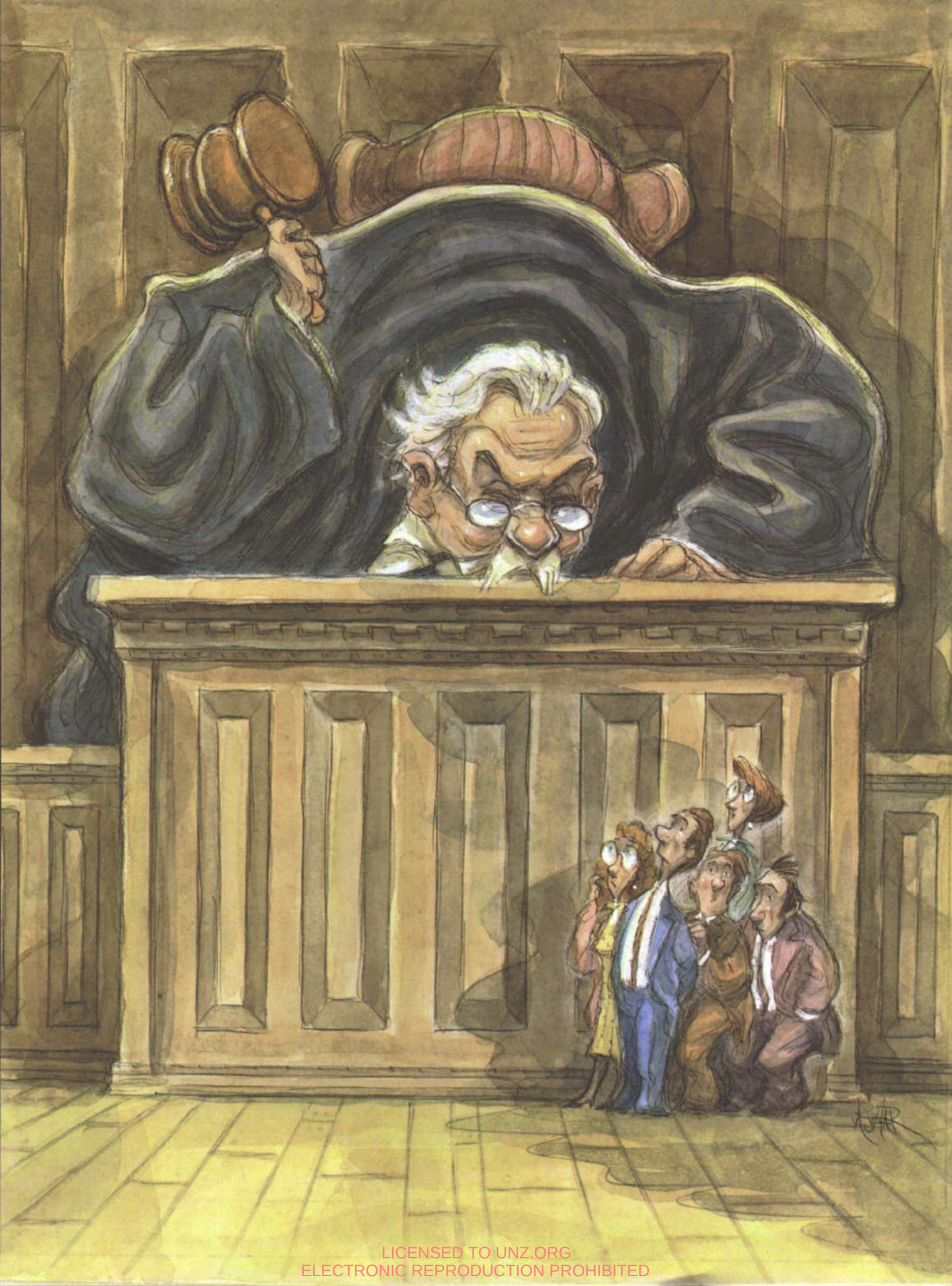

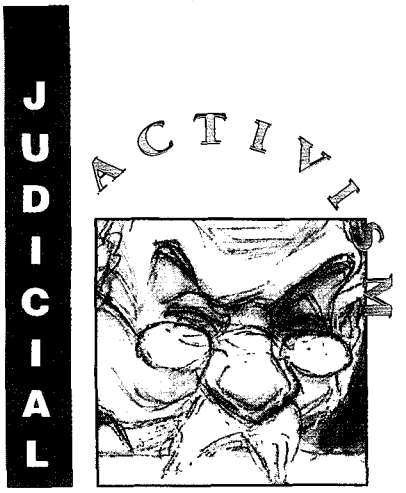

Curbing Our Imperial Courts

by Roger Clegg

WHO RUNS THE PUBLIC SCHOOLS IN KANSAS CITY, MISSOURI? NOT THE SCHOOL BOARD, OF COURSE, BUT JUDGE RUSSELL CLARK. YOU CAN READ ABOUT HIM, STARTING ON PAGE 52. • WHO WRITES THE MARRIAGE LAWS FOR HAWAII? NOT THE MARRIAGE BUREAU, OF COURSE, OR EVEN THE STATE LEGISLATURE, BUT JUSTICE STEVEN H. LEVINSON. YOU CAN READ ABOUT HIS HANDIWORK TOO, STARTING ON PAGE 57....

And who sets welfare policy for illegal immigrants in California, determines who can march in the Boston St. Patrick's Day parade, writes gay-rights ordinances for every Colorado city and town, decides what initiatives can appear on the ballot in Florida, and tells the antitrust division of the U.S. Department of Justice when and how to settle a case against Bill Gates? Not the California legislature, or Boston city council, or any elected representative in Colorado, or the people of Florida, or the head of the antitrust division.

No, if you've been reading the papers lately you know that the answer to each question is the same—judges set these policies. They are able to do so because they have usurped the decision-making authority of other government officials, often by manufacturing new constitutional "rights" that have no basis in actual constitutional language or history.

This is called judicial activism, and it is a bad thing.

Judicial activism is bad for both practical and philosophical reasons. The first practical objection is that it inevitably thrusts judges into policymaking roles for which they have no competence. Are judges as qualified as school boards to run local schools, or state legislators to write marriage laws, or antitrust officials to bring and settle antitrust cases? Of course not.

Secondly, when judges take on a function, they remove it from the political process. That's fine if it's a judicial matter—conducting a criminal trial, for instance—but an activity like funding and running schools ought to be subject to political give and take, compromise, and coalition-building. There is no one "right" way to run schools; the community and their chosen representatives should decide questions that arise. This is a place for the politics of self-government, but judicial activism shoves it aside. Of course, this is why many interest groups encourage judicial activism. It is easier to persuade a judge or two than the whole electorate. And so, as Tocqueville correctly observed, political problems in America inevitably end up before a judge.

To see the costs of constitutionalizing an issue and removing it from the normal political process, perhaps the best example in this century is the Supreme Court's 1973 abortion decision *Roe v. Wade*. By manufacturing a constitutional right to abortion, the Court both nationalized the abortion debate and made political compromise impossible. It has been a divisive issue ever since.

Illustration by Brian Ajhar

Judicial activism is also bad for more fundamental philosophical reasons. Simply put, it breaks the original Contract with America, namely the Constitution itself. The Founders believed that the federal government, and especially the federal courts, should play a relatively small role in our republic. The judiciary was to be the "least dangerous" branch, as Hamilton called it in *The Federalist*, doing no more than reading and applying the constitutional and legal texts that others wrote.

It is undemocratic when judges overturn laws passed by electoral majorities. When these judges lack a constitutional basis for doing so, they act illegitimately as well. The Constitution is the fundamental statement of We the People's political intentions—the "supreme Law of the Land," as it says in Article VI. No judge, legislator, or bureaucrat can legitimately break this law by substituting his wishes for it. On the other hand, when a legislature passes a legitimately constitutional law, no judge may break that law by overturning it and substituting his wishes for the people's. And any judge inclined to such arrogance should realize that an electorate thwarted in its efforts to carry out its will through laws will eventually turn to more dangerous means of expressing its will.

When judges refuse to do their job of applying the law, they also make it easier for the other branches to refuse to do their jobs. If Congress knows that the judiciary will exercise its own policy judgment, Congress knows it can duck making tough calls. An example: former Massachusetts Sen. Paul Tsongas sponsored the Equal Rights Amendment to the Constitution, but when challenged about what its abstract provisions would mean in practice, he claimed he didn't know and we should let the courts decide.

In the late twentieth century, apologists for judicial activism are generally found on the Left. But the practical and philosophical objections to activism ought to be recognized by both sides of the aisle, and the origins of activism ought to drive this point home.

Judicial activism has a long and sad history in our country. Exhibit A is the Supreme Court's 1857 *Dred Scott* decision, which struck down a congressional statute—the Missouri Compromise—on the grounds that by prohibiting slavery in federal territories it violated the Due Process Clause of the Fifth Amendment. The Court also proclaimed that blacks were so inferior that they could not be U.S. citizens. And by inventing an absolute right for a slaveholder to do whatever he chose with his "property," the judicial activism of *Dred Scott* threatened to spread slavery to the free states and so hastened the Civil War. Overturning this judicial attempt to "solve" a political problem required the bloodiest conflict in American history, as well as three constitutional amendments. One would have thought this epic failure might have chastened the judiciary, but it didn't.

Instead, the Supreme Court seized on a Reconstruction-era constitutional amendment to begin a new round of activism. It used "substantive due process" (the very doctrine that Chief Justice Taney had created in *Dred Scott*) to begin striking down state economic regulations (child labor laws and the like). This practice continued until the New Deal era.

The Warren Court of the 1960s began the next great era of activism. The Court meddled in all sorts of state and local laws that aimed to reduce public nuisances like vagrancy and panhandling. It opened vast loopholes that allowed redhanded criminals to get off on technicalities. The minting of new, previously unheard-of rights has continued to the present day, when judges contemplate imposing same-sex marriages on Hawaiians and interior-decorating choices on Missouri school officials.

Since earlier activism was distinctly unprogressive, it is shortsighted for the Left to defend the activism of our era. Nonetheless, the Left does. And when the term "judicial activism" is misused, most frequently and willfully it is by proponents on the Left.

There are three common mistakes. Sometimes "activist" is used as a synonym for "energetic." One pictures the activist judge bouncing out of bed and into his chambers early in the morning, fortified by a brisk jog and bowl of granola, and going unshirkingly about the business of judging. The apostle of restraint, on the other hand, comes in late and goes home early, after a long lunch hour, letting the cases pile up on his desk. This is silly, of course, but you'd be surprised how many news articles point to the diminishing caseload of the Supreme Court as proof that it has rejected an activist role.

Slightly more sophisticated is the claim that an activist court is one that overrules its own precedents. If today's Rehnquist Court calls into question, let alone overturns, a hallowed Warren Court precedent, the liberal pundits exclaim, "Ah ha! This is not a conservative court at all. These hypocrites are themselves activist!" As if returning the laws to constitutional shape is the same as stretching them at whim.

Finally, "activist" is also applied to any decision that asserts judicial power against the political branches. Once again, pundits use this definition to "prove" the hypocrisy of a conservative court. If a statute is struck down as an unconstitutional taking of private property, well that is surely "activism"—even if the statute is flatly inconsistent with the Constitution.

All of these are misuses of the term. What judicial activism truly describes is a judge who misapprehends the role of the judiciary—by asserting his view of what the law should be, instead of determining what in fact the law is. A court that works hard and decides a lot of cases, but renders its decisions based on what the Constitution and statutes actually say, in short, is not activist. A lazy court that, when it does speak, does so arbitrarily is still activist.

Similarly, if a court is confronted with a precedent it determines is not based on a sound interpretation of legal language, it is hardly being "activist" when it overturns that decision. Conversely, rigid adherence to established activist precedents is simply consistent activism.

There is nothing activist about a court declaring the actions of the legislature or executive unconstitutional—so long as those actions are in fact inconsistent with the Constitution, and not simply contrary

Roger Clegg is vice president of the National Legal Center for the Public Interest, a Washington, D.C.-based law and education foundation.

to the judges' own predilections. Indeed, it is a form of activism to ignore real constitutional guarantees, as has frequently occurred in this century with property rights, for example.

Given its discredited history and general unpopularity, what accounts for the persistence of judicial activism? The answer is simple: like most evils, it is rooted in human nature. Two instincts in particular account for judicial activism: the very human desires to right wrongs and to boss people around. The first is more defensible than the second, but working together the two often lead to a bad end.

People commonly go into politics or law because they (a) have strong views about how the world ought to be ordered, and (b) want to do something about it. And it is from the ranks of politically involved lawyers that we draw our judges. In Hollywood, everyone wants to direct, and there is a strong temptation for judges to use the bench as a director's chair too.

This tendency is aggravated by the social circles in which judges generally find themselves. When they speak at law schools, when they participate at conferences, when they hire their bright young law clerks, when they talk with the press, when they go to the annual American Bar Association convention, when they attend the receptions thrown by their spouses' favorite causes—there are few social rewards for resisting the temptation to hurry along "progressive" political interests through judicial activism. Opposing activism will prompt raised eyebrows at fashionable social events, while indulging in it will earn a warm pat on the back.

Because there are both internal and external pressures to be activist, it is easy for a judge to rationalize a wrong decision. Heaven knows there are now plenty of bad precedents out there for the weak lower-court judge to follow. And focusing on the law is more difficult than giving in to your feelings. Judicial restraint requires qualities that are the polar opposites of "righting wrongs" and "bossing people around." Unsurprisingly, these qualities come hard to most people.

For starters, restraint requires a recognition that ends do not justify the means. It is not easy to say to someone for whom you feel sympathy, "Sorry, but my job is not to help you, even though I could." That requires discipline and detachment. Restraint also calls for a mature acceptance of the fact that no one person and no one institution can know all the answers, for what would that be but dictatorship under another name?

If activism is here and if human nature makes it likely to stay, what can be done about it? There is no simple solution. As we've seen, this is a deep-seated tendency that has been with us a long time. But certain steps can be taken.

The first is to make sure that a problem is really with the judge and not with the legislature. The ugly truth is that sometimes judges interpret laws in crazy ways because that's how they're written. With so many laws being passed these days, with the laws written being so long, and with regulatory bureaucracies piling dozens, even hundreds, of regulations on top of each statute, mistakes are made. Sometimes politicians and bureaucrats cater to special interests, hoping that the public at large won't notice. Or, in an attempt to please everyone, lawmakers write laws in a deliberately vague way.

If a law or regulation is defectively written, don't blame the judge—blame the legislature or the bureaucracy and demand action there.

Often, solutions to activism will lie in the political branches, even when the problem is with the judiciary. If a judge decides to extend a narrowly intended law into a new area, he can be thwarted if that law is then clarified by amending it. The new ordinance prohibiting discrimination against the disabled wasn't intended to cover the city's ballet? Just say so.

A recent variation on this theme involves the so-called exclusionary rule. This judge-made doctrine excludes evidence from a criminal trial that is later determined to have been seized in violation of the Fourth Amendment's restrictions on searches and seizures. Bills overturning this rule are now working their way through Congress.

When, as often happens, a legislative or administrative response is difficult or impossible, there is still hope. Many state judges are either elected or are subject to recall votes. Even impeachment may be possible. And just as judges are susceptible to personal, political, and social pressures to be activists, they can be subjected to the same pressures to refrain from activism.

Still, there's no doubt that to some extent judges can ignore public opinion. They're supposed to, after all. Ultimately, the only way to avoid having activist judges appointed is to make it politically costly for presidents (or governors) to appoint them, and politically attractive not to. This is the legitimate area of inquiry at a judicial candidate's hearings, and voters should demand that it be explored. After the fact, presidents and their parties should be held accountable for the activism of their appointees. Who appointed Judge Clark anyhow?

There is a larger lesson to be learned from the sorry history of judicial activism. The real question is, who decides? And how do we decide who decides?

The Constitution wisely gave only limited powers to the federal government. Today, it is not just federal judges who have seized more power than the Framers gave them, but Congress and the executive branch. Those branches have been "activist" too.

Asking the federal government to act may be an easy way of getting the statute, or entitlement, or pork that we want. It may be much simpler, individually and collectively, than dealing with a given problem at the state or local level, or within one's own business or one's own family. Taking responsibility is hard, and so is rejecting government help when it's offered to you. But in the long run we pay dearly in lost liberty when we cut corners. We must accept the fact that the proper means may not always be the easiest way to the ends we would like.

There is nothing wrong with demanding that judges do only their jobs. But we must also demand that other federal officials do only theirs—and we must be willing to do ours too.

Home Again: Aleksandr Solzhenitsyn's First Year Back in Russia

Edward E. Ericson, Jr.

The first thing to note about Aleksandr Solzhenitsyn returning to Russia at the age of 75 is the wellnigh miraculous fact that he lived to get the chance. More than 40 years ago, he almost died of cancer. He spent eight years in the Gulag camps that claimed at least 60 million lives, lives we know of through him. The KGB plotted to kill him and once almost succeeded with poison. By any measure, his is one of the truly dramatic lives of our century, a classic illustration that the pen in one hand is mightier than the sword in many.

Born in 1918, Solzhenitsyn had decided by his teen-age years what he had been born to do: he would be a writer in the great Russian literary tradition. His subject would be the greatest event in modern world history, the Bolshevik Revolution. For he thought that the Soviet experiment was the defining experience of the twentieth century. His viewpoint would be undergirded by what he had learned in school: Marxism-Leninism.

Came World War II, and Solzhenitsyn entered the Red Army. As the war effort stumbled, he wrote a friend a letter criticizing Stalin's strategic blunders. Bad move. Military censors opened the letter. For this criticism, offered in private and less severe than what we daily read in public print about our nation's commander-in-chief, he was sent to prison. There he learned horrible things that as a schoolboy he could not have imagined, any more than we could have imagined them until he told us. There his commitment to the so-called progressive forces of history was quickly undermined by talks with the worst enemies of the state—religious believers. And so, gradually, he returned to that faith into which his family had had him baptized as an infant.

Once out of prison, he wrote and wrote. What stories this first-hand witness now had to tell. They were pieces of the greatest horror story, at least in quantitative terms, in world history. In addition to his novels, stories, and plays, he wrote a non-fiction history of those prison camps to which he gave the name *Gulag*. Thus did one man contribute to our dictionaries one word to stand, along with *Holocaust,* as a shorthand term for modern man's inhumanity to man.

In 1974, when the KGB tracked down a copy of *The Gulag Archipelago,* Solzhenitsyn was sent into exile, a state he says is worse than death for a Russian writer. He settled in the United States. The press—and here I mean what Harold Rosenberg has called the herd of independent minds—will tell you that Solzhenitsyn is anti-Western. Solzhenitsyn will tell you that the United States is the most generous and most magnanimous country in the world. When he departed from his 18-year-temporary home in Cavendish, Vermont, he thanked the locals for their lessons in grass-roots democracy and declared that those years had been the happiest and most richly creative of his life.

In Vermont, he wrote the series of novels he had projected in his youth. They are longer by far than Tolstoy's *War and Peace.* He devoted the prime of his life to telling future generations of Russians the truth of their history, after a concerted official effort to replace truth with falsehood. Initial judgments of this mammoth project, called *The Red Wheel,* are not favorable, but these judgments have been cast before the work has been seen as a whole. A generation from now, after some critical siftings, today's students may know whether he parceled out his life's energies wisely.

Solzhenitsyn's life has been not only dramatic but also influential. In a major article last year in *The New Yorker,* David