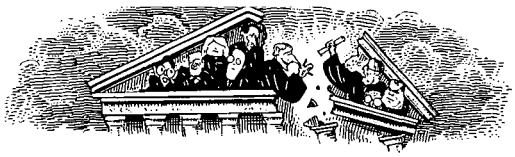

by Jeremy Rabkin

No Quick Fixes

An indifferent public is no match for activist courts.

Conservative commentators have been doing a fair bit of huffing against the Supreme Court in recent months, and new provocations are appearing almost daily on the front pages. After California voters endorsed a state constitutional amendment banning affirmative action preferences, a federal judge almost immediately held the measure unconstitutional. The Clinton Justice Department has announced its readiness to defend the judge's action all the way to the Supreme Court. The injunction may be activist, but under existing precedents it can certainly be defended.

When a Hawaii court held that the state might be obliged to recognize same-sex marriages, Congress responded by enacting a federal statute, authorizing all other states to refuse to accord inter-state recognition to such marriages. Reputable scholars, such as Georgetown Law professor William Eskridge, insist that the Supreme Court will be on solid ground in declaring the Defense of Marriage Act in violation of the Constitution.

Meanwhile, almost everyone acknowledges that public policy faces anguishing challenges in dealing with pain-ridden, terminally ill patients who want medical assistance to end their lives. Federal appeals courts on both coasts have decided to end the anguish by simply decreeing a new policy—a right to assisted suicide—in the name of the Constitution. The Supreme Court may well go along.

Lino Graglia, a law professor at the University of Texas, has offered a particularly stark interpretation of the general pattern. Contemporary constitutional adjudication, he says, has become little more than a system to "enact the policy preferences of the cultural elite of the far left of the American political spectrum." In *Slouching Towards Gomorrah*, Robert Bork says that is "exactly so." And he proposes a suitably radical remedy: a constitutional amendment that would authorize Congress to override constitutional rulings of the Supreme Court by a two-thirds vote.

But both Bork's diagnosis and the remedy seem wide of the mark. On the current Court, Rehnquist, Scalia, and Thomas are pretty reliable hold-outs against the constitutional preferences of the "far left." So controversial decisions require the support of the Court's wobbling center—Justices O'Connor and Kennedy—to achieve a majority. Say what you will about these two, they are not likely to harbor ambitions of enacting the agenda of the "far left." On the contrary, they have sided with the conservatives in a number of major rulings in recent years, as for example in decisions against racial gerrymandering of electoral districts and against federal overreaching at the expense of the states. They pride themselves on striving for "balance."

This can be maddening to a logical thinker like Justice Scalia. As even Scalia recognizes, though, it doesn't make these justices reliable agents of the "far left." Last year the balancers signed on to Justice Ginsburg's feminist tirade in the VMI case, equating state support for an all-male military academy with state-sponsored racism in the days of segregation. Given the force of this logic, Justice Scalia protested, even a private school would have to be denied tax-exempt status if it were not co-educational—unless the Court disregarded its own precedent here, which, as Scalia immediately acknowledged, "is a substantial hope, I am happy and ashamed to say."

How many Americans would agree with the claim that the Supreme Court has been enacting the preferences of the "far left" of the "cultural elite"? No doubt, the general public is woefully uninformed about the actual decisions of the Court. Polls continually show that, while solid majorities oppose abortion on demand, equally solid numbers say they support Supreme Court rulings regarding abortion. Most people do not understand what the Court is up to. But if the public does not see the Court as extreme, how likely is widespread support for extreme remedies for judicial activism?

History must be discouraging for those who seek to build public support for ambitious remedies. The most ambitious attempt to force changes on the Court was surely President Roosevelt's "Court-packing" scheme, in which he proposed to add new seats in order to provide himself with openings for new appointments. Roosevelt announced the proposal after the Court had struck down a series of popular New Deal measures and after voters had reaffirmed their overwhelming support for FDR in the 1936 election. The Court-packing plan nevertheless provoked such hostile public reactions that congressional leaders did not dare even to bring it to a vote.

Is the public now so much angrier at the Court than it was in the 1930's? Perhaps it should be, but there isn't much

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evidence that it is. If the public isn't already aroused, Bork's remedy isn't likely to do much good, even in the unlikely event that the public could be persuaded to support the sort of constitutional amendment he proposes.

In fact, this scheme has already been tried and has proved a great disappointment as a check on judicial activism. Canada adopted a new federal constitution in 1982. Prime Minister Trudeau had been eager to have a judicially enforced bill of rights as a reassurance to French-speakers and other minorities. But many Canadian politicians— shocked at how much power courts had come to exercise in the United States—opposed the plan unless it included definite safeguards against judicial usurpation. The compromise finally adopted allowed the federal parliament and any one of the ten provincial parliaments to override a constitutional ruling of the Supreme Court by simple majority vote.

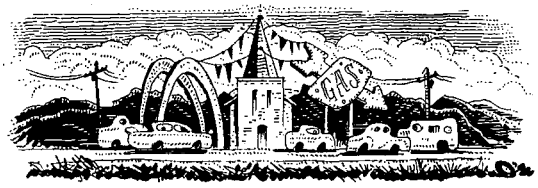
The Canadian Court then duly adopted an activist stance, as if to make up for lost time: it has struck down Canada's anti-abortion laws, introduced American-style legalisms into the criminal justice system, struck down Sunday-closing laws as infringements on religious liberty, and so on. Not one of its rulings has ever been overruled by the federal Parliament, and only Quebec and Manitoba have exercised their veto power—one time each.

Why such reticence, when the new Canadian constitution explicitly allows politicians to override the court? One reason is that, while it is perfectly legal, politicians fear that such overrides will appear as threats to civil liberties or the rule of law. And, like politicians everywhere, Canadian pols are not anxious to jump into controversial issues. Yet before 1982, Canadians had almost no history of activist judicial intrusion into social issues—on the contrary, they had a tradition of disciplined parliamentary support for the government of the day. If Canada doesn't make use of checks on its Court—and its Court seems unintimidated—why expect better results here?

It is not so much a particular braking device that's required, as specific demonstrations of the need for brakes. If the Court is ever to restrain itself, the political system must signal its willingness to resist judicial activism. A lot of political campaigning is required on specific issues to teach the justices what will be regarded as too "far left" or just too far out for the country to accept. A Republican Congress can be a big help in this effort to instruct the Court by rallying public opinion. For example, a law limiting federