

1-1-1992

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Recommended Citation

S. David Cohen, *Law, Order and Democracy: An Analysis of the Judiciary in a Progressive State--The Saskatchewan Experience*, 56 *Saskatchewan L. Rev.* 23 (1992), <http://digitalcommons.pace.edu/lawfaculty/420/>.

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LAW, ORDER AND DEMOCRACY: AN ANALYSIS OF THE JUDICIARY IN A PROGRESSIVE STATE—THE SASKATCHEWAN EXPERIENCE

S. DAVID COHEN*

ABSTRACT

Current legal debates on the *Charter of Rights and Freedoms* in Canada have focused on the apparent shift in the location of power from elected representatives to the judiciary since 1982. In this paper, I take an historical perspective on that issue. I will explore the relationship of political power, as exercised by the judiciary through the interpretation of legislation, with concepts of parliamentary supremacy in Saskatchewan during the first half of this century.

The paper first describes the political character of the judiciary in Saskatchewan from 1905 until 1941, and then describes the political movements which gave rise to the enactment of “progressive” legislation in Saskatchewan during the same era. The relationship between the judiciary and the legislative branches of government is developed through an analysis of several pieces of legislation introduced during this period, and of several hundred cases in which that legislation was applied by the judiciary.

The results of the analysis indicate a significant difference in the number of cases decided in favour of creditors as compared to debtors in this period. In the final section of the paper, I explore several possible explanations for this difference and suggest that identification with the economic interests of creditors may be the most persuasive explanation for the data.

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I. INTRODUCTION

We do not know a great deal about Adolphe Poirier. What we do know from his experience with the legal system during the Great Depression in Saskatchewan is not pleasant. In 1935, Adolphe Poirier, a Saskatchewan farmer, was in danger of losing his farm. In the late fall of that year, Poirier sought protection from his creditor's claims, under the recently enacted *Farmers' Creditors Arrangement Act, 1934*.¹ Under the *Act*, his remaining funds were deposited with an Official Receiver, but his application to the Board of Review established under the *Act* was refused. As a result of the rejected proposal, on January 3, 1936, the District Court of Saskatchewan ordered the money held by the Official Receiver to be distributed to his creditors, including the Banque Canadienne Nationale.

Adolphe Poirier had ten days to appeal the decision. He took thirty-one days to appeal, and was not permitted to do so. His explanation for the delay was simple—he swore that he intended to appeal the decision, but could not because the funds necessary to pay his lawyer were in the hands of the Official Receiver, and were not available to him as a direct result of the decision from which he sought to appeal.

Adolphe Poirier sought a review of this decision at the Saskatchewan King's Bench, arguing that the judge ought to exercise his discretion to extend the time for filing the appeal under the circumstances. Bigelow J., of whom we know nothing more than the little we know of Adolphe Poirier,² said that it was not for him to decide whether the order was right or not. Adolphe Poirier lost his appeal.³ This paper is an attempt to understand this case and some two hundred and seventy cases like it decided in Saskatchewan during the first half of this century.

The origins of this paper are found in two events separated by almost thirty years. The first was the publication of *Agrarian Socialism: The Co-operative Commonwealth Federation in Saskatchewan* in 1950. In *Agrarian Socialism*, Seymour Lipset describes the genesis of the Co-operative Commonwealth Federation (CCF) party in Western Canada, the first socialist provincial or state

¹ S.C. 1934, c. 53.

² H.V. Bigelow, K.C., was counsel for a mortgagee in *Fawell v. Andrew*, [1917] 34 D.L.R. 12 (S.C.), March 10, 1917. Counsel for the mortgagor was successful in representations dealing with a distress issue and the mortgagor's debt was suspended. During the same year the Supreme Court of Saskatchewan was renamed the Court of King's Bench, and Bigelow was appointed as a Puisne Judge. He remained a Puisne Judge on the King's Bench until 1949. See [1917-18] 10 S.L.R. iii; *The Canadian Law List* (Toronto: Hardy's, 1949) at 593. He did not return to private practice in Saskatchewan. Before his appointment, Bigelow practised law in Regina as a partner in the firm of Bigelow and Kinsman. *The Canadian Law List* (Toronto: Hardy's, 1949) at 215.

³ *Poirier v. North American Life Assurance Company et al.*, [1936] 17 Can. Bank. Rep. 255.

government in North America.⁴ When I read the book, I slowly realized that most of the “legal” institutions and ideas with which I was familiar were invisible. What is remarkable about Lipset’s description and analysis of the development of the CCF is the absence of any description of, or reflection on, the part played by the judiciary in the implementation of the CCF legislative platform. Reading the text leads one to believe that all legislation is unambiguous and self-enforcing; all the CCF needed to do in order to fulfil its electoral promises was to enact legislation and that would be the end of the story. My sense of politics and law led me to believe that enacting legislation could very well represent only an intermediate stage in the ongoing process of political dialogue.

The second event (or rather series of events) which led to this research was the immediate and continuing debate about the way in which the judiciary might utilize the *Charter* to constrain progressive legislative agendas.⁵ The parallel literature is immense and, while important, is largely uninspiring in the way in which it fails to answer its own ultimate question. One answer may be found in the introduction of the writer’s own hopes and political agendas through the interpretation of appellate decisions and by the development of arguments articulated within the framework of traditional legal materials and rhetoric.⁶

These two ideas came together in 1990 with the publication of Seymour Lipset’s second book on Canadian politics—*Continental Divide: The Values and*

⁴ S.M. Lipset, *Agrarian Socialism: The Co-operative Commonwealth Federation* (Berkeley: University of California Press, 1950).

⁵ See, for example, A.C. Hutchinson & A. Petter, “Private Rights/Public Wrongs: The Liberal Lie of the Charter” (1988) 38 U.T.L.J. 278. The debate continues today with the recent contribution of Judy Fudge who has responded to the somewhat naive but optimistic writings of two political scientists on the use of law as a progressive instrument of social transformation. See J. Fudge, “What Do We Mean by Law and Social Transformation” (1990) 5 Can. J. of Law and Soc. 47. It is not surprising that the debate is most often engaged in by the progressives, because progressives have the most to lose through the apparent metamorphosis of political dialogue into legal rhetoric. See M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989).

⁶ The naive hope for judicial radicalism is remarkable in its simultaneous honesty and unreality. That one can read history and still argue that judges will come to the aid of the homeless, poor and oppressed reflects the sincerity of the beliefs of the writers and little else. Recent examples of Canadian writing suggesting a progressive role for the judiciary include: Parkdale Community Legal Services, “Homelessness and the Right to Shelter: A View from Parkdale” (1988) 4 J. of Law and Soc. Policy 33 at 67.; M. Jackman, “The Protection of Welfare Rights Under the Charter” (1988) 20 Ottawa L.R. 257; K. Ruff, “The Canadian Charter of Rights and Freedoms: A Tool for Social Justice ?” (1988-89) 13 Perception 19.

One of the more important contributions to the literature, and one which recognizes the “false optimism” surrounding the world of the Charter debate is J. Bakan, “Constitutional Interpretation and Social Change: You Can’t Always Get What You Want (Nor What You Need)” in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Edmond Montgomery, 1991) at 445.

*Institutions of the United States and Canada.*⁷ Lipset implies that the Canadian courts in 1950 were somehow political eunuchs, characterized by deference and neutrality in political matters. He suggests that the *Charter* represents a revolutionary change in Canadian legal culture, almost eliminating the difference between Canadian and American legal cultures.⁸ He also believes that Canadian courts were obsessively respectful of other political actors, exercising judicial self-restraint and deference to legislative judgment. One commentator notes, “[Canadian] judges and lawyers, supported by the press and public opinion, reject any concept of the courts as positive instruments in the political process.”⁹

The research which I describe below represents an initial attempt to improve the understanding of the connection between law and politics, and between judges and legislators in Canada. First, I hope to add a level of description to Lipset’s work by describing one Saskatchewan judiciary, and by investigating the response of that judiciary to progressive legislation over a forty year period from 1905 until 1944. Second, I interpret that data and offer to those engaged in the current debate enveloping the Charter of Rights and Freedoms a systematic, historical appraisal of the cases as an indication of what we might expect of the judiciary in Canada who have taken on the power to affect public policy.

This paper has three parts. In the first, I briefly describe the political character of the judiciary in Saskatchewan. Like virtually all who have studied the question of political patronage in the judicial selection process in Canada, I conclude that the judiciary in Saskatchewan during this century was not comprised of lawyers who were associated with either the CCF or NDP prior to their appointment. In the second part, I identify several examples of important “progressive” legislative enactments introduced in Saskatchewan which contemplate the continuation of market transactions, but which purport to alter the balance of power and the outcome under those Acts. I then analyze 269 cases in which judges have applied those statutes in particular situations. I conclude that, on balance, the judiciary favoured creditors over debtors, although the bias is clearly not universal. I also conclude that the data aggregating judicial responses to the legislation support those who argue that judges decided cases in a way which consistently interfered with progressive legislative agendas. Finally, I suggest that one must be cautious in interpreting data which compares case outcomes based on variables such as class. Further, the data may demonstrate a more pervasive and complex set of institutional and personal factors influencing judicial decision-making than one might first conclude.

⁷ See S.M. Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York: Routledge, 1990).

⁸ *Ibid.* at 102.

⁹ K. McNaught, “Political Trials and the Canadian Political Tradition” in M. Friedland, ed., *Courts and Trials: A Multidisciplinary Approach* (Toronto: University of Toronto Press, 1975) at 138.

II. THE JUDICIARY

The potential conflict between the judiciary and the provincial legislative branch of governments is derived from the constitutional power of the *federal* government to appoint superior court judges.¹⁰ Although the provinces have legislative authority over the administration of justice, there is no doubt that Ottawa exercises formal powers of judicial appointment. While it is possible that the federal government could defer to provincial political agendas in making judicial appointments, there is no evidence that Ottawa appointed progressive lawyers to the Saskatchewan judiciary during the relevant period.

My analysis of the judiciary in Saskatchewan is, in part, derived from anecdotal descriptions of the judges in local legal periodicals. Very little of that literature reveals the political affiliations of the judges.¹¹ However, there is at least some writing which makes explicit reference to the political affiliation of judges.¹² The definitive work in this area describes the careers of fifteen of the more important members of the Superior Court in Saskatchewan from 1907 until 1980. In all but one case, there was a direct connection between the judge and one of the major federal or provincial political parties; however, in no case was the judge associated with the CCF.¹³

Such anecdotal descriptions of the political activity of particular judges are consistent with the more organized analyses of the political character of judicial appointments in Canada and Saskatchewan.¹⁴ Research generating this empirical data on the judiciary in Saskatchewan is made easier by the relatively small provincial population and the equally small number of lawyers who represent the population from which the judges were selected. For example, in 1957, there were only 441 practising lawyers in the province, of whom 421 were resident in Saskatchewan.¹⁵

¹⁰ See Section 96 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

¹¹ Most involved obituaries or public speeches on formal occasions. See "Editorial" (1955) 20 Sask. Bar Rev. 1, 21, 57; "Minutes of the Law Society" (1957) 22 Sask. Bar Rev. 67.

¹² See "Obituary on Mr. J.W. Estey" (1956) 21 Sask. Bar Rev. 3 (Liberal Cabinet Minister); "Obituary of Judge V.R. Smith" (1960) 24 Sask. Bar Rev. 39, 40; "Obituary of Hon. R.C. Davis, Q.C." (1960) 24 Sask. Bar Rev. 38, 39; "A Tribute to Retiring Members of the Saskatchewan Judiciary" (1961) 24 Sask. Bar Rev. 42, 44 (Hon. W.M. Martin as Liberal Member of Parliament; Mr. Justice Graham as Member of Parliament).

¹³ W.H. McConnell, *Prairie Justice* (Calgary: Burroughs & Co., 1980) Chap. 6, "Provincial Superior Court Judges."

¹⁴ See W.A. Angus, "Judicial Selection in Canada—The Historical Perspective" (1967) 1 Can. Leg. Stud. 220.

¹⁵ "Minutes of the Annual Meeting of the Law Society" (1957) 22 Sask. Bar Rev. 67 at 68. This report indicates that the numbers were shrinking as lawyers left the province. It appears that the population of lawyers peaked at about 650 prior to 1927, with 634 lawyers enrolled in the Law Society in that year.

In 1966, a survey of judicial appointments to the superior courts in Canada from 1945-1965 reviewed the political affiliation of twenty Saskatchewan appointments. All twenty of the appointees had known political affiliations: eleven (55%) being associated with the Liberal Party; and nine (45%) associated with the Conservatives. *100% of the judges were appointed by their own party.*¹⁶ Recent commentary suggests that this practice has been pervasive since Confederation and continues today. From the earliest days of Confederation judicial appointments by the federal government have been highly politicized, not only in the sense that the party in power has rewarded its own supporters but also in the sense that appointments have been frequently made on the grounds of friendship, professional or familial ties and departmental morale.¹⁷

A recent study by the Canadian Bar Association describes “a long history of patronage appointments to the Bench by both major parties in Canada.”¹⁸ It specifically describes the patronage role in Saskatchewan as very strong, and details an incident in recent years where the Saskatchewan government was forced to amend provincial legislation to prevent the appointment of judges by the Liberal government in power in Ottawa.¹⁹

All the evidence confirms that the judges in Saskatchewan from 1905 until 1965 were either Liberal or Conservative, and certainly not known supporters of either the CCF or the New Democratic Party. As Peter Russell has stated, the requirement that a judicial candidate be of the “right” ideological persuasion has meant that lawyers identified with the New Democratic Party have “rarely been appointed to judgeships even in provinces where that party holds power.”²⁰

III. THE LEGISLATION AND CASES

Since the turn of the century, prairie governments in general and, in particular, Saskatchewan governments of all political persuasions, have responded aggressively to the political demands of the farming community.²¹ One response

¹⁶ See “A Survey of Judicial Appointments to Canadian Superior Courts 1945-1965.” Presented to the 1966 Annual Meeting of the Association of Canadian Law Teachers at the University of Sherbrooke, Sherbrooke, Quebec, June 1966; Appendix “A” to the 1969 Annual Report of the Section on Administration of Justice of the Association of Canadian Law Teachers.

¹⁷ See J.S. Ziegel, “Federal Judicial Appointments in Canada: The Time is Ripe for Change” in *Judicial Selection in Canada*, Discussion Papers and Reports, Prepared for the Canadian Association of Law Teachers Special Committee on the Appointment of Judges, (1987) at 45. P.H. Russell, *The Judiciary in Canada; The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 115-17.

¹⁸ Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada (1985) at 9.

¹⁹ *Ibid.* at 9, 37-40.

²⁰ *Supra*, note 17 at 117.

²¹ I began this project with the idea of looking only at legislation introduced in Saskatchewan from 1944 until the mid-1960’s when the New Democratic Party was defeated. However, the

by Saskatchewan governments to the needs of the farming community was to enact legislation delimiting the enforcement of certain limited aspects of market transactions.²² This legislation restricted the contractual rights of financial

CCF and subsequently, the NDP did not institute substantial changes to the existing legislation which had been introduced to benefit the farming community. The legislation which was introduced was not the subject of sufficient judicial decisions to warrant the kind of analysis presented here.

The legislation which I examined was largely a product of legislatures which were sensitive to the economic conditions of the Prairie farmer. Saskatchewan politics from 1905-1964 exhibited a consistent pattern of responsiveness to agrarian interests. From 1905 until 1929, the Liberal party was closely tied to the Saskatchewan Grain Growers' Association. After the First World War the Liberal Party's hold on power was challenged by the Progressive Movement, but the neutrality of the Grain Growers' during this era led to linkages between the Progressive Movement and the United Farmers of Canada. An analysis of the background of Saskatchewan MLA's from 1905 until 1966 demonstrates that the Liberal Party was not only supported by the farming community, but that, except for the Liberals in 1938, the vast majority of elected members from *all parties* were identified as having agricultural interests. See D.E. Smith, "The Membership of the Saskatchewan Legislative Assembly: 1905-1966" (1967) 20 Sask. Hist. 41 at 49.

The 1929 election resulted in a "Co-operative" government under the Conservatives with 5 Progressive and 6 Independents lending support to the otherwise minority Conservative government until 1934. It was during this era that the CCF developed, with an emphasis on Eastern domination and control by the traditional political parties. The most radical political agendas of the CCF were modified and in 1944 the CCF came to power as a social reform party focusing on socialized health care, reforms to the conditions of collective bargaining, and a continuation of the earlier farmer protection programs:

The CCF's "four-point land policy was: (1) protection of the farmer against foreclosure and eviction; (2) protection of the farmer's crop against seizure; (3) a moratorium to compel reduction of debts; and (4) crop failure clauses in mortgages. D.E. McHenry, *The Third Force in Canada; The Co-operative Commonwealth Federation, 1932-1948* (Berkeley: University of California Press, 1950) at 213.

Table 1 briefly lists the electoral results between 1905-1944. A comprehensive description of Saskatchewan politics can be found in D.E. McHenry, *The Third Force in Canada; The Co-operative Commonwealth Federation, 1932-1948* (Berkeley: University of California Press, 1950), Chap. 7, "Saskatchewan under CCF Rule"; E. Eager, *Saskatchewan Government; Politics and Pragmatism* (Saskatoon: Western Producer Prairie Books, 1980), Chap. 4; *Building the Co-operative Commonwealth: Essays on the Democratic Socialist Tradition in Canada* (W.J. Brennan, ed., Regina: Canadian Plains Research Centre, University of Regina, 1984) at 181.

²² Of course, the CCF introduced a broad range of socially progressive legislative measures which did not generate a substantial amount of litigation, and thus have not been analyzed in this paper. This legislation included *The Social Aid Act*, S.S. 1947, c. 95, which augmented *The Local Improvement Districts Relief Act*, R.S.S. 1940, c. 160; *The Municipalities Relief and Agricultural Aid Act*, R.S.S. 1940, c. 159; and *The Direct Relief Act*, R.S.S. 1940, c. 158 all of which had been enacted during the Depression to provide direct financial assistance to indigent persons in Saskatchewan.

The CCF medicare policies were represented by a series of legislative enactments beginning with *The Saskatchewan Hospitalization Act*, S.S. 1946, c. 82 and ending with *The Saskatchewan Medical Care Insurance Act*, S.S. 1961, (2nd Sess.), c. 1. The legislation, which while generating extensive academic commentary did not give rise to litigation at the implementation and operational stages. See E.A. Tollefson, "The Medicare Settlement" (1963) Sask. Bar Rev. 92; E.A. Tollefson, *Bitter Medicine—The Saskatchewan Medicare Feud*

institutions by denying the enforceability of certain express contractual terms.²³ It also afforded members of the farming community positive rights against sellers and manufacturers of farm equipment; rights which they would not have enjoyed at common law. Such legislation can be considered progressive, even though it accepted the continued existence of private capital and ownership of property, through its mandatory socialization of economic risks.²⁴

By denying creditors the right to enforce contractual rights against farmers, either on an *ex post* or *ex ante* basis, some of the Acts effectively instituted a mandatory social insurance program. All farmers effectively paid a non-risk-based premium for coverage against a range of payment default risks. These risks were mostly related to weather and international grain markets, factors over which farmers had little influence, but which could prevent them from fulfilling their debt obligations to financial institutions. The legislation encompassed within this category includes:²⁵

(Saskatoon: Modern Press, 1964); C.H. Higginbotham, *Off the Record: The C.C.F. in Saskatchewan* (Toronto: McClelland and Stewart, 1968), Chap. 5, "Medicare."

Similarly, the CCF introduced extremely significant legislative reforms in both employment standards and the collective bargaining arenas. The treatment of labour legislation in the courts has been extensively examined by others. Again, it is my impression that much would be gained by an analysis of the numerous judicial decisions on the *CCF Trade Union Act*, S.S. 1944, 2nd Sess., c. 69, and related legislation, rather than by the traditional analyses of elite appellate decisions.

Others have commented extensively on the way in which certain judges interfered with "New Deal" legislation introduced by the Federal government during the 1930's. See, for example, F.R. Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485.

²³ As the House of Lords said, the legislation statutorily modified contracts between two parties "one of which is an agriculturist but the other of which is a lender of money." *Reference re The Farm Security Act, 1944 (Sask.) Attorney General of Saskatchewan v. Attorney General of Canada et al.*, [1949] A.C. 110 at 123.

²⁴ While legislation of this character may not seem radical today, shifting power away from the Eastern banks, grain merchants and farm implements dealers remained at the core of CCF politics throughout Saskatchewan's history. See O. Melnyk, *Remembering the CCF, No Bankers in Heaven* (Toronto: McGraw-Hill Ryerson, 1989) at 14, 24.

²⁵ Two related acts which are not included in this paper are *The Farm Security Act*, S.S. 1944, (2nd Sess.), c. 30 and *The Agricultural Co-operative Associations Act*, S.S. 1913, c. 62. Subsequent legislation amending or reenacting the *Agricultural Co-operative Associations Act* includes S.S. 1915, c. 37; S.S. 1916, c. 37, s. 35; S.S. 1918-19, c. 68; R.S.S. 1920, c. 119; S.S. 1920, c. 50; S.S. 1921-22, c. 52; S.S. 1923, c. 43; S.S. 1924, c. 26. The Act was repealed by S.S. 1928, c. 54, s. 40.

The Farm Security Act represented an attempt to shift some of the risks of farmer/debtors to the lenders by declaring up to 160 acres of farmland immune from foreclosure. The legislation was one of the first major legislative actions of the CCF. A mortgage association immediately challenged the legislation and section 6 of the Act was held *ultra vires* the provincial government by the Supreme Court of Canada in 1947 in *Reference re The Farm Security Act, 1944 (Sask.) Attorney General of Saskatchewan v. Attorney General of Canada et al.*, [1947] S.C.R. 394. An appeal was rejected by the Privy Council in November 1948, on the ground

1. *The Debt Adjustment Act*;²⁶
2. *The Limitation of Civil Rights Act*; ²⁷ and
3. *The Farmers' Creditors Arrangement Act, 1934*.²⁸

that the legislation was in relation to interest, and thus an intrusion on federal constitutional powers under section 91 of the British North America Act. See [1949] A.C. 110. The two cases decided under the *Farm Security Act* are *Canada Permanent Trust Company v. Eagleson et al.*, April 24, 1947, [1947] 1 W.W.R. 1007 and *Canada Permanent Trust Company v. Eagleson et al.*, July 12, 1948, [1948] 2 W.W.R. 675. Neither of the cases falls within the time period with which this paper is concerned.

The Agricultural Co-operative Associations Act enabled a group of five or more individuals to incorporate for the purposes of agricultural operations. The Act did not provide for protection from creditors; each member of a co-operative was liable for a portion of the debts of the corporation in an amount corresponding to the number of shares the individual held in the co-operative. The Act simply allowed farmers to gather capital and share risks so as to operate more effectively as a group, just like any other corporation. No reported cases decided under *The Agricultural Co-operative Associations Act* were found within the time period covered by this paper.

²⁶ *The Debt Adjustment Act* was first enacted as S.S. 1928-29, c. 53. Subsequent legislation amending or reenacting the *Debt Adjustment Act* includes R.S.S. 1930, c. 162; S.S. 1931, c. 59; S.S. 1932, c. 51, s. 2; S.S. 1933, c. 82; S.S. 1934, c. 59; S.S. 1934-35, c. 88; R.S.S. 1940, c. 87; S.S. 1942, c. 15. The Act was repealed by S.S. 1943, c. 15, s.15.

The statute has been described as "ameliorating and life-giving" to debtors and "vicious and demoralizing" to creditors. See R.R. Siddall, "The Debt Adjustment Acts" (1934) 3 *The Fortnightly Law J.* 198, 214, 281. *The Debt Adjustment Act* was the beginning of a comprehensive re-organization of the rights of lenders which culminated in the Saskatchewan Debt Adjustment Program in 1936 and associated legislation including *The Statute Law Amendment Act*, S.S. 1937, c. 95 and *The Drought Area Debt Adjustment Act*, S.S. 1937, c. 92. See G.E. Britnell, "The Saskatchewan Debt Adjustment Program" (1937) 3 *Can. J. of Econ. and Pol. Sci.* 370.

A comprehensive and detailed review of the debate surrounding the introduction of the Debt Adjustment Bill indicates that a number of financial institutions and manufacturing concerns including the National Trust Company, Robert Simpson Western Limited, and the International Harvester Company vehemently opposed the legislation. See "Co-operative Government's Response to the Depression, 1930-1934" (1971) 24 *Sask. Hist.* 81 at 89-90.

²⁷ *The Limitation of Civil Rights Act* was first enacted as S.S. 1933, c. 83. Subsequent legislation amending or reenacting the Act until 1945 included S.S. 1934, c. 60; S.S. 1934-35, c. 89; S.S. 1936, c. 119; S.S. 1937, c. 94; S.S. 1939, c. 93; R.S.S. 1940, c. 88; S.S. 1941, c. 18; S.S. 1942, c. 19; S.S. 1943 c. 16; S.S. 1944, c. 21. The Act exists today as R.S.S. 1978, c. L-16.

Related legislation included *The Land Contracts (Actions) Act*, S.S. 1943, c. 17. I have not organized or analyzed the cases decided under this latter Act given the date of its enactment. An example of one decision which interpreted the legislation restrictively is *Manufacturers Life Insurance Co. v. Williams et al.*, [1945] 1 W.W.R. 383 (power of court extends only to postpone not extinguish mortgagee's common law rights). See also, *Huran & Erie Mortgage Corporation et al. v. Propp*, (1943) 24 *Can. Bank. Rep.* 73 (C.A.) (decision by court refusing to exercise discretion to extend redemption period under mortgage).

²⁸ *The Farmers' Creditors Arrangement Act* was first enacted in 1934 as S.C. 1934, c. 53. Subsequent legislation amending or re-enacting the Act until 1945 includes S.C. 1935, cc. 20, 61; S.C. 1938, c. 47; and S.C. 1943-44, c. 26. *The Farmers' Creditors Arrangement Act* was repealed by S.C. 1988, c. 2, s.68.

The legislation permitted debtors to make a proposal to a Board of Review which could make a mandatory order compromising creditor claims. The legislation only applied to debts incurred prior to May 1, 1935 unless the creditor concurred in the proposal. While the legislation was generally recognized as benefiting indigent farmers, in 1939 the Supreme

A second set of legislation afforded employees and farmers the positive right to sue employers for personal injuries or suppliers of farm machinery for economic loss. This legislation effectively instituted a similar social insurance program with the same non-risk-based premiums and the same coverage, but in this case coverage was limited to the risk of non-payment due to defective farm equipment. The two examples of this legislation which I review are:

1. *The Workers' Compensation Act*;²⁹ and
2. *The Farm Implement Act*.³⁰

While both statutes had already been in force for some time when the CCF came to power, concerns with the working conditions of employees and with the market power of eastern manufacturers of farm equipment remained relevant throughout the early CCF era.³¹

The series of statutes limiting the enforcement of contractual claims and affording farmers and employees rights against suppliers of farm equipment and employers generated substantial judicial activity in the margin of their applicability. Ambiguous language generated disputes which could be resolved either in favour of the farming community or in favour of the financial/manufacturing community.³² Individual judges sometimes

Court, in an appeal from a Manitoba judgment, held that the Act applied to corporations. See *In Re Barickman Hutterian Mutual Corporation*, [1939] S.C.R. 223.

²⁹ *The Workers' Compensation Act* was first enacted as *The Workmens' Compensation Ordinance*, O.N.W.T. 1900, c. 13. Subsequent legislation amending or reenacting the *Workers' Compensation Act* during the period under inquiry includes O.N.W.T. 1905, c. 98; S.S. 1910-11, c. 9; R.S.S. 1920, c. 210; S.S. 1928-29, c. 73; R.S.S. 1930, cc. 252, 253; R.S.S. 1940, cc. 302, 303; and S.S. 1945, c. 103, s.5, and c. 104. *The Workmens' Compensation Act* became *The Workers' Compensation Act* in R.S.S. 1978, cc. W-17, W-18. With numerous amendments, *The Workers' Compensation Act* exists today as S.S. 1979, c. W-17.1.

³⁰ *The Farm Implements Act* was first enacted as S.S. 1915, c. 28. Subsequent legislation amending or reenacting the Act during the period which this paper reviews includes S.S. 1916, c. 26; S.S. 1917, (2nd Sess.), c. 56; R.S.S. 1920, c. 128; S.S. 1920, c. 57; S.S. 1921-22, c. 56; S.S. 1928, c. 57; R.S.S. 1930, c. 160; S.S. 1939, c. 72; and R.S.S. 1940, c. 199. *The Farm Implements Act* became *The Farm Machinery Act* as R.S.S. 1965, c. 232 and *The Agricultural Implement Act* as S.S. 1968, c. 1. It has been amended and re-enacted on numerous occasions since then and exists today as *The Agricultural Implements Act*, R.S.S. 1978, c. A-10. The Act provided both for the extension of contractual rights against manufacturers and for a substantial expansion of non-modifiable rights against sellers of farm machinery. The positive right of farmers to sue for economic losses against suppliers of farm machinery, effectively instituted a social insurance program similar to that of the more general debt relief legislation described above, with the same non-risk based premiums, and the same coverage—but in this case limited to the risk of non-payment due to defective farm equipment.

³¹ For example the CCF supported the Canadian Cooperative Implements, Ltd., a tri-lateral arrangement of the Prairie provinces organized in 1944. See D.E. McHenry, *supra*, note 21 at 241.

³² I assume for the purposes of this analysis that the debtors in these cases were individual farmers and the creditors organized financial and industrial concerns. However, the legislation was also drafted to apply with equal force to members of the local communities who might be

acknowledged the political character of the interpretative judgments made in relation to the legislation. In *Gofton et al. v. Shantz et al.*,³³ a sub-buyer of mortgaged property argued that he was entitled to rely on the provisions of the *Farmers' Creditors Arrangement Act*³⁴ to have the mortgage debt reduced. The Court held that there was no relationship of debtor and creditor between the sub-buyer and mortgagee and that the sub-buyer could not bind the mortgagee:

There are two views that may be put forward of the [Act]: First, that the benevolent operation of the *Farmers' Creditors Arrangement Act* will be greatly hampered unless it can be so construed as to render, subject to its provisions the entire affairs of the farmer seeking its benefits. If he has bought land subject to a mortgage...he cannot attain full benefit of the statute in question unless he can be relieved from some part of the burden of the mortgage upon his farm....

The opposite and contrasted view of the statute is that it very clearly interferes with the rights of secured creditors and that it is important that a statute of this nature should be strictly construed and kept within its legitimate operation.³⁵

Whether or not judges acknowledge their role in this way,³⁶ one might predict that judicial power produced by the open meaning of language, and the inability or unwillingness of legislative institutions to address all possible futures, would be exercised in a fashion which might consistently favour the interests of either creditors or farmers.

What is particularly interesting about the set of cases is that they uniformly deal with formal "technical" questions. The disputes typically involve: the applicability of the legislation to loans before or after a specified date; the residency requirements of the debtor; the classification of the transaction as a sale or lease; whether an executor of a farmer could claim the benefits of the legislation; whether an administrative agency made a "jurisdictional error." The

owed money by farmers. This fact may well have triggered decisions favouring creditors in those cases. The manner of reporting does not permit one to discriminate between the two groups of creditors. See McConnell, *supra*, note 13 at 195.

³³ [1937] 4 D.L.R. 347 (Ont. C.A.).

³⁴ *Supra*, note 28.

³⁵ *Supra*, note 33 at 349.

³⁶ F.L. Morton, ed. *Law, Politics and the Judicial Process System in Canada* (Calgary: University of Calgary Press, 1984) at 63 adopts the naive, albeit traditional, view that judges interpreting common law and statutes affect public policy less directly than judges interpreting constitutional powers. It is my view that public policy is implicated as much in describing the scope of legislation, and thus determining its impact in favour of a particular community, as it is in describing the scope of legislation in the process of validating it for constitutional purposes.

apparent political emptiness of the legal disputes and their resolution is truly remarkable.³⁷

The current debate between the more radical anti-*Charter* critics and liberal pro-*Charter* supporters has typically focused on Supreme Court of Canada decisions and other appellate decisions. These critiques offer interpretations which, while provocative, are usually contradicted by the judicial rhetoric and the equally logical arguments of the other side. Empirically analyzing a relatively large number of lower court decisions over time represents an attempt to reduce marginally the subjectivity of interpretation.³⁸

The difference between the traditional analysis of elite judicial decisions and the approach taken in this paper may be appreciated through an analysis of the judicial responses to the *Farmers' Creditors Arrangement Act, 1934*.³⁹ In 1937, the Privy Council in *Attorney-General for British Columbia v. Attorney General for Canada et al.*,⁴⁰ upheld the *Act* as within the constitutional authority of the federal government to enact bankruptcy and insolvency legislation. This decision is generally viewed, in light of related decisions of the Privy Council and the Supreme Court of Canada, as indicating judicial support for progressive legislation designed to permit farmers to maintain themselves and their families in productive farming communities.⁴¹ However, at the lower court level, the vast majority of decisions involving the application of the statute at the margin favoured the creditor rather than debtor. Does the judicial response to the *Act* indicate support for the farming community or allegiance to the interests of creditors? There is no doubt that looking at appellate decisions is important, but the image of the world through that lens is very different from the one I describe here.

³⁷ This should be contrasted with work from J.A.G. Griffiths to Joel Bakan, as examples of those who consistently focus on what are facially class, gender, labour/capital and other "political" disputes. See J.A.G. Griffiths, *The Politics of the Judiciary* (Manchester: Manchester University Press, 1977); J.C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall L.J. 123; J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485.

³⁸ I admit that lower court decisions themselves represent an extremely narrow population of the relationships which are regulated by a particular legislative framework. However, it is almost impossible to access debtor-creditor relations which did not produce litigation. One important, and as yet uninvestigated source of very important data are the over 50,000 cases adjudicated by the federal Board of Review under the *Farmers' Creditors Arrangement Act* which might very well produce a wealth of information about the way in which that *Act* affected creditor/farmer relations from 1934 onwards. See *In Re Petrisor* (1946), 27 Can. Bank. Rep. 243 at 248.

³⁹ *Supra*, note 28.

⁴⁰ [1937] 1 D.L.R. 695.

⁴¹ An early comment on the legislation is G.W. Forbes, "Court Decisions Concerning the *Farmers' Creditors Arrangement Act*" (1937) 15 Can. Bar Rev. 697.

I have been able to collect and interpret 269 cases considering the two categories of legislation described above.⁴² Certainly, my interpretation of judicial outcomes and language is no more authoritative than any other, but the reality of legal authorship demands that my analysis operate definitively for these purposes.⁴³ Of forty-two cases decided under the *Debt Adjustment Act*, twenty-eight (66.7%) were decided in favour of the creditors and only fourteen (33.3%) in favour of debtors. Of fifty-eight cases decided under the *Workers' Compensation Act*, thirty-two (55.2%) were decided in favour of creditors and twenty-six (44.8%) in favour of debtors. Of seventeen cases decided under *The Limitation of Civil Rights Act*, twelve (70.6%) were decided in favour of creditors and five (29.4%) in favour of debtors. Of fifty-eight cases considering *The Farm Implement Act*, thirty-one (53.5%) were decided in favour of sellers, twenty (34.5%) in favour of buyers, and seven (12%) were ambiguous. Of ninety-four cases decided under the *Farmers' Creditors Arrangement Act*, forty-nine (52.1%) were decided in favour of creditors and only forty-five, (47.9%) in favour of farmers. *In the aggregate, 152 of the 269 decisions (57.1%) were decided in favour of the creditors and only 110 (40.8%) in favour of debtors,*

⁴² Several of these cases involve different levels of court and thus different judges interpreting the same legislation and facts at various trial and appellate levels. See *Diewold v. Diewold* (1939), 21 Can. Bank. Rep. 242 (Sask. K.B.) (decision favouring debtor); *Diewold v. Diewold* (1940), 21 Can. Bank. Rep. 370 (Sask.C.A.) (decision favouring creditor); *Diewold v. Diewold*, [1941] S.C.R. 35 (decision favouring creditor). Of the two cases decided under the *Farm Security Act*, one favoured the debtor and one the creditor. This difference is significant at the one percent level.

The same analysis might be applied to cases involving common law contract claims. In this case the doctrinal rule will generally produce legislation involving debates about its applicability of common law rules to specific facts and one might engage in an analysis of these cases to determine whether the cases, in the aggregate, reveal a systemic bias. See *Lynberg v. Tarbox* (1908), 1 Sask. L. R. 492 (claim by manufacturer of threshing machine on an assignment by purchaser of money earned with machine; held for creditor on claim for money earned with part of machine); *Grimes v. Gauthier* (1908), 1 Sask. L. R. 54 (claim by chattel mortgagee for full value of machine seized and sold by mortgagor, held for debtor since sale by mortgagee was not carried out with proper care to secure highest price); *Hopkins v. Danroth* (1908), 1 Sask. L.R. 225 (claim by conditional vendor for deficiency after repossession, held for vendor, resale did not rescind contract). Anyone interested in the list of cases analyzed may obtain it from the editors of the *Saskatchewan Law Review* or from the author directly.

⁴³ In assessing the cases, I have ignored decisions in which judges addressed the constitutional validity of provincial statutes or programs. I have also ignored legislation which dealt with conflicts between farmers and small tradespeople. See *An Act Respecting Threshers' Liens*, R.S.S. 1909, c. 152 considered in *Rudy v. Sonmore* (1915-16), 9 Sask. L.R. 267. As well, I have not distinguished among the various levels of court in determining whether the decision favoured the creditor or debtor, financial institution or debtor, manufacturing concern or buyer as the case may be. I have also not attempted to determine any temporal pattern to the decisions either in relation to the introduction of the legislation, or to external variables such as local or national elections or the economic circumstances affecting the community. Finally, I have not included cases which I could only classify as ambiguous in terms of whether the decision favoured one or other of the parties. See, for example, *McDougall v. McDougall et al.*, (1918-19), 12 Sask. L.R. 289 (wife's interest in homestead limited to 160 acres, but still applies to property notwithstanding that husband owned only a one-half interest).

while seven (2.1%) were ambiguous. This difference is significant at the one percent level.⁴⁴

The results of my analysis offer some limited support to those who have argued against simplistic assertions of judicial neutrality in understanding the relationship of politics and the judiciary.⁴⁵ That is, one can argue that a creditor success rate of 65% on cases which should offer an equal probability of success or failure to both creditors and debtors, demonstrates that for whatever reason—class identification, an interest in preserving capital, concerns with attracting investment, the inability of debtors to express their position persuasively—judges favoured financial institutions and manufacturing parties who loaned capital or produced goods or services over farmers and debtors.

IV. ARE THERE LESSONS FROM HISTORY?

Little would be gained from speculating on the reasons for Seymour Lipset's failure to recognize the relevance of the political character of judges and of the various and subtle ways in which judicial power could interfere with the ability of elected institutions to fulfil political mandates.⁴⁶ However, it would appear

⁴⁴ Unlike some analyses of aggregated case law, I have not attempted to describe and assess the judicial discourse contained in these 269 cases. Such criteria as language, structure and form, rhetorical and metaphorical devices and selection of facts, are the traditional sources of analysis of reasons for judgment which one comes across in legal literature. I decided against engaging in that exercise for several reasons. First, reasons for judgement may very well be thought of as judicial rationalization. While the reasons make an interesting focus for inquiry if one is concerned as to why judges would want to publicize one set of ideas over another, they may not reveal very much at all about the complex and perhaps unknowable motivating influences in particular cases. Second, this research was designed to answer questions about the existence of judicial or institutional bias and one might predict that there would be little explicit reference to that issue in public reasons for judgment. Third, this research is concerned with the impact of legal institutions on a particular class of litigants in individual cases and in the vast majority of cases that impact would have been totally independent of the reasons for judgment given by particular judges. Fourth, even a cursory review of these cases indicates that they contain little more than a brief recitation of selected facts, an equally brief description of law, and a conclusion. While one might speculate as to why some facts were included while others were excluded and engage in technical legal analysis to demonstrate the availability of equally coherent legal outcomes, the cases themselves are not rich sources of reasons, ideas, values or anything else which might reveal much about the judicial mind. Most of these were lower court decisions, decided on financially "trivial" claims from the perspective of creditors, and they did not generate the extensive judicial opinion, writing and debate which characterizes modern constitutional litigation. Finally, the decisions were made between 1910 and 1945, when the style of judicial writing in these kinds of cases can only be described as minimalist and which, even in major cases, addressed "technical" legal issues and little else.

⁴⁵ Griffiths, *supra*, note 37.

⁴⁶ Seymour Lipset implies that the Canadian courts in 1950 were somehow apolitical, characterized by deference and neutrality in political matters. See S.M. Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York: Routledge, 1990).

that the data supports the recent theorizing that the legalization of politics may obstruct progressive legislative action. My analysis of the cases suggests that at least one group of judges consistently made interpretative choices which were insensitive to the needs of one of the less powerful groups in the Prairie community.

However, one must be cautious about engaging in simplistic interpretations of the data in support of claims that judges exhibited personalized class bias. The presence of a statistically significant imbalance in outcomes indicates only that more cases were decided in favour of creditors than debtors, and that the outcome is not a product of random variation. There are two further questions which remain to be addressed in considering the meaning of the data and its significance today.

First, we need to understand the depth of the ideas which produced the result. That is, while the imbalance of outcomes of the cases is significant, its implication for modern Charter theorists depends on one's sense of the depth and breadth of the attitudes which generated the decisions. Judges might have been insensitive to farmers in a way unique to that time and place. If that is true, the data may not tell us very much about the way in which modern political debates will unfold in the courts.

Second, we need to understand why that imbalance in outcomes occurred. There may be different variables which affected the outcomes of cases involving creditors and debtors. These variables may present important qualifications on attempts to employ the data to support an interpretation which would challenge the alleged neutrality of individual judges, judicial institutions or the law itself as a social institution.

A. THE POSITION OF THE FARMING COMMUNITY

We must recognize that the farming community as an oppressed group in Saskatchewan differs dramatically from other groups such as: organized labour,

Certainly one can identify a theme of "rationalism" and "technical" expertise and professionalism which pervades at least some political analyses of judicial decision-making in contract and other common law areas. See Morton, *supra*, note 36 at 62-65. As late as 1965, John Porter in *The Vertical Mosaic* (Toronto: University of Toronto Press, 1965) at 416, while recognizing the political patronage issue in senior judicial appointments, went on to describe a judicial role "marked by impartiality, rational inquiry, and attention to fact."

What seems to have happened is that many political scientists and sociologists accepted without criticism the classic model of judicial decision-making and ignored the wealth of legal scholarship in Canada dating from at least the Depression, and certainly from the end of the Second World War, which was influenced by the American Realist tradition. See F.R. Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485; B. Laskin, "'Peace, Order and Good Government' Re-Examined" (1947) 25 Can. Bar Rev. 1054; W. Friedmann, "Judges, Politics and the Law" (1951) 29 Can. Bar Rev. 811.

Aboriginal peoples, immigrants, the poor, and women whose interests might be prejudiced by the wielding of judicial power under the *Charter of Rights and Freedoms*. The farming community, once organized, could and often did dramatically influence political events. It represented a well organized and politically powerful voice in the electorate of Saskatchewan during the period under study. The absolute numbers, the potential and actual political power, and the importance of the farming community to the economic and social situation of the province are not characteristics shared by most groups who have recently raised concerns about judicial power in Canada. While judges might have been expected to be sensitive to the suffering of the farmers as a politically empowered group, they were not. The data might have been much more one-sided had the farmers been as isolated and marginalized as are many of the potential beneficiaries of progressive legislation today. If the data indicates bias in these historical circumstances, one should not be sanguine about the ability of politically disempowered and marginalized groups to sensitize modern judges to their respective situations.

It is also possible that Saskatchewan judges considering the legislation would have recognized it as an attempt to shift wealth from financial institutions and corporations with resources outside of Saskatchewan—from central Canada—to the farming community within the province.⁴⁷ The current Charter debate rarely permits one to conclude that judicial decisions in favour of oppressed groups would redistribute substantial amounts of wealth into the particular region in which the oppressed group and the judges reside. It must have been obvious that decisions in favour of debtors might well have benefited Saskatchewan at the expense of central Canada. The fact that the data favours creditors further strengthens the interpretation of the data as indicating an extremely powerful bias in favour of creditors.

Such a regional bias might have been augmented by judicial sensitivity to the unique circumstances of farmers in Saskatchewan during the Depression. The suffering of the farming community in Saskatchewan may have been conceived as a product of “nature.” The “naturally” disadvantaged farmers might have been treated more compassionately than those whose disadvantage was construed by the judges as a matter of individual choice, or at least of personal responsibility. Sympathy with farmers as victims of nature could have led to decisions in their favour, given that farming success or failure during the first half of the century in Saskatchewan was often a product of weather and international grain markets rather than of individual initiative or effort. One has a sense that the needs of labour, Aboriginal Peoples, immigrants, women and other groups today, are

⁴⁷ A problem with the cases is that they do not identify the residency of the disputants and thus it is difficult to verify this interpretation. A related problem is that the legislation was applied to individual creditors/sellers in some cases and I have been unable to disaggregate the cases on that basis.

often perceived by judges as a product of those individuals failing to take advantage of their abilities and opportunities.⁴⁸ That the historical data evidences a bias even in the case of “innocent” victims may indicate that the position of other groups who are unable to generate a sympathetic attitude might be much worse today.

Much of the legislation, and a substantial percentage of the cases, occurred during an economic crisis unique to the Canadian experience. No immediate crisis relevant to the position of disadvantaged groups exists in the minds of judges today. Again, one might have expected the judiciary to be sensitive either to the magnitude and severity of the suffering experienced by individual members of the farming community in Saskatchewan,⁴⁹ or to the risk of direct challenges to the economic and political order. Analogues to those risks are difficult to identify today. Certainly, with per capita income falling 72% from 1928 to 1933 an argument can be made that the circumstances of Saskatchewan farmers during the Depression had reached crisis proportions.⁵⁰ It is remarkable that decisions in these crisis circumstances favoured creditors, and that this bias existed in the face of economic crisis suggests that the situation of many disadvantaged groups today would be far worse.

Finally, all the above legislation while progressive in a limited sense, was enacted by Liberal provincial governments or by the Bennett government in Ottawa. Many proponents of the legislation admitted that it was not radical, and indeed it only provided for a modest and likely temporary period of consolidation for the farming community faced with drought, collapsing international wheat markets and limited capital reserves. The mainstream political parties’ parentage most likely attenuated the impact of judicial political affiliation. Had the legislation been introduced by a democratic socialist provincial government, the ideological opposition would have been greater.⁵¹

⁴⁸ It is interesting to note that at least one judge alluded to individual responsibility in refusing to permit a farmer to avoid his contractual obligations under an executed transaction which did not comply with the *Farm Implement Act*. See *Haubrich v. Keefner*, [1922] 1 W.W.R. 1079 (to permit the farmer to obtain the benefits of the machine and then avoid his obligations by acting opportunistically would “make the statute an instrument of fraud”).

⁴⁹ The depth and magnitude of the economic disaster experienced by farmers in Saskatchewan should not be underestimated. For example, the average yield per acre of wheat in Saskatchewan, which exceeded 25 bushels in 1925, had fallen to a low of 2.7 bushels in 1937. The estimated net income from wheat fell from \$218 million in 1928 to only \$42.3 million in 1933 to \$17.8 million in 1937. Export prices fell almost 50% from 1929 to 1933. See W.T. Easterbrook & H.G.J. Aitken, *Canadian Economic History* (Toronto: Macmillan, 1956) at 476-514. The suffering was not limited to farmers, but extended as well to thousands of seasonal farm workers. See L.A. Brown, “Unemployment Relief Camps in Saskatchewan, 1933-1936” (1970) 23 Sask. Hist. 81.

⁵⁰ See P.A. Russell, “Co-operative Government’s Response to the Depression, 1930-1934” (1971) 24 Sask. Hist. 81.

⁵¹ This is especially true when one looks at the judicial treatment of the *Federal Farmers’ Creditors Arrangement Act, 1934*.

This makes the data all the more remarkable, and suggests that any current fears that the judiciary will interfere with legislation introduced by democratic socialist provincial governments may be justified.

Furthermore, the legislation, while progressive, could be viewed as a self-financing insurance scheme, with wealth distribution taking place *within the farming community, not from the financial/manufacturing communities to the farmers*.⁵² So long as progressive legislation is directed at modifying substantive relationships in market transactions, one can be assured that the redistributive impact will be confined to those within the disadvantaged group. The legislation, while socializing risk, does so among the expected beneficiaries of the regulatory intervention. It is anything but radical legislative intervention in the marketplace. Understanding the legislation in that fashion, judges could have decided the cases in favour of debtors without significant concern that, over the long run, the position of creditors would have been prejudiced. The fact that the judiciary did not do so strengthens one's sense of the creditor bias reflected in the cases, and supports those who have argued that truly redistributive legislation may be at risk in the modern era of judicial hegemony.

Taken together, these ideas could just as well have combined to produce much more "neutral" data. One could have predicted that the Saskatchewan judiciary might have been more sensitive to the needs of the farming community than was the case. The particular context in which these decisions were made permits an interpretation of the data favouring creditors on the basis of class as reflecting a much stronger and more pervasive bias than might appear on a mere quantitative analysis.

B. NON-CLASS VARIABLES

There are several other ideas which make the analysis even more difficult to interpret. The first is that any interpretation of the data as evidencing systemic *personal judicial* bias may be incorrect if one relaxes an important assumption underlying the analysis so far. Until now, I have assumed that the outcomes in the 269 cases were independent of all variables except for the character of the parties as either a debtor or creditor. For example, the cases do not control for such variables as the age of the parties, the residency of the parties, the impact of the judgment on the local community, explanations for the non-payment of the

⁵² That is, one could assume that the lending institutions or manufacturers would charge a fixed premium reflecting the increased risk of non-recovery on default, or the increased risk of lawsuits associated with defective machinery. The result of this non-risk based premium would be to force low risk farmers to subsidize high risk farmers. Since all creditors and manufacturers were treated alike, any increased costs associated with calculating the premium would be passed on to the debtors/buyers.

money owing. In any event, one might plausibly argue that those kinds of factors did not vary in any systematic way with class across the cases.

However, a critical factor which certainly would have influenced the outcome of such disputes, and one which is almost certainly correlated with the class of the plaintiff or defendant, is the legal resources and legal expertise available to the parties. My analysis has assumed that access to legal resources and expertise is independent of wealth, organizational structure and debtor/creditor class.⁵³ I have assumed that, apart from class, the outcomes of the cases ought to have been equally divided among debtors and creditors.

However, a more realistic assumption is that creditors would have been able to invest considerably more money than debtors faced with the imminent loss of their farms. More importantly, creditors, as “repeat-players” in debt enforcement litigation, would often have made rational decisions to invest substantially more resources in order to pursue a claim in an individual case than would the debtor in that same case. Further, if one assumes that the quality of legal advice and the outcome of litigation is directly related to the amount invested, then my earlier interpretation of class bias may be incomplete. The data may be a product of institutional design factors—reflecting the use of markets to distribute legal services to both impoverished debtors and financial and industrial concerns—which produce results systematically favouring the latter two groups. Of course, once one admits this, then the entire legal system is implicated in the obstruction of progressive legislation.⁵⁴ Moreover, the phenomenon of systemic institutional bias, whether or not it augments systemic personal bias, equally implicates the law as part of a complicated political process.⁵⁵

There is no material in the literature of the era which sheds light on the impact of litigation strategies on case outcomes. It might, however, be possible to analyze the cases using a different set of parameters which, at least in theory, might offer some assistance in exploring this hypothesis. As noted earlier, the study encompasses 269 cases. One might attempt to allocate the cases into any one of several categories. A first set might involve cases determined by pure

⁵³ As well, one might posit that the judges would have been more familiar with the lawyers representing creditors, and thus would have been more comfortable with the arguments which their colleagues were making as compared with their attitude towards lawyers representing destitute farmers.

⁵⁴ This systemic bias is supported by a study of the availability of legal assistance in criminal and civil matters in Saskatchewan, which concluded that in 1965 “there is no assistance in civil litigation for an indigent.” See J.G. Anderson, “The Law versus the Poor in Saskatchewan” (1965) 30 Sask. Bar Rev. 126 at 134.

⁵⁵ I should acknowledge another institutional factor which might have produced outcomes favouring creditors. If debtors were undertaking litigation as part of a broadly based political strategy, one might have expected that some significant percentage of “losing” cases might have been taken in order to pursue either long term legal agendas, or non-legal agendas. However, in my reading of the literature describing the litigation in this era, there is no mention of an organized farmer litigation strategy.

findings of fact; a second set might involve the application of statutory provisions to particular facts; a third set might involve issues of retroactivity and retrospectivity; a fourth set might raise procedural issues; and a final set might involve questions of judicial review of administrative decisions. One might expect creditors to invest greater resources and perhaps succeed in a larger percentage of cases in the set of cases which have long-run implications (for example, in the set of cases generating issues of judicial review), as compared to the set of cases which will have little if any precedential values (for example, the set of cases involving pure fact determinations).⁵⁶

Viewing judicial behaviour as an unreflective, abstract reasoning process, which focuses on the application of formal, rational rules, and operates within a system which limits access to information about the implications of judicial choices, and which utilizes an extremely limited form of discourse in judicial institutions, also complicates the interpretation of the data as showing systemic bias. This is reinforced by the socialization of lawyers and judges by which those characteristics become invisible. They operate largely at an unconscious level and represent a pervasive part of the law and legal decision-making. This particular understanding of the law and the way in which judges are constrained in their choices suggests that legal determinacy is a product of training and reflective socialization in which one's ability to understand the world is narrowed over time.⁵⁷

This understanding of the law appears in the present context through the application of a "fundamental tenet" of interpretation. Judges may have believed or had faith in the idea that legislation is not intended to affect (or ought not to be interpreted as affecting) existing legal entitlements. Put another way, the judiciary would not interpret legislation as expropriating judicially-created contract and property rights unless the legislation was unambiguous and permitted no other interpretation.⁵⁸ This interpretative rule might have been

⁵⁶ An attempt was made to carry out this analysis on the 269 cases which comprised that data base for this study. However, it was not possible, with a sufficient degree of confidence in the accuracy of the choices demanded by such a study, to allocate a substantial percentage of the cases under review to any one particular category.

⁵⁷ Alan Hutchinson and I have developed this idea in an earlier paper. See D. Cohen and A.C. Hutchinson, "Of Persons and Property: The Politics of Legal Taxonomy" (1990) Dal. Law J. 20.

⁵⁸ This idea was reflected in two complementary interpretative rules operating throughout this era. The first is a presumption against the alteration of common law rights, and the rule that legislation should not be taken as affecting the common law unless it uses words which point unmistakably to that conclusion. See W.F. Craies, *A Treatise on Statute Law* (2nd ed., 1911) at 302, to W.F. Craies, *A Treatise on Statute Law* (6th ed., S.G.G. Edgar ed., 1963) at 336; *Greville v. Parker*, [1910] A.C. 335 (clear words necessary to interpret legislation to confer relief on persons "not specially meritorious"); *City National Assistance Board v. Wilkinson*, [1952] 2 Q.B. 648.

The second rule was consistent with the first, but focused specifically on legislative modification of contract rights. It provided that any construction should be rejected if it would

operating to influence judicial outcomes without a conscious understanding of its political content and without any suggestion of conspiratorial bias in favour of creditors. The judgments which I considered often spoke in the formal language of preserving the legal status quo.⁵⁹

In this case, as in the case of resource asymmetries, the systemic biases become institutional rather than class-based. All of this simply reinforces one's interpretation of the data as evidencing personal judicial bias. It suggests that the bias was more complicated and more deeply imbedded in legal operations than consciously designed prejudices. To the extent that these ideas remain part of the law today, one should not be optimistic about the position of disadvantaged groups under the *Charter of Rights and Freedoms* as interpreted by the judiciary.

Finally, and perhaps most importantly, there is considerable doubt regarding the legitimacy of my interpretation of the meaning of a balance between decisions favouring the farming community and decisions favouring the financial/manufacturing firms. I have presented the data on the assumption that a "neutral" judiciary would have produced results which would not have varied with class—roughly one half of the cases would have been decided in favour of debtors, and one half in favour of creditors. Thus, the data produced—favouring creditors—can be interpreted as evidence of judicial, or systemic institutional bias in that direction. However, I think that the analysis is much more complex than that.

Viewing the balance as indicating a relative degree of political impartiality in the judiciary assumes that there is one "correct" interpretation of the relevant legislation, and that the legal advisors to both groups accurately identified their respective situations as being close to the line. A balance in outcomes would have indicated that the judges, acting in an unbiased fashion, responded to something other than class in arriving at the particular judicial solution in each case. On those assumptions, my conclusion as to the political independence of the result might be supportable.

However, a very different set of assumptions might lead to a very different interpretation of the data. One might posit that there is no single correct answer to the question as to how legislation should be interpreted—that some legislators

enable a person to impair his contractual obligation by his own act. See F. Stroud, *Maxwell on the Interpretation of Statutes*, (5th ed., 1912) at 332, to R. Wilson & B. Galpin, *Maxwell on the Interpretation of Statutes*, (11th ed., 1962) at 200.

This common law interpretative rule contradicts the explicit legislative direction contained in the Saskatchewan *Interpretation Act* which from 1907 onwards stated that all legislation was deemed remedial and was to be accorded a fair, liberal construction and interpretation to achieve its legislative object. *The Interpretation Act*, S.S. 1907, c. 4, s.2; *The Interpretation Act*, R.S.S. 1965, c. 1, s.11.

⁵⁹ See, for example, *J.I. Case Threshing Company v. Whitney*, [1922] 3 W.W.R. 643 where the Court of Appeal refused to apply the *Farm Implement Act* retrospectively, and expressed concern that "if the section were held to apply to transactions that took place before the Act came into force contractual obligations would be prejudiced." *Ibid.* at 648.

might have wanted the outcome to go in one fashion, that other legislators might have wanted a different result, that creditors would have wanted a third and so on. In this world, judges might, as a class, be predicted to produce a fourth outcome. Based on a population of cases, lawyers would attempt to predict the judicial outcome. On that basis, they would only bring forward cases which they predict would be successful. On that analysis, the cases ought to have been equally distributed in favour of creditors and debtors whether the judges were neutral or biased in either direction!

Neutral data is a product of nothing more than a smoothly functioning legal system, which produces disputes. Given *any* set of predicted judicial behaviour, and any judicial bias, lawyers will litigate cases close to the line, and judges will produce outcomes equally distributed on each side. It is the location of the line which is important, and looking at these cases tells us little about *that*.

However, I think that one can and should take this analysis one step further. If all of the above is true, then the explanation for data which present an imbalance in outcomes must go beyond a static conception of bias, whether personal or institutional. One possible explanation for the data might be that the judges were constantly shifting the line in favour of the creditors over time. When acting for debtors, lawyers who predicted the outcome of cases using an historical lens would be expected to over-estimate the chances of success. It is this error which produces the imbalance in outcomes in a way which is dependent on class.⁶⁰ This hypothesis, which is the only one that explains the imbalance in outcomes, incorporates a much more dynamic conception of the way in which judicial attitudes, and thus decision-making, manifest themselves in case law over time.⁶¹

V. CONCLUSION

One engages in empirical research on law in the hope of reducing the ambiguity of the interpretative exercise which characterizes legal discourse. The

⁶⁰ One could, however, posit that lawyers would predict the dynamic behaviour of judges and correct their predictions to take into account a particular rate of change. If that is so, then the imbalance of outcomes favouring creditors might be due to a shift in the *rate* of change, which is not accounted for by the legal advisors for the debtor community.

⁶¹ The hypothesis might be tested through an analysis of the outcome of the cases over time. If the theory is correct, (and if every other factor which might influence the outcome over time is held constant) one might find a rough balance in outcomes at the outset of litigation on a specific piece of legislation, and an increasing imbalance as the body of case law matures. However, and this is extremely important, *if the legal advisors are cognizant of litigation trends*, they could be expected to incorporate that into their predictions of outcomes—producing a constant balance of outcomes between debtors and creditors over time notwithstanding the judicial shift—all they need to know is the rate of change. If *that* is true, then the imbalance must be a product of an unanticipated change in the rate of change, representing an acceleration in the extent and degree of bias over time.

case law which I describe, taken in the aggregate, is intended to inform the debate about the connection between law and politics, about the implications legal hegemony and ultimately about the relationship between legal and representative institutions. However, the meaning of the data remains uncertain. Nonetheless, I have attempted to demonstrate that there are many indications that the data may evidence a deeply held legal antipathy towards economically disadvantaged groups, which manifests itself in individual decisions on legislation enacted for their benefit.

In 1932, Prime Minister R.B. Bennett responded to labour unrest by suggesting that those who advocated progressive change would “destroy law and order and democracy.”⁶² My analysis of 269 cases decided under progressive legislation suggests that it was law and order exercised through the interpretive power of the judiciary which represented and still represents a disturbing challenge to democracy in Canada. Law and order is constituted in a traditional set of legal institutions, forms of judicial rhetoric and the exercise of power through interpretation by an elite judiciary. As one reflects on the experiences of the farming community in Saskatchewan under “progressive” legislation (which might not have been that progressive at all), the outcome of the current debate regarding the place of the *Charter of Rights and Freedoms* in Canadian law and politics becomes sadly predictable.

Tragically, this relationship between the law and politics, and the sense of disempowerment of members of the farming community in Saskatchewan, continues today. Farm foreclosures in Saskatchewan currently occur at a rate of 120 per month. David Ashdown, an Anglican Minister, writes an essay on “The Tale of a Man Destroyed” in which he describes the farmers he knows as victims of “international grain markets, the intricacies of the legal system, the vagaries of financial institutions, and government policies.”⁶³ One has to wonder whether legislation introduced today in response to of human tragedy which occurred half a century ago, would be received any differently by the judiciary.⁶⁴

⁶² Cited in O. Melnyk, *Remembering the CCF, No Bankers in Heaven* (Toronto: McGraw-Hill Ryerson, 1989) at 3.

⁶³ D. Ashdown, “The Tale of a Man Destroyed” Vancouver Sun, (5 February 1991) A9.

⁶⁴ The article, with full supporting documentation, has also been printed with the permission of the *Saskatchewan Law Review* in Canadian Legal History Project, CLHP-WPS-92-18 under the same title.