Michigan Law Review

Volume 82 | Issue 4

1984

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Michigan Law Review

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Recommended Citation

Michigan Law Review, *Toward Increased Judicial Activism: The Political Role of the Supreme Court*, 82 MICH. L. REV. 709 (1984).
Available at: https://repository.law.umich.edu/mlr/vol82/iss4/6

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TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT. By *Arthur Selwyn Miller*. Westport, Conn.: Greenwood Press. 1982. Pp. xii, 365. $29.95.

The United States has pursued a path characterized by prosperity and power; having reached the end of that path, only darkness and uncertainty lie ahead. The choice is an easy one. We, as a nation, may continue along our current path and plunge head first into the abyss or we may take a step backward and survive, albeit more simply. As the age of scarcity approaches, Americans need a leader with the courage and vision to divert them from their current suicidal course. In his book, *Toward Increased Judicial Activism: The Political Role of the Supreme Court*, Arthur Selwyn Miller[1] suggests that the Supreme Court of the United States can and should become that leader.

Professor Miller proceeds from the premise that the United States is in a state of transition. The Age of Abundance that marked the post-war era is being replaced by an Age of Scarcity in which "Americans and others now confront not a crisis, but a crisis crises — a climacteric — unique in modern and probably in all history" (p. 184). As the ecological trap closes, Miller argues, there is an urgent need for a national leader with the strength and wisdom to preserve human dignity. The author contends that because the political branches of government have become prisoners of special interest groups, neither Congress nor the President can fulfill this leadership role (p. 259). While pluralism was possible, perhaps even beneficial, in an era of economic growth, its natural tendency toward "a series of cobbled-up compromises" now undermines the kind of moral and ethical consensus needed in an age of scarcity (p. 260). Thus, Miller properly concludes that pluralism has created "a growing paralysis" and has become "intellectually untenable" (p. 159).

Because the political branches cannot meet the challenges that lie ahead, the author suggests that the Supreme Court is the only alternative (p. 317). His plea is for an activist Court, with the qualification that such activism is desirable only "if it furthers the attainment of human dignity" (p. 9). To propose that the Court immerse itself more deeply in politics is not to advocate a radical transformation in its role, according to Miller. He persuasively demonstrates that throughout American history, the Supreme Court, rather than sim-

1. The author is Professor Emeritus of Law at George Washington University and Leo Goodwin, Sr., Distinguished Visiting Professor of Law at Nova University's Center for the Study of Law. Professor Miller is also the author of a recent work entitled DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL (1981).

ply interpreting the law, has, in fact, created it, together with associated national public policy (pp. 38-39). As an institution of the "Establishment," the Court has historically made policy decisions that have consistently benefitted the propertied classes (p. 43). These policy decisions have, the author argues, been concealed beneath a myth of judicial impartiality that has added an unquestioned legitimacy to the Court's rulings.

As conditions have changed in American society, the Supreme Court has, according to Miller, demonstrated its political dexterity by adapting constitutional doctrine to meet those changes. In this regard, he argues that the Supreme Court established a Constitution of Powers (as opposed to a Constitution of Quasi-Limitations) in the post-World War II era so that it could make the kind of enlightened affirmative decisions necessary to help preserve the status quo by mollifying discontent (p. 267). Because the Court has historically acted as a quasi-legislative branch of government, Miller concludes that the Court ought to shed its traditional mystique; it should admit and expand the policymaking role of the Court.

Having demonstrated that the Court is in fact a political organ that has the power to make policy decisions, Miller concludes that the Court is ideally suited to fit the role of "authoritative spokesman for national values" (p. 258). First, as an independent branch, the Court is insulated from the interest group pressures that have paralyzed the Presidency and the Legislature. Perhaps more importantly, however, the Constitution has historically been viewed as "a religious instrument" (p. 221) and the Supreme Court the divine interpreter of that instrument (p. 224). In short, the Constitution and the Court fulfill an important religious need in American Society. With such a religious following, the modern Supreme Court can function as an American version of Plato's "philosopher-rulers" (p. 230). Thus, the Supreme Court, Miller contends, is the ideal institution to guide the nation through the tumultuous times that lie ahead.

As a description of the historical role of the Supreme Court and the present condition of American politics, the author's analysis is quite persuasive. This description, however, adds very little to the current state of knowledge. For more than half a century, legal realists have maintained that the judiciary is guided more by personal and class biases than by the mythical rule of law.[2] Nor is there anything particularly new or original in the idea that government action has been crippled in recent years by the pluralist nature of American politics. Finally, commentators on political science and ecology have already recognized that democracy as we now know it probably

2. *See, e.g.*, Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. PUB. L. 279 (1957); Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A. J. 1212 (1977).

cannot survive the coming Age of Scarcity. Indeed, William Ophuls has argued that as the overcrowded world approaches its ecological limits, the polity should be run by an elite class of Platonic philosopher-kings.[3]

What *is* original about Miller's work is the suggestion that the Supreme Court can and should assume the role of Platonic guardian. Miller's argument is that the Court's decisions should be guided not only by the desire to assure procedural fairness,[4] but also by the substantive interest in assuring the preservation of human dignity. Given the present composition of the Court, the author admits that such enlightened leadership is inconceivable. His plea, instead, is for a new Court with "the capacity to see what is right and the courage to state it." "If that demand is a call for a group of superhumans, as perhaps it is," Miller says, "so be it" (p. 294).

At this point, Miller's argument is really no argument at all. Who would question the desirability of government by such enlightened Platonic guardians, whether they occupied the Judiciary, the Congress, the Presidency or any other organ of government? But to call for national leadership by a group of superhumans is really to beg the question. It is for the very reason that we are unable to identify such superior beings that power must be balanced between competing branches of government. The real issue, given the fallibility of humankind, is how best to distribute power among the various organs of government. It is absurd to assume first that one organ is virtually perfect and then to conclude that it should be all-powerful.

Miller indicates that because judges are not as susceptible to interest group pressures (pp. 259-60), and because of the judiciary's inherent position of ethical leadership, they are more likely to make enlightened decisions in the public interest. But as he also points out, the judges themselves are chosen from a class of narrow-minded lawyers who have a vested interest in preserving the status of the established elite (p. 281). Historically, judges have failed to transcend the values of the class from which they are drawn and the author suggests no selection process that would remedy this state of affairs. In a similar vein, Miller contends that the adversarial process is an inadequate method of providing the information with which judges can make policy, but again he posits no alternative (p. 281).

Miller goes to great lengths to document the wide scope of judicial power. He fails to realize, however, that his proposal for activism unleashed would destroy the very foundation of the Court's

3. W. OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY 160 (1977).

4. For the view that the primary function of the Court is to assure that democratic procedures are correctly followed, see J. ELY, DEMOCRACY AND DISTRUST (1980).

authority. Stripped of the mystique that has led the public to view the Supreme Court as a modern Delphic oracle, the Court's decisions would be revealed as nothing more than the political judgment of a group of all too fallible individuals. With the myth of judicial impartiality shattered, the Court would lose its religious following and with it the public respect upon which the judiciary thrives. Indeed, the Court has attempted to maintain its power by being careful not to immerse itself too deeply in political disputes. As Miller himself admits, the Supreme Court must ultimately "rely on the goodwill of others, at all levels of government, to translate [its] standards into operational reality" (p. 271). Thus, if the justices attempt to impose controversial public policy decrees upon an unwilling President and a recalcitrant Congress, the Court will soon find its jurisdiction substantially diminished and its orders unenforced.

The author suggests that we need not concern ourselves with the untrammeled abuse of judicial power because the decisions of the Court will be limited by the concept of human dignity. Again, this begs the question, for Miller never suggests a selection process for choosing the Platonic guard. Without a guarantee of a near-perfect Court (which Miller cannot provide), the tyrannical abuse of power (if, indeed, such power could ever be obtained in the first place) would be inevitable.

In an attempt to preempt these criticisms, the author warns that those who disagree must not label their argument as an attack upon "the dangers of judicial activism, anytime, anywhere, against any power, and toward any end" (p. 303). In a sense, Miller is right. The danger of judicial tyranny would not exist if it were possible to secure the leadership of an enlightened judiciary relentlessly striving to preserve human dignity. Many of those most wholeheartedly committed to notions of judicial restraint would gladly sacrifice the present system of democratic rule for such godlike leadership. The problem is that Miller's ideal court is nothing more than an ideal. In the final analysis, one must respect Professor Miller for his courageous attempt to provide a solution to the crises that Americans will confront as they approach the Age of Scarcity. Unfortunately, neither his criticism of the American political system nor his description of the impending watershed is unique in any way, and the solution he offers is not a solution at all.

THE LAW GIVETH . . . LEGAL ASPECTS OF THE ABORTION CONTROVERSY. By *Barbara Milbauer* in collaboration with *Bert N. Obrentz.* New York: Atheneum. 1983. Pp. xiii, 363. $21.95.

To the nonlawyer, Barbara Milbauer's[1] book *The Law Giveth* may be an original and valuable contribution to the debate over abortion because it focuses on the legal aspects of the controversy. To the lawyer, the book may be equally original and valuable because it goes beyond the legal aspects of abortion[2] to look at the development of the law on abortion, the happenstance nature of how legal rights are gained and lost, and most importantly, the lives of the women affected by abortion laws.

Milbauer begins her compendium of interviews, cases, historical material, and social analysis with an account of the woman called "Jane Roe," a Texan who agreed to let her case be the vehicle for challenging state prohibitions on abortion. Reading Justice Blackmun's opinion in *Roe v. Wade*[3] affords an understanding of the legal response to the problem of unwanted pregnancy. Reading Jane Roe's story yields an understanding of the human side of the problem. Hardly anyone will be able to read dispassionately of how Jane, divorced and poor, lost custody of her only daughter through subterfuge to her mother, was raped by three men on a gravel road in Georgia, and returned to Texas to find she had no choice but to give birth to and give up a second child. Milbauer recounts interviews with other women as well, including Mary Doe, the plaintiff in *Doe v. Bolton*,[4] the companion case to *Roe*, and the attorneys for these plaintiffs. She also gives short biographies of the major actors of the past — notably Margaret Sanger, who in the first half of this century almost single-handedly challenged the federal "obscenity" ban on birth control information and founded Planned Parenthood.

Milbauer also indulges the reader with historical material tending to show that anti-abortion laws and other restrictions on women's rights were more often than not products of the vagaries of

1. Milbauer is a 1980 graduate of New York Law School. She has authored several books including DRUG ABUSE AND ADDICTION (1970). Her collaborator, Bert N. Obrentz, is also a 1980 graduate of New York Law School and is associated with the International Ladies Garment Worker's Union.

2. The legal literature on abortion is abundant. For a sampling of discussions of the major issues, see Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721 (1981) (a criticism of the holding in *Harris v. McRae*, 448 U.S. 297 (1980)); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (the seminal criticism of Roe v. Wade, 410 U.S. 113 (1973)); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976) (defending the *Roe* result); Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979) (justifying the *Roe* result with an equal protection argument).

3. 410 U.S. 113 (1973).

4. 410 U.S. 179 (1973).