

September 1986

Policy Activism in the West Virginia Supreme Court of Appeals, 1930-1985

John Patrick Hagan
West Virginia University

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Courts Commons](#)

Recommended Citation

John P. Hagan, *Policy Activism in the West Virginia Supreme Court of Appeals, 1930-1985*, 89 W. Va. L. Rev. (1986).

Available at: <https://researchrepository.wvu.edu/wvlr/vol89/iss1/6>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

POLICY ACTIVISM IN THE WEST VIRGINIA SUPREME COURT OF APPEALS, 1930-1985

JOHN PATRICK HAGAN*

I. INTRODUCTION

Over the past decade, the philosophical direction of the West Virginia Supreme Court of Appeals has become a subject of significant debate and controversy in state politics. This level of visibility is unusual for appellate courts in general, and it is certainly atypical for most state courts. The high profile is especially unusual in this state because the court has traditionally had a reputation for institutional conservatism and passivity in matters of public policy. Two recently developed indices of "judicial innovation" support this characterization. Between 1945 and 1975, the court ranked among the least active and least progressive state supreme courts in the nation.¹

However, since 1976, the court has attained a reputation for dramatic intervention in public policy disputes. Herb Little's analysis of the court's output patterns in 1984 captured what is probably the present consensus of opinion within the state. "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—social welfare, education, criminal law, women's rights, consumerism, and relations between state government's judicial, legislative and executive branches."² Correspondingly, the court's "Judicial Innovation" rank has moved upward.

In order to understand the depth of change in West Virginia's court, some background information is necessary. The West Virginia Supreme Court of Appeals is an elected court, composed of five members serving twelve-year terms. Traditionally, supreme court elections have been largely invisible affairs, characterized

*Assistant Professor of Political Science, West Virginia University; B.A., 1976 West Virginia University; J.D., 1979, West Virginia University; M.A., 1982, University of North Carolina; Ph.D., 1986, University of North Carolina. Posthumously edited by James H. Falk, Jr.

The author wishes to gratefully acknowledge the comments and suggestions of several persons who read and commented upon an earlier version of this paper that was presented at the 1985 Meeting of the West Virginia Political Science Association. They include Mr. Peter Kalis, Esq. of the firm of Kirkpatrick & Lockhart, Professors Richard J. Richardson and Thad Beyle of the University of North Carolina, Professor David Bingham of West Virginia University, and Hon. Darrell V. McGraw, Jr. of the West Virginia Supreme Court of Appeals. The opinions and conclusions expressed in this article, along with any errors of fact or interpretation, rest solely with the author.

¹ Canon & Baum, *Patterns of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975 (1981); Baum & Canon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 83 (1982). Both rankings are based upon overall trends in the adoption of modern tort law innovations between 1945 and 1975. The 1982 ranking places the West Virginia court in a tie for fortieth position among the fifty state supreme courts. In the somewhat more sophisticated and statistically complex 1981 index, West Virginia ranks forty-sixth among the fifty states.

² Charleston Gazette, Jan. 1, 1984, at 1B, col. 5.

primarily by incumbent justices winning uncontested reelection to office.³ Additionally, replacements for judicial vacancies have frequently been a matter disposed of by interim gubernatorial appointments.⁴ Thereafter, the appointee runs for reelection at a subsequent regular election.⁵ This mode of recruitment has been a dominant facet of the West Virginia court in modern history. From 1932 until the 1972 general election, only two justices came to the court by way of election.⁶

The increased "activism" of the court in the 1970s and 1980s developed in part as the result of two distinct phenomena. First, at a general level, there was a noticeable change in the tone of state politics during the 1960s and 1970s. One commentator speaks in terms of a "reform movement" spreading through West Virginia in the wake of the 1960 Presidential election campaign. In his view, numerous changes flowed from the lavish attention gained from John Kennedy's focus on the state during the primary campaign. "The miners and their friends... staged the great Black Lung revolt, wringing concessions from a reluctant state legislature. The same reform movement . . . propelled a straightforward and utterly honest veteran of 27 years service in the West Virginia mines, Arnold Miller, to the presidency of the decadent United Mine Workers (UMW). Finally, there [was] the emergence of reform-minded political leaders like John D. (Jay) Rockefeller IV, Congressman Ken Hechler, and the late House Speaker Ivor Bioarsky."⁷

The "reform movement" in state politics manifested itself on several fronts. A rising tide of pro-environmentalism crested during the 1970s. Increasing re-

³ Judicial elections have often been characterized as inherently invisible affairs, lacking the public salience of elections for other offices. *See, e.g.,* Burnett, *Observations on the Direct-Election Method of Judicial Selection*, 44 TEX. L. REV. 1098 (1966); Johnson, Shaefer, & McKnight, *Salience of Judicial Candidates and Elections*, 59 SOC. SCI. Q. 371 (1978). Recent analysis suggests, however, that judicial elections may generate levels of voter awareness and participation comparable with other offices—provided the voters are given meaningful choices and meaningful voting cues. *See generally* Adamany & Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731 (1976); Atkins, *Judicial Elections: What the Evidence Shows*, 50 FLA. BAR J. 152 (1976); Barber, *Ohio Judicial Elections-Nonpartisan Premises with Partisan Results*, 32 OHIO STATE L.J. 762 (1971); Ladinsky & Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128 (1967); *See also* P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980).

⁴ As is the case in most states with elected court systems, a large proportion of judicial vacancies arise due to retirements between elections.

⁵ Herndon, *Appointment as a Means of Initial Accession to Elective State Courts of Last Resort*, 38 N.D.L. REV. 60 (1962) was the first effort to systematically document the extent to which "elected" state courts were actually dominated by members who gained their seats by gubernatorial appointment. His analysis revealed that more than half of all justices then sitting on elected state supreme courts initially gained their positions through interim appointment.

⁶ From 1932 until the 1972 general election, eleven new justices joined the court at various times. Only Justices Calhoun and Berry came by way of popular election, both in 1958. The other nine were appointed to the court.

