratic justices for activist decisions in the economic issues cases. The genie of activism once freed from its master’s political bottle has expanded to serve the ideological preferences of the Court’s current majority. The influence of the activist leadership that Frank Celebrezze had on the Ohio Supreme Court has survived his defeat. It is unclear whether that affect will continue as an attribute of the Court but it appears that it will, perhaps to await a new activist leader.
Activist leadership in perspective. This three court comparative analysis has focused on activist leadership as an explanation of judicial activism, a factor that has had little attention, although Tarr and Porter (1988) discuss the importance that Justices Vanderbilt, Heflin and Traynor of the New Jersey, Alabama, and California Courts, respectively, had to certain changes in their courts. None of the variables, other than activist leader, is a potentially sufficient influence for a policy making court. All the others have been absent when at least one of the three courts was activist. See Table 6. These other variables may be sufficient in various combinations to explain judicial activism. The combination of the presence of intermediate appellate courts, political gridlock in the other branches, an elective selection system, a court that is politically divided with a democratic majority may be sufficient in combination with an activist leader. These were present and possibly moved the Ohio Court to activism. An unanimous Democratic, elected court with absolute docket control that has an activist leader was sufficient during the period of the West Virginia Court's activism. A politically divided court with an activist leader that was selected by a merit system and had a Republican majority in a state experiencing political gridlock made policy in Indiana during the late 1980s. These very different sufficient combinations of variables in just three courts illustrate the extreme hazard in concluding that any combination of factors is a necessary concomitant of judicial activism generally. Perhaps there is a model for explanation of judicial activism that is specific for each state. The second, third, and fourth columns of Table 6 provide post hoc models for West Virginia, Ohio and Indiana, respectively.
Ideology

Ideology, which has been generally credited with the drive behind activist judicial decision making, comes up short just as it did in the quantitative analysis. There was no change in the ideology of the Indiana Court at the time of the advent of that court's modern activism and the Court's constant ideological tenor necessarily disqualifies ideology as a sufficient condition for the activism the Indiana Court manifested. The only change in the personnel of the Court at about the time of the advent of activism was the replacement of Republican Justice Hunter, who had regularly joined Democrat DeBruler in registering activist dissents during his tenure on the Court, by Republican Justice Shepard, who had a background of service in national and local Republican politics. If there was a change in the ideological balance of the Court it would seem to have been toward the right, rather than to the left and would have predicted continued, if not diminished, activism rather than an activist revival. Further evidence that ideology should be discounted can be found in Ohio. It is an unsatisfactory explanation for the different levels of activism in Ohio in social and economic cases during the first half of the 1980s. The Ohio Court at that time had an ideological balance yet it was decidedly activist in making its pro-underdog economic decisions but it was decidedly non-activist in making its decisions in social issue cases.

Summary

All three courts were led to activist decision making by a justice who was determined that his court would reach activist decisions. There is nothing in this study
that falsifies the hypothesis that as a court has a leader who is dedicated to making activist decisions that court's activism increases. Nor is there anything that existed or occurred in the three courts that contradicts the hypothesis that a state high court that has an activist leader will be an activist court. This should not be misunderstood to suggest that an activist leader assures that a court will decide each case it considers in an activist manner. It does not. A determination of the level of activist decisions that a court must reach in order to be described as "activist" is beyond the purview of this study. A view of these courts at their most active convinces me that it is less than one-hundred percent. It should not be misunderstood to suggest that the leader will decide to make judicial policy in every case in which it is possible. It does not. In Indiana, despite Justice's Shepard's activist leadership, and with his vote, the Court decided against creating a cause of action for a child's loss of its parent's consortium. Nor should it be misunderstood that a court with an activist leader will always agree with its leader. It has been shown that a majority of the court may decide for activism in a particular case although its activist leader opposes such decision. In West Virginia a majority decided to invalidate the state's public school funding structure although Justice Neely favored continuation of the legislative plan and registered his disagreement in a written dissenting opinion. In Ohio the court overruled the common law disqualification of a spouse's testimony in criminal trials although Chief Justice Celebrezze opposed it with a strongly worded opinion. This three court study provides strong evidence of the importance of activist judicial leadership. It can not prove that activist leadership is a necessary condition for judicial policy making in all courts, at all times, and in all kinds of cases.
but it does show that activist judicial leadership must be accounted for in any study that would claim to explain the determinants of judicial assumption of a policy making role.

The effect of an activist leader on a court seems to be to legitimate the activist decision and to make it acceptable for the other justices to decide in an activist way if it represents their preference. It makes judicial activism an acceptable alternative to deference to the state legislature or to judicially established doctrine. Further examination of individual state supreme courts will further clarify the role of activist leadership.
CHAPTER VIII

WHAT WE DID - WHERE WE GO FROM HERE

What others have done

In the serious studies of judicial decision making that were interested in the substantively activist decisions, no attempt was made to explain the possible causes of judicial activism generally, i.e. without reference to the specific characteristics of the kind of case being analyzed. In other words, to explain the decision of a court to make an activist decision. Causation was addressed only incidentally to an explanation of the specific substantive activist decisions in the narrow issue areas: exclusionary zoning, trust doctrine, educational financing. The earlier studies were not undertaken for the purpose of determining the general causes of judicial activism nor could they have produced a clear picture of these general determinants. Since their purposes were limited to explaining narrow issue areas their investigations were colored by specific characteristics of these areas and their conclusions were similarly contaminated. These studies utilized variables and explanatory models that illuminated the determinants of the specific activist result in the respective narrow issue areas. Their models were different depending on the particular characteristics of the legal issue and their explanations were specific. It may be that different models are necessary to explain the preliminary role decision in cases with different legal issues. See my speculation in Chapter III. Regardless, there was no serious support in any of the pre-existent studies for any general over-arching
explanatory model or generally applicable variable, except the pervasively mentioned ideology.

In both my quantitative and qualitative analyses I have attempted to identify the causes of the preliminary role decision generally, across legal issue areas. No attempt was made to design quantitative models that would include particular variables that were related narrowly to the specific legal issues in the cases from the seven legal issue areas. For example, it would have been possible to include variables such as "justice who had taught school" or "justice who had been a personal injury lawyer" or "justice who had been a member of the Sierra Club". These kinds of variables were not included because these narrow variables would have been applicable to only one or, at most, a few of the seven issue areas, they would have had slight chance to prove generally important, their presence would have resulted in over-specification of the models and would have introduced only statistical confusion into the analysis. Such variables would also not have been consistent with either of my theoretical models and they were not suggested by earlier studies of judicial decision making. The focus on the preliminary role decision was maintained in the three court study. Particular factors that were narrowly related to the legal issue of the case were disregarded.

What I Have Contributed

Because this study assiduously avoided deviation from the use of only general variables it is distinct from studies that have gone before. The influence of the general
variables was not confounded by the effect of specific variables. Unfortunately, in the regression analyses few of these general variables reached traditional statistical significance and, of those that did, fewer still were substantively significant. However, we can be reasonably sure that the variables that were both statistically and substantively significant have importance in the explanation of the judicial role decision. Among these important variables are LEGISLATIVE SESSION and NATIONAL LEGAL EDUCATION. The encouraging performance of these two variables warrants further investigation in order to determine whether they can be advantageously combined with other undefined variables in theoretically based models that can further illuminate the activist role decision generally.

Although my efforts have not produced a model that makes even a modest start at explaining the general role decision, just as we can be confident that variables that did perform well do have explanatory importance, we can also be confident that the statistical and substantive inefficacy of the disappointing variables reflects their actual explanatory power. These variables can assuredly be assigned to the trash heap and safely ignored in future efforts. IDEOLOGY is such a variable that can be confidently discarded. The pervasive assumption that a court's ideology drives its activism decision magnifies the importance of the failure of the IDEOLOGY variable across time and issue areas to achieve either statistical or substantive significance. This failure makes it possible to eliminate ideology from future consideration. The negation of the force of ideology in the qualitative examinations of the Shepard Indiana Court, the Neely West Virginia court,
and the Celebrezze Ohio Court confirms the statistical evidence of ideology's inefficacy in this judicial process. A court's ideology, if fairly measured and tested, is unimportant in its decision whether or not to embrace an activist role.

The regular reinforcement of the assumption that ideology is important in the explanation of this decision may make it difficult to accept the unequivocal evidence of both the quantitative and qualitative studies. A consideration of the forces behind the same activist decision when made by states' governors may make it more palatable. Activist governors make decisions that change the established policies. These activist governors alter the policy course of their states because they believe that their office requires them to direct their states' governments along the best possible course, as they see such course. The force that drives the gubernatorial decision to assume an activist role is the inherent belief in the propriety of gubernatorial activism (Van Horn 1992). The manifestation of that activism may be properly described as liberal if a governor's preferred substantive course requires liberal decisions or it may be described as conservative. Regardless, we do not assume that the governors' liberalism or their conservatism impels them to be activist although we may assume that the substantive manifestation of the activism has an ideological explanation.

Although, at present, it seems natural to describe governors as activist, a governor could look at the governor's role as that of a caretaker, in which case the governor's role decision would be non-activist. It is not difficult to accept that the force that drives the
decision to assume or reject the activist role is the governor’s belief in the propriety of that role, not the governor’s inherent ideology. Our comfort in understanding gubernatorial role decisions and our uneasiness with the evidence that judicial role decisions are made in the same way probably results from a lingering belief that while the activist role is the traditional role for governors, judicial adoption of that role is unconventional. Regardless, there is no apparent reason to assume that courts are driven to activism by the force of their ideology while governors, when making the same decision, are not.