⁷ N. PEIRCE, THE BORDER SOUTH STATES: PEOPLE, POLITICS, AND POWER IN THE FIVE BORDER SOUTH STATES 151 (1975).

sentment of low levels of taxation imposed upon non-resident corporate landholders resulted in a backlash against local politicians and demands for better schools and government services. The strong reform movement in the United Mine Workers signaled a new push for pro-union and pro-labor public policy. The overt movement of the UMW into reform politics was manifested most clearly by the creation of the Coal Miners Political Action Committee (COMPAC) in 1973. "Funded on contributions from the UMW membership, COMPAC was created to lobby for specific legislation and help candidates friendly to the union's views win office."⁸

The second critical component lies with the governorship of Arch Moore. Elected to office in 1968, Moore, a Republican, served two successive terms as Governor from 1969 through 1976. During the first term, he had the opportunity to name five appointees to the West Virginia Supreme Court of Appeals. However, West Virginia politics during this period was dominated at the statewide level by the Democratic party. Thus, Moore's appointees (all Republicans) became especially vulnerable to electoral challenge. Moore's first two appointees (John Carrigan and Oliver Kessel) were defeated in 1972 by Democratic challengers Richard Neely and James Sprouse. Justice Sprouse resigned three years later to seek the Democratic nomination for Governor. He was unsuccessful in that venture (losing to John D. "Jay" Rockefeller), but was subsequently appointed to a seat on the United States Court of Appeals for the Fourth Circuit by President Carter. His appointed replacement on the West Virginia Supreme Court of Appeals (Edwin Flowers), along with another Moore appointee (Donald Wilson) faced reelection in 1976.⁹ Together with the seat of retiring Democrat Thornton Berry, this placed three of the court's five seats on the line in the 1976 election.

The 1976 West Virginia Supreme Court of Appeals election thus occurred in a unique context. The combination of an underlying liberal "reform movement" in state electoral politics combined with the anomaly of incumbent Republican appointees essentially guaranteed the ascension of elected "reform" Democrats to the court. The addition of strong Democrats at the top of the ticket (Jay Rockefeller and Jimmy Carter, both strong winners) only served to increase the probability of a dramatic shift in the court's membership. The open seat and both incumbent seats were taken by three Democratic challengers: Sam Harshbarger, Darrell McGraw, and Thomas Miller. Suddenly, the court, which had witnessed the ascension of only two elected judges in thirty years, now had four originally elected members.¹⁰

⁸ *Id.* at 176.

⁹ The fifth Moore appointee, Charles Haden, took office in 1972 and resigned in 1975 to accept a federal district court appointment. He was replaced on the court by Justice Wilson.

¹⁰ Democrat Richard Neely had come to the bench in 1973 as a result of his victory in the 1972 election. In retrospect, Justice Neely's ascension to the court must be considered a primary catalyst in the court's transition to a more active role in the public policy process. An examination of his early opinions together with his subsequent writings, *See, e.g.,* R. NEELY, *HOW COURTS GOVERN AMERICA* (1981); R. NEELY, *WHY COURTS DON'T WORK* (1983), reveals a style that is markedly different

II. SCOPE OF ANALYSIS

Since 1976, the West Virginia Supreme Court of Appeals has issued a number of significant, far-reaching, and controversial rulings. In the areas of tort and workmen's compensation law, the court has pushed aggressively to move state law in a predominately pro-plaintiff/pro-claimant direction.¹¹ This trend has not gone unnoticed (nor has it gone uncriticized),¹² but there is little debate that the court's overall impact in these areas has been to push West Virginia law in the direction of general national trends.¹³

At a more basic level, there is a common perception that the "tone" of the court has changed since 1976. The court's decisions strike many observers as being more overtly "policy-oriented" than in the past, and occasional public disputes among the justices (most often in the form of separate concurring or dissenting opinions) give the impression of disagreement about the court's fundamental role in the political system.¹⁴ In some of the more dramatic instances of policy in-

from the traditional legalistic tone of his predecessors on the Court—strong doses of history, sociology, and economics laced throughout opinions which present arguments primarily from the realm of public policy and political philosophy. *See, e.g.*, Justice Neely's opinion for the court in *Citizens Bank of Weirton v. West Virginia Bd. of Banking and Fin. Inst.*, 160 W. Va. 220, 226-31, 233 S.E.2d 719, 724-27 (1977), wherein he discusses the policy impact of judicial intervention in the administrative decisionmaking process.

¹¹ *See, e.g.*, *Mandoldis v. Elkins Indus. Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978), (defining "willful, intentional, or deliberate conduct" under the Workmen's Compensation Act permitting tort action in the presence of such conduct); and *Powell v. State Workmen's Comp. Comm'r.*, 273 S.E.2d 832 (W. Va. 1980) (ruling that cancer may qualify as an occupational disease compensable under the Workmen's Compensation Act). In the area of tort law, the court's newfound innovativeness is illustrated in cases such as *Morningstar v. Black and Decker Manufacturing Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979); and *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979). In *Bradley*, the court adopted a modified form of "comparative negligence," overruling prior cases which had followed the traditional position that contributory negligence serves as a bar to recovery in tort. In *Morningstar*, the court adopted the rule of "strict liability" in defective products cases. On a more fundamental level, the court also used the case to specifically declare that constitutional considerations (W. VA. CONST. art. VIII, § 13) do not act as a bar against the court's ability to modify common law principles by judicial decision.

¹² *See, e.g.*, Flannery, Beeson, Bradley & Goddard, *The Expanding Role of the West Virginia Supreme Court of Appeals in the Review of Workmen's Compensation Appeals*, 81 W. VA. L. REV. 1 (1978).

¹³ Baum & Canon, *supra* note 1.

¹⁴ Justice Neely, for instance, has broken openly with the court's rulings in several areas. *See, e.g.*, his dissenting opinions in *State ex rel. Kanawha County Bd. of Educ. v. Rockefeller*, 281 S.E.2d 131 (W. Va. 1981) [hereinafter cited as *Kanawha County*] and *Killen v. Logan County Comm'n.*, 295 S.E.2d 689 (W. Va. 1982). In the *Kanawha County* case, Justice Neely chastised the court's majority for deciding a nonjusticiable "political question" (validity of a gubernatorial veto involving state public education funding). He cited numerous cases in defense of his position, the noted "I recognize that all these cases were written prior to 1977, the 'A.D.' of West Virginia judicial history; however, I include them to add the appearance of authority to this opinion" (*Kanawha County*, 281 S.E. 2d at 140 (Neely, J., dissenting)).

tervention, the post-1976 court has declared the state's system of property tax-based public school financing to be unconstitutional;¹⁵ ordered a comprehensive restructuring of the state property tax assessment and appraisal system;¹⁶ barred direct legislative review of agency rule-making activities on the basis of separation-of-powers considerations;¹⁷ ordered the State Departments of Health and Welfare to institute community based alcoholism/detoxification programs and emergency food/shelter/medical care programs;¹⁸ and, invalidated a gubernatorial veto in order to protect funding of a constitutionally mandated governmental program (public education).¹⁹

It is not the purpose of this article to evaluate the "tone" of the current West Virginia Supreme Court of Appeals, nor is it the purpose to discuss the importance of specific rulings handed down by the court. All appellate courts manifest some level of disagreement among the justices. Similarly, all state supreme courts hand down some proportion of "significant" or "controversial" rulings. The nature of appellate court decision-making is to resolve problematic issues and to deal with developing legal problems; inevitably, some such decisions will be attacked as unwarranted or "activist."²⁰

¹⁵ Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979).

¹⁶ Killen, 295 S.E.2d 689.

¹⁷ State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981).

¹⁸ McGraw v. Hansbarger, 301 S.E.2d 848 (W. Va. 1983); Hodge v. Ginsberg, 303 S.E.2d 245 (W. Va. 1983).

¹⁹ Kanawha County, 281 S.E.2d 131.

²⁰ Any attempt to compile a list of the court's most "significant" or "controversial" post-1976 decisions is inherently plagued by the problems of subjective appraisal and imprecise definition. However, there are some indicators that certain cases during this period have attained objectively "special" status. The editors of the *American Law Reports* have selected over twenty of the court's decisions from this period as the subject of full case annotations. In addition to several of the cases already cited (i.e., *Mandolidis*, 161 W. Va. 695, 246 S.E.2d 907; *Powell*, 273 S.E.2d 832; and *Killen* 295 S.E.2d 689), these include *Murredu v. Murredu*, 160 W. Va. 610, 236 S.E.2d 452 (1977); Annot., 98 A.L.R. 3d 1146 (1980) (child support); *Committee on Legal Ethics v. Pence*, 161 W. Va. 240, 240 S.E.2d 668 (1977); Annot., 93 A.L.R. 3d 1057 (1979) (defense of delay in disciplinary proceedings); *Hendershot v. Handlan*, 162 W. Va. 175, 248 S.E.2d 273 (1978); Annot., 7 A.L.R. 4th 893 (1981) (non-party court order violations); *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979); Annot., 16 A.L.R. 4th 1356 (1982) (prejudice to witness testifying in prison attire); *Tug Valley Recovery Center v. Mingo County Comm'n*, 164 W. Va. 94, 261 S.E.2d 165 (1979); Annot., 9 A.L.R. 4th 428 (1981) (taxpayer standing); *Dierkes v. Dierkes*, 165 W. Va. 425, 268 S.E.2d 142 (1980); Annot., 17 A.L.R. 4th 1153 (1982) (remarriage and the prior divorce decree); *State v. Moore*, 165 W. Va. 837, 273 S.E.2d 821 (1980); Annot., 19 A.L.R. 4th 959 (1983) (false pretences); *State ex rel. J.M. v. Taylor*, 276 S.E.2d 199 (W. Va. 1981); Annot., 25 A.L.R. 4th 1072 (1983) (minor's waiver of council); *Farley v. Zapata Coal Corp.*, 281 S.E.2d 238 (W. Va. 1981); Annot., 20 A.L.R. 4th 1268 (1983) (fringe benefits and mechanic's liens); *West v. National Mines Corp.*, 285 S.E.2d 670 (W. Va. 1981); Annot., 25 A.L.R. 4th 1192 (1983) (property damage from dust); *State v. Beck*, 286 S.E.2d 234 (W. Va. 1981); Annot., 31 A.L.R. 4th 120 (1984) (corroboration testimony of victim's testimony in sex offense); *State ex rel. Walker v. Giardina*, 294 S.E.2d 900 (W. Va. 1982); Annot., 36 A.L.R. 4th 978 (1985) (contempt); *Flannery v. United States*, 297 S.E.2d 433 (W. Va. 1982), cert. denied, 467 U.S. 1226 (1984); Annot., 34 A.L.R. 4th 281 (1984) (loss of capacity to enjoy life); *In*

This paper will examine aggregate patterns of policy output from the West Virginia Supreme Court of Appeals in historical context. The analysis here is based upon a random sample (10%) of all decisions handed down by the court from 1930 through 1985 (the sample was taken from all signed and per curiam opinions; summary orders and memoranda are excluded from analysis). This sample comprises a representative pool of all cases, unanimously and nonunanimously decided, for all case-types and legal subfields, across the duration of the fifty-six year period of analysis. [The sample of cases was obtained by use of the state court index in each volume of West Publishing Company's *Southeastern Reports*.]

For purposes of the present analysis, several types of information were obtained for each case included in the study. These include the subject area of the case (e.g., Property/Contract, Tort, Workmen's Compensation, Criminal Appeal/Habeas Corpus, Administrative Appeal, etc.); the direction of the court's ruling (in areas with a clear ideological or policy-related cleavage); the vote breakdown (with unanimous versus nonunanimous being the primary consideration at this point); and whether the decision is "activist" or "non-activist" (together with the basis for classification; see the following section for the operational definition of "judicial activism"). This combination of information allows for description and analysis of activism patterns in terms of court membership, dissent patterns, substantive policy areas, and interest favored. At the most fundamental level, it permits comparison of policy activism levels, subjects, and directions of the present West Virginia Supreme Court of Appeals with figures from prior decades.

III. EMPIRICAL ANALYSIS OF "JUDICIAL ACTIVISM"

Attempting to measure "judicial activism" is inherently problematic because no single definition fully explains the concept. There are, however, certain recurring components of the concept which seem to enjoy substantial consensus among commentators.²¹ Two general criteria for "judicial activism" recur

re Teubert, 298 S.E.2d 456 (W. Va. 1982); Annot., 37 A.L.R. 4th 528 (1985) (holographic will); Nelson v. West Virginia Pub. Employees Ins. Bd., 300 S.E.2d 86 (W. Va. 1982); Annot., 34 A.L.R. 4th 457 (1984) (attorneys' fees in mandamus); State v. Oldaker, 304 S.E. 2d 843 (W. Va. 1983); Annot., 31 A.L.R. 4th 798 (1984) (expert testimony and modus operandi). Additional lists of "significant" cases decided during the post-1976 period are provided in compilations such as Miller and Zak, *Noteworthy Decisions of the Supreme Court, 1977-1980*, 6 W. VA. ST. B.J. 18 (1980); and in the annual *Survey of Developments in West Virginia Law* published in the W. VA. L. REV..

²¹ Several writers point to the expansion of litigant standing, together with the movement into arguably "advisory opinions" and "political questions" as activist trends, e.g., Lamb, *Judicial Restraint on the Supreme Court*, in SUPREME COURT ACTIVISM AND RESTRAINT 7 (1982); Schick, *Judicial Activism on the Supreme Court*, in SUPREME COURT ACTIVISM AND RESTRAINT 37 (1982). Other observers stress a focus on "result orientation" and the use of judicial rulings to accomplish overt shifts in the direction of public policy. (e.g., Abraham, *Line-Drawing Between Judicial Activism and Restraint: A 'Centrist' Approach*, in SUPREME COURT ACTIVISM AND RESTRAINT 201 (1982); See also R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977);

throughout both public and academic discussion: (1) a lack of judicial deference to other branches of government and, (2) a lack of proper respect for judicial precedent and the principle of "stare decisis."²² These two dimensions embody what is basically a separation-of-powers perspective, defining activism by reference to express policymaking in the face of contrary policy from other branches.²³

A. COS, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976); D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

The difficulty with the use of criteria such as these for purposes of social science analysis is that they are impossible to meaningfully define in any empirical sense. In part, the problem does reflect real differences of opinion over the proper boundaries of judicial power. More generally, however, disagreement tends to intensify when "real world" judicial rulings must be identified as falling in or out of the "judicial activism" designation.

Whether a specific litigant has standing to raise an issue in court under traditional standards, whether a dispute presents a concrete "case" as opposed to what is effectively a request for an advisory opinion, whether a set of issues in a legal controversy are so "political" that judicial resolution is inappropriate—these are not questions which lend themselves to simple and objective "yes" or "no" answers. Instead, the answers to such questions will inevitably be based upon an inherently subjective appraisal of law and facts, and upon a personal judgment about where to draw the line between "applying" or "extending" the law, and "changing" it.

²² See generally Novak, *Economic Activism and Restraint*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 77 (1982); See also Lamb, *supra* note 21 and Abraham, *supra* note 21.

²³ Many scholars have based work upon the overruling of other branches of government, especially the invalidation of legislation, e.g., Caldeira and McCrone, *Of Time and Judicial Activism: A Study of the U.S. Supreme Court, 1800-1973*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 103 (1982); Champagne and Nagel, *The Advocates of Restraint: Holmes, Brandeis, Stone, and Frankfurter*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 303 (1982). They also have based works upon rulings against other governmental actors more generally, e.g., Spaeth & Teger, *Activism and Restraint: A Cloak for the Justices' Policy Preferences*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 277 (1982); Canon, *A Framework for the Analysis of Judicial Activism*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 385 (1982); Baar, *Judicial Activism in State Courts: The Inherent Powers Doctrine*, in *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* 129 (1982); H. GLICK & K. VINES, *STATE COURT SYSTEMS* 89-105 (1973); See also G. SCHUBERT, *THE JUDICIAL MIND: ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946-1963* 97-157 (1965); See generally R. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES* 155-64 (1967); Adamany, *Legitimacy, Realignment Elections, and the Supreme Court*, 1973 *WIS. L. REV.* 790 (1973); Casper, *The Supreme Court and National Policy Making*, 70 *AM. POL. SCI. REV.* 50 (1976).

A more recent development is the willingness of scholars in this area to examine policymaking by courts in the absence of action by other actors in the governmental process. See, e.g., Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquires for a New Situation*, in *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* 3 (1982); see also Becker, *Survey Study of Hawaiian Judges: The Effect on Decisions of Judicial Role Variations*, 60 *AM. POL. SCI. REV.* 677 (1964); Groot, *The Effects of an Intermediate Appellate Court on the Supreme Court Work Product: The North Carolina Experience*, 7 *WAKE FOREST L. REV.* 548 (1971); Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts*, 76 *MICH. L. REV.* 961 (1978); Laitos, *The Social and Economic Roots of Judge-Made Air Pollution Policy in Wisconsin*, 58 *MARQ. L. REV.* 465 (1975). These types of analyses rely upon the overruling of precedent and/or the creation of new legal principles as evidence of judicial policymaking. See also Canon & Baum, *supra* note 1; and Baum & Canon, *supra* note 1, for use of this basic concept as a measure of judicial "innovation."

In the present analysis, "judicial activism" is measured as the proportion of total decisions issued during any specified period which have an "activist" outcome. Each case in the study sample has been coded based upon a dichotomy of "activist" versus "non-activist." Reflecting the two dimensions of judicial policy-making discussed above, criteria for classifying any case as activist are as follows: (1) *any case ruling against a non-judicial governmental actor on grounds of state law; and (2) any case expressly overruling, disapproving, or discarding state law precedent.* Any case which does not fall within either of these two categories has been coded as non-activist.

The first category of "activist" cases covers judicial nullification of any governmental policy on state grounds, as well as all cases in which a state or local governmental actor is party to a case and receives an adverse ruling from the court. In each of these case-types, whether rightly or wrongly, the court refused to accept the legal position of another branch of government, thus displaying a lack of "deference to the other branches" and a willingness to "substitute the judgment of the court."²⁴

Under the second criterion for "activism," a case has been coded as activist if the court expressly abandoned precedent in favor of a new rule (as long as the

²⁴ Novak, *supra* note 22. Several points regarding this first category of activist cases should be explicitly noted. First, any case involving a dispute between two non-judicial governmental actors will inherently result in an "activist" outcome regardless of how the court rules—once the court does in fact accept the case for judicial resolution.

Second, no case involving application of federal rulings to state actors will be coded as activist. Even though such rulings will operate against a governmental actor, the state court will be presumed to be acting in reference to the federal judiciary rather than in reference to other state actors. The reaction of state courts to federal court directives is a fruitful subject for analysis, e.g., G. A. TARR, *JUDICIAL IMPACT AND STATE SUPREME COURTS* (1977); Kramer & Riga, *The New York Court of Appeals and the U.S. Supreme Court, 1960-1976*, in *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* 175 (1982), but it is conceptually distinct from the subject of substantive policy activism in matters of state law.

Third, this category of "activism" encompasses only conflict with non-judicial governmental actors. The reversal of a lower court ruling is not inherently activist under this definition. Conflict with lower courts may be regarded as a form of "activism." See, e.g., Richardson and Vines, *Review, Dissent, and the Appellate Process: A Political Interpretation*, 29 J. POL. 597 (1967), but it is not conceptually related to substantive policy activism. Inter-court friction may empirically correlate with high levels of substantive policy activism, but that issue is not a subject of the present study.

As one final consideration on this point, the vast majority of criminal appeals and habeas corpus petitions were excluded from classification as "activist" under this criterion. Criminal appeals most often involve evidentiary and statutory definition issues which are regarded as integral and appropriate components of appellate judicial agendas. Formally, prosecuting attorneys are part of the executive branch, but their work in criminal prosecutions and appeals is more appropriately viewed in the context of the judicial workgroup. Therefore, reversals of criminal convictions will not be treated as inherently activist under the present coding scheme. These cases are only coded as "activist" if they fit under the second category of judicial activism—overruling of state precedent. Trends in the decisional patterns of criminal cases will be reported (as will trends in "Tort/Compensation" cases and "Public Law" cases), but they will not figure prominently in computing the overall scores for "activism" levels.

departure is not based upon compliance with federal standards or subsequent legislative action). Unless the court's opinion expressly states that the precedent is being overruled, the case has been coded as non-activist. If the court claims to be merely applying, interpreting, modifying, restricting, or extending existing law, their pronouncement has been accepted at face value. This strict coding format obviously excludes some highly significant and controversial cases from "activism" designation, but one of the proposed strengths of this measure is its definitional conservatism. If a case is such that reasonable people can disagree over whether it makes truly "new" law or simply interprets and extends existing principles, then it cannot be objectively classified as an activist ruling.

Several commentators suggest that "judicial activism" falls into a number of distinct categories, making dichotomous measurement inappropriate.²⁵ Bradley Canon has suggested a prospective framework for the analysis of judicial activism in which the relative level of activism in any given case is the product of six separate dimensions of activism.²⁶ Canon bases his model upon the observation that judicial activism restraint is not a dichotomy, but a multidimensional concept. He is no doubt correct in general terms, but objective coding becomes a serious problem in empirical application of such a framework. Dichotomizing the activism variable at the case level may obscure much of the nuance of "judicial activism," but this cost is offset by the simplicity, parsimony, and objective quality of the measure which has been used here. Additionally, it is possible to incorporate substantively important aspects of a multidimensional framework within the basic coding scheme.

"Judicial activism," as measured here, is based upon an essentially dichotomous measure at the case level, but the reported score for "activism level" during any given period also takes account of more discrete subcategories within the total group of activist cases. Most activist cases will invariably involve simple legal rulings against governmental litigants. Constitutionally-based rulings overturning judicial precedent were less common. To reflect the substantive importance of these two special categories of activist cases, these cases have been assigned special weight in computing overall activism levels. Thus, in calculating overall "activism levels," a non-activist ruling is assigned a weight of zero; a simple ruling against another governmental actor a weight of one (1); and a constitutionally-based ruling or overruling of precedent a weight of two (2). The activism level for any period thus may range from a low of zero to a high of 2.00.

As a final matter, one must keep "judicial activism" in perspective. From the standpoint of overall policymaking, there is no doubt that general and subtle shifts in a court's policy direction across total output are at least as important

²⁵ See, e.g., Porter and Tarr, *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* XI (1982); H. Glick & K. Vines, *supra* note 23; Kramer & Riga, *supra* note 24.

²⁶ Canon, *A Framework for the Analysis of Judicial Activism*, in *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* 385 (1982); Canon, *Defining the Dimensions of Judicial Activism*, 66 *JUDICATURE* 236 (1983).

as the more isolated and atypical phenomenon of overt policymaking "activism." A court may never overrule a single precedent, and yet move systematically toward a posture where certain categories of litigants (tort plaintiffs, worker's compensation claimants, criminal defendants, etc.) come to win an overwhelming proportion of all cases within a given legal subfield. These sorts of aggregate trends are strong evidence of shifts in substantive policy direction on a court. They also serve to more fully illuminate the agenda and collective ideology of an activist court. Trends in the direction of output across several areas will be reported here to track the relationship between such patterns and "activism" levels as previously defined. Taken together, these measures provide a comprehensive picture of shifts and patterns in policy activity on the West Virginia court across the length of the study period.

IV. FINDINGS

Results of the basic analysis in this study are presented in a series of three tables. Table 1 presents information regarding levels and types of policy activism across time. Specifically, this table reports the following information: (1) "Mean N" (average number of cases disposed of by full or per curiam opinion for each year during the specified time period,²⁷ projected from the 10% sample); (2) "Conflict Level" (proportion of cases decided by nonunanimous vote); (3) "A-Level" (judicial activism level for the period, based upon proportion of total caseload calculated according to the weighted formula already discussed; (4) "A-Precedent" (the proportion of all activist cases based upon overruling of precedent); and (5) "A-Constitution" (the proportion of all activist cases based upon state constitutional grounds).

Table 2 sets forth the breakdown of caseload by various categories across time. "Criminal" covers all cases involving criminal appeals, habeas corpus petitions, and other appeals for relief from conviction and/or incarceration. "Prop/K" covers all cases involving property and contract disputes (wills, trusts, boundary disputes, debtor-creditor disputes, commercial litigation, etc.). "Tort/Comp" covers all personal injury, wrongful death, libel or other tort suits, insurance disputes, workmen's compensation, and unemployment compensation cases (the unifying policy dimension here being an economic "underdog" versus "overdog" cleavage). Finally, the "Pub Law" category encompasses all challenges to governmental action (or actors) that fall outside the categories of tort, contract, or compensation matters. This includes a wide range of cases including such disparate proceedings as administrative appeals, taxpayers protests, utility rate protests, civil service hearings, license revocations, declaratory judgment suits, and eminent domain proceedings. For each category in this table, the number of cases is presented both as a proportion of total caseload and as an average number of cases per year for the specified time period.

²⁷ The time periods reported reflect breakdowns encompassing significant changes in court membership. Across the period of analysis, there are fairly distinct points at which the overall membership

Table 3 presents "ideological" patterns across time. For each of the three categories included ("Criminal," "Tort/Comp," and "Public Law"), the figures reported are the proportion of all cases under that heading that are decided in a "liberal" or "activist" direction: pro-accused in Criminal cases; pro-claimant in Tort/Compensation cases; and pro-challenger in Public Law cases. Obviously, a figure around 0.50 reflects an aggregate pattern of neutrality. Figures approaching either zero or 1.00 reflect strong ideological trends, at least in practical aggregate terms.

TABLE 1
WEST VIRGINIA SUPREME COURT OF APPEALS
ACTIVISM/CONFLICT PATTERNS, 1930-1985

Period	Mean N ¹	Conflict Level ²	A-Level ³	A-Precedent ⁴	A-Constitution ⁵
1930-37	231	.081	.194	.031	.094
1938-41	183	.254	.127	.000	.000
1942-52	108	.260	.185	.000	.048
1953-58	73	.227	.204	.143	.143
1959-72	76	.140	.318	.107	.107
1973-76	90	.194	.139	.667	.000
1977-85	211	.111	.421	.185	.296

¹ Mean number of total cases per year (projected from sample).

² Proportion of cases decided by nonunanimous vote.

³ "Activism" score: based on proportion of total case output, with "A-Precedent" and "A-Constitution" cases assigned weight of 2.0.

⁴ Proportion of Activist cases based on overruling of precedent.

⁵ Proportion of Activist cases based on State Constitution grounds.

Several of the findings are dramatic. In Table 1, the first column immediately draws attention. The number of cases heard and disposed of by the court (with opinion) more than doubles following the 1976 election. For twenty years preceding that date, the court consistently handed down between seventy and ninety decisions each year. In both 1977 and 1978, over one-hundred decisions were delivered. By 1980, the figure increases to two-hundred. In 1982 and 1983, the figures peak at around the three-hundred level, but this figure then drops back to a point of apparent stability around the two-hundred level for 1984 and 1985. In simple terms, the post-1976 court has tripled its decision workload.

Equally noticeable is the increase in "activism-level" for the post-1976 court. The "A-Level" score of .421 represents a significant increase over previous periods, and it is in fact comparable with figures recorded for other "activist" courts

of the court underwent dramatic change over relatively short periods of time. The dates reported roughly reflect these points.

such as California, New Jersey, and Michigan.²⁸ Additionally, the overall increase in "activism" level for this most recent period appears to be the result of a systematic and fairly constant increase in "activist" output on the court during each year of the post-1976 period. After an initial jump in "A-Levels" of .333 for 1977 and .450 for 1978, the court settled into a relatively stable level around .310 for 1979-1981. One then observes an increase to .370 for 1982 and .714 for 1983. This one-year peak then drops back to a .474 level in 1984, and returns to .333 for 1985.

An apparent anomaly in West Virginia is the absence of any dramatic increase in "conflict" (separate opinion levels) correlating with the shift to an activist stance. Other activist courts exhibit clear patterns of increased conflict in the years immediately preceding an activist transition.²⁹ Essentially, what we see in West Virginia is almost a "bloodless coup"—a virtually complete change in the total membership of the court overnight, with conservative and legalistic judges being systematically replaced by elected justices with more activist orientations. Contrary to popular perceptions, the differences of opinion on the court after 1976 are really issues of degree; the fundamental splits that one would expect to see between activist newcomers and traditionalistic incumbents are non-existent. In fact, with the exception of one year during this period when separate opinion levels peaked at about the .300 level (1977), conflict level on the court has remained fairly stable—ranging only between .05 and .15. This includes the findings for 1985, after the election of William Brotherton to the court. For 1985, "conflict" level was only .045 (one nonunanimous decision in a sample of twenty-two cases).

One subtle pattern in the separate opinion levels is interesting, and it reflects the more general changes on the West Virginia court. From 1977 through 1980, eighty-eight percent (.875) of the nonunanimous cases in the sample involve dissents or concurrences by the new justices (Harshbarger, McGraw, and Miller) arguing on behalf of a more activist stance. Then, from 1981 through 1984, the

²⁸ Hagan, *Measuring Judicial Activism in State Supreme Courts* (Paper presented at the 1986 Annual Meeting of the Southwestern Political Science Association (March 21, 1986)). During the late 1970s, the "Activism" levels on these three courts were as follows: .462 for Michigan (1973-1980); .417 for New Jersey (1974-1980); and .538 for California (1977-1980). Like West Virginia, each of these courts underwent clear and dramatic shifts from passivity to "activism" at distinct points in time—California in the early 1940s (following the appointments of Phil Gibson and Roger Traynor); New Jersey in the late 1940s (following the constitutional revision of 1948 and the appointment of Arthur Vanderbilt as Chief Justice); and Michigan in the mid-1950s (as the result of a series of liberal Democratic appointments by Governor G. Mennen Williams).

²⁹ Hagan, *Power Motivation and Judicial Behavior: A Political Model of Activism Cycles in State Supreme Courts* (Paper presented at the 1985 Annual Meeting of the American Political Science Association (August 30, 1985)). In California, "Conflict" level increased from .133 in the 1930s to .393 during the 1940s. In New Jersey, the same figure rose from .214 during the early 1940s to .445 for the latter half of the decade. Finally, in Michigan, "Conflict" was only at a .119 level from 1944-1953; this increased to .299 for the period 1954-1964. In contrast with West Virginia, "Conflict" levels on these courts have remained very high for decades. The most recent levels are illustrative: .500 in California (1977-1980); .479 in New Jersey (1974-1980); and .559 in Michigan (1973-1980).

tables are turned. During this latter period, eighty percent (.800) of the splits in the sample involve dissents or concurrences by the other Justices (Neely and McHugh) arguing on behalf of a more restrained position for the court. It is possible that the substitution of Justice Brotherton for Justice Harshbarger as a result of the 1984 election will alter this statistic. However, the extremely low conflict level in Justice Brotherton's first year of service makes even a preliminary evaluation of this possibility premature.

TABLE 2
WEST VIRGINIA SUPREME COURT OF APPEALS
CASELOAD COMPOSITION, 1930-1985*

Period	Mean N	Criminal (n)	Prop/K (n)	Tort/Comp (n)	Pub Law (n)
1930-37	231	.091 (21)	.424 (98)	.264 (61)	.095 (22)
1938-41	138	.072 (10)	.449 (62)	.268 (37)	.130 (18)
1942-52	108	.093 (10)	.287 (31)	.278 (30)	.222 (24)
1953-58	73	.247 (18)	.274 (20)	.274 (20)	.137 (10)
1959-72	76	.237 (18)	.158 (12)	.250 (19)	.303 (23)
1973-76	90	.333 (30)	.189 (17)	.278 (25)	.111 (10)
1977-85	211	.342 (72)	.137 (29)	.158 (33)	.258 (55)

* Figures in columns three through six report the proportion of total case output falling into the subject category specified. Numbers in parentheses report the mean number of rulings per year in each area (projected from sample).

Output patterns regarding substantive policymaking patterns for the post-1976 court are also quite striking. The figures in Table 2 indicate that the court has not moved dramatically into any specific cluster of policy issues. The caseload composition does shift in a general way from private law to public law issues during the 1950s and 1960s, but these changes appear to be basically gradual and continuous in nature. The same sort of pattern is evident in other state courts during the same period, and is probably more the result of national stimuli than any state-level factors.³⁰ The modern court does move more aggressively into criminal cases following the 1972 changes in membership, and the post-1976 court clearly expands its "Public Law" agenda. These shifts as proportions of caseload, however, do not appear dramatic. Much more important is the overall increase in caseload as a whole and the increasingly strong patterns of output in certain policy areas.

Throughout the first forty-seven years of this study period, the West Virginia court displayed a consistent pattern of moderate conservatism in "Tort and Com-

³⁰ Compare Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977) with Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978).

pensation" cases, and moderate deference in public law cases. As the figures in Table 3 indicate, this changes dramatically after 1976. For the 1977-1985, period the court shows very strong pro-claimant patterns in Tort/Compensation law (.733) and increasing "activism" in public law cases (.694). Interestingly, the court does not show any noticeable movement in criminal law areas. Apparently, economic relations, consumer protection, business regulation, and pro-labor protection form a fairly tight and coherent policy agenda in which the court has chosen to specialize.

TABLE 3
WEST VIRGINIA SUPREME COURT OF APPEALS
DECISIONAL PATTERNS IN SELECTED AREAS, 1930-1985*

Period	Criminal (% Pro-defendant)	Tort/Comp (% Pro-claimant)	Public Law (% Non-deferential)
1930-37	.357	.460	.444
1938-41	.500	.353	.571
1942-52	.500	.394	.467
1953-58	.818	.333	.333
1959-72	.545	.444	.567
1973-76	.333	.400	.250
1977-85	.446	.733	.694

* Figures report the proportion of case decisions in each area that rule in favor of the specified direction: Pro-defendant in Criminal cases; Pro-claimant in Tort/Comp cases; Non-deferential in Public Law cases. In the "Criminal" category, for example, a score 1.00 would mean that every case during the period was decided in favor of the accused; a score of 0.00 would mean that every case was decided in favor of the State.

There are at least two reasons why this observation is unsurprising. First, analysis of other "activist" state courts suggests that the one overwhelming common denominator in state court activism is a pattern of liberal output in Tort/Compensation cases. In all states previously analyzed, this pattern correlates perfectly with the activism and conflict patterns discussed earlier.³¹ Previous work has focused on the importance of these areas of law for state court policymaking generally,³² and upon the relationship between "activist" role orientations and

³¹ Hagan, *supra* note 29. In fact, the decisional patterns in West Virginia are directly comparable with patterns in the other three "activist" courts that were analyzed. Since 1940, the proportion of California "Tort/Comp" cases decided in favor of the claimant is .857. Similar figures exist for New Jersey (.723 for 1949-1980) and Michigan (.730 for 1965-1980).

³² Canon & Baum, *supra* note 1, Baum & Canon, *supra* note 1, see also Canon & Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW AND SOC'Y REV. 969 (1979); Croyle, *The Impact of Judge-Made Policies: An Analysis of Research Strategies and an Application Products Liability Doctrine*, 13 LAW AND SOC'Y REV. 949 (1979); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

ideological liberalism.³³ The findings here simply emphasize how much West Virginia's court resembles other state courts which have undergone the transition to a more active stance in state policy debates.

Second, previous scholarship strongly suggests that few courts attempt to influence all areas of public policy. Rather, even "activist" courts tend to be policy specialists, focusing their attention on one or two areas at a time.³⁴ Findings from other states would suggest that the West Virginia court will concentrate its attention on a fairly narrow band of issues at any given time. The findings in Table 3 simply suggest that the post-1976 court's first priority was reform of the body of state law affecting economic "underdogs."

SUMMARY AND CONCLUSIONS

In an interview published in the *Charleston Gazette* in the Spring of 1978,³⁵ Editor Don Marsh asked Justice Darrell McGraw a line of questions concerning a constitutional-level budget dispute between the state legislature and the West Virginia Supreme Court of Appeals.³⁶ One of Marsh's questions to the then new Justice was as follows:

The court in the last year or two has become more activist, it has changed its traditional posture on the kind of cases it accepts and the kind of action it takes. Some people theorize that there is a group of lawyers and interests representing a desire to maintain the status quo—the establishment—and that this group is reserved and suspicious of the new directions on the court. Do you think that this is involved in the budget problem?³⁷

Given traditional norms of judicial abstention from public debate or comment on issues of such significant controversy, it is rare that a state supreme court justice will place himself in the position to be confronted with such a topic. Justice McGraw's response, and additional comments during the interview, shed much light on the perspective of the court's new members.

Yes, there could be something to that. Traditionally, courts have represented what might be styled the power elite. Courts have been reticent, low-keyed kinds

³³ Glick & Vines, *Law-Making in the State Judiciary: A Comparative Study of Judicial Role in Four States*, 2 POLITY 142 (1969); Wold, *Political Orientations, Social Backgrounds, and the Role Perceptions of State Supreme Court Justices*, 27 W. POL. Q. 239 (1974); See also Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 70 AM. POL. SCI. REV. 178 (1985); Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911 (1978).

³⁴ Hagan, *supra* note 29.

³⁵ *Charleston Gazette*, March 31, 1978, at 11, col. 1.

³⁶ The dispute was ultimately resolved in the court's favor in *State ex rel. Bagley v. Blankenship*, 246 S.E.2d 99 (W. Va. 1978). A consideration of the political ramifications of these types of disputes is provided in Baar, *Judicial Activism in State Courts: The Inherent-Powers Doctrine*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 129 (1982).

³⁷ *Charleston Gazette*, *supra* note 35.

of operations that existed in too many instances to preserve the status quo, irrespective of progressive legislative actions or . . . progressive actions taken by chief executives. I think it has also been [the case] that the West Virginia court over the years has been primarily an appointed court. That is to say, that the way one got on the Supreme Court was to be appointed by some friend who was a governor and then to run for election after the appointment [The] current court consists of four members who actively sought the office of Supreme Court of Appeals and were not appointed by any executive authority. We probably feel a devotion to an independent judiciary, which some people in the past have not felt [The] Constitution quite clearly says that the three branches of government . . . are separate, distinctive, and independent, and our court is determined to vindicate that separation.

. . . We on the Supreme Court are taking the brunt and receiving all of this criticism because we are doing our work. It is not often in government that people get criticized for doing their work. We are cleaning up our docket. That is what people are always complaining about in the courts, that the dockets are always clogged that the work is never done, and that it takes years to get a decision. We are doing our work and some people do not like it.

. . . [Now] that we are judges, we are being criticized really because we are taking cases and hearing cases. As the cases are decided, a new philosophy is prevailing with respect to the law and this is what is unsettling to the power elite, if you would, who have a vested interest in the status quo. It is unsettling because many people—lawyers are, you know, terribly subject to this—all their learning has been in a certain direction, and as one remolds the law to fit the times then it obsoletes their learning. It does, to some degree, unsettle the law and set it in a new direction. But we believe that if we have unsettled the law, and set it in a new direction, that it has been in the direction of redressing wrong and of providing a remedy where previously there was no remedy by due course [to] law.”

To a large extent, Justice McGraw’s comments capture the essence of the controversy that has surrounded the court since 1977. Traditionally, the West Virginia court decided very few cases. The cases that were accepted reflected primarily a private law agenda, and decision patterns were consistently conservative—protecting what Justice McGraw called “vested interests” against the liberal encroachments of modern trends at the national level. The court generally refused to hear public law issues. When it did accept such cases, the pattern of decision was consistently deferential.

Since the 1976 election and the 1977 changes in membership, the West Virginia court has changed its path. Reflecting national trends that are now several decades old, the court has moved to liberalize the law in such areas as Tort and Compensation law. The court has displayed increasing willingness to hear Public Law cases, and to critically evaluate government policies and actions. Most importantly, the court has dramatically increased the number of cases that it hears.

³⁸ *Id.*

The court is "doing its work," as Justice McGraw put it, "and some people do not like it."

That final observation apparently has some merit. In the 1984 election, incumbent Justice Sam Harshbarger was defeated by a challenger of clearly less activist temperament—William Brotherton. Justices McGraw and Miller face reelection in 1988. In this context, it is obviously possible that the "activist" stance of the current court will not survive electoral challenge over the long term. I personally consider that scenario unlikely.

Findings from other states suggest that the fundamental judicial transition from passivity to "activism" is effectively irreversible. Among other state supreme courts which have undergone fundamental transitions to more activist postures, none have subsequently gone into non-activist remission. The levels of policy activism in these states have remained high. In fact, they have shown continuous, though gradual increase after the initial dramatic surge in activity.³⁹

The most profound long-term effect of the shift to activism may be to fundamentally change the norms and expectations associated with a court. A young lawyer who "grows up" watching an Arthur Vanderbilt in New Jersey, a Roger Traynor in California, or a Richard Neely or Darrell McGraw in West Virginia can hardly be blamed for bringing an "activist" orientation when he ascends to the bench in later life. By changing public perceptions and expectations, the molders of an activist state court change the basic norms of appellate court behavior. Once change of this magnitude has been carried through, it is difficult to imagine an easy transition back to judicial passivity. There will always be continuing debate over the substance of judicial policymaking, but debate over the basic propriety of such activity ceases at some point to be a meaningful issue.

³⁹ Hagan, *supra* note 29. In California, "Activism" level rested at a very low .144 during the 1930s and 1940s. This figure then rose to .225 for the 1950s, .270 for the 1960s, and .466 for the 1970s (.538 for 1977-1980). The same basic pattern occurs in New Jersey (.136 for the 1940s; .192 for 1949-1973; and .417 for 1974-1980) and Michigan (.174 for 1944-1953; .226 for 1954-1964; .427 for 1965-1972; and .462 for 1973-1980).