We should not waste any substantial time or serious effort on the ideology of the court in future analysis of judicial activism. The courts are driven to assume or reject the activist role by a force or forces other than their predominant ideology. The conservative/moderate, Shepard-led Indiana Court as well as West Virginia’s liberal Neely led court together with the liberal/populist, Celebrezze-dominated Ohio Court can be elevated together to the pantheon of judicial activism.

In my qualitative analysis of the decisions of the supreme courts of Indiana, West Virginia, and Ohio I also sought a general explanation of the activist decision that is unaffected by particular characteristics of narrow issue areas. I was interested in and sought factors that could explain why the court accepted or rejected the activist role and ignored factors that would explain only a decision in the substantive issue area of the case. The factors that I concluded had explanatory potential are enumerated in Table 12,
Only one of these factors promised considerable power. The quantitative evaluation of judicial decisions by legal issue area suggested the possibility that there was a distinct explanatory model for each legal issue area (see Chapter III). The three court qualitative analysis suggests that there may be a different model for each state.

However, along with the different arrays of factors that could have combined to cause the decisions in each of the three states my qualitative exercise did produce one variable, activist leadership, that was present during the activist period in each state and was absent during periods when the court was less or non-activist. I confidently conclude that activist leadership is an important explanatory variable of the activist judicial decision and that it requires consideration in any attempt to understand the judicial role decision.

My conclusion that the presence of a justice who combines court leadership with advocacy of judicial activism on a court is bolstered by the satisfactory statistical performance of the NATIONAL LEGAL EDUCATION variable across the three decades and the seven issue areas in the statistical analysis. These quantitative results support my conclusion that activist leadership is an important explanatory factor. Two of the three activist leaders who were identified in the individual studies were graduates of national law schools. Their legal educations distinguished them from their high court brethren. The prestige of these schools and the veneration that they inspire in lawyers who have graduated from other law schools would encourage their graduates to assume
court leadership roles. Although the complexity of the activist judicial leadership concept precludes a quantitative operationalization, if such quantitative reduction were possible, the legal educational background of the members of the court would be a prominent component of any statistical model. Activist leadership is the most important explanatory factor of the judicial activist role decision that was isolated by this study and together with the negation of the assumed importance of ideology are two solid foundations for further studies of state supreme court activism.

Where We Are

It is clear that a general explanation will not be found in the attributes that enhance the power of courts to make policy decisions. The power model performed poorly in all its applications. Factors that describe the opportunity of the courts relative to the opportunity of the state legislatures are slightly more promising. However, overall, the performance of the opportunity model was only slightly better than the power model, but its performance with cases from the 1970s and with cases dealing with the doctrine of charitable immunity were two bright spots in this study. In particular circumstances state supreme courts do consider the relative opportunity that the state legislature has to decide the same policy question when deciding which role to assume. It was an important consideration for the state high courts that were faced with a demand that they abrogate the common law doctrine of charitable immunity.
Perhaps these courts were reacting to reports of the high and escalating costs of the lobbying contests in the state legislatures between alliances of powerful interest groups and the possible deadlock of these contests. Too, they may have been reacting to their own sense of the impropriety of this unseemly activity in the legislatures over an issue that had its inception in judicial doctrine and took the opportunity they had to settle it where it belonged. Whether or not these explanations are persuasive, the relative opportunity of state supreme courts and state legislatures to decide policy questions is a relationship that promises some explanation of the courts’ decision to become activist.

Toward a Fuller Explanation

Although the results from my quantitative study were spare, they do enable us to narrow the search by discarding a court’s ideology. The marginally more encouraging result from the more narrowly defined subset of cases, e.g. the 1970s and the charitable immunity cases, strengthens an observation that I made earlier that explanations may be specific to legal issue areas. Pursuit of explanation can perhaps be profitably made with sets of cases limited to narrower time periods and from other specific issue areas. I do not intend to imply by this that we should be satisfied with explanations of the role decision that rest on variables that are tailored to specific issue areas nor that we should be satisfied with explanations of judicial role decisions that depend on variables that are narrowly temporally defined. Rather, I suggest that it may be possible to model theoretical explanation of the activist judicial decisions within the narrower subsets of cases. After the works of Harrison, Lawler and Parle, and Swinford we know that
specific substantive activist decisions can be successfully explained. Nothing of importance would be added by repeating their efforts in different substantive areas and narrower time periods. However, more restricted study might enable us to begin to understand the factors that contribute to the preliminary activist decision.

Any pursuit of the explanation of the activist decision, whether limited temporally or substantively or of a broader scope, must include an examination of the power of activist judicial leadership. Because it is impossible to define this factor for quantitative evaluation, a qualitative component of any such study will be necessary. Ideally, the qualitative study would be coextensive with the subset of cases being quantitatively analyzed. An identification of activist leaders of the states' high courts for a decade would be arduous but not prohibitive. An identification of activist judicial leaders by substantive area might be thought to be impractical but if a temporally limited study were undertaken first, its fruits could flow into the needs of the analysis of substantively limited cases. However its done, the probable prominence of judicial activist leadership can not be ignored.
LIST OF REFERENCES


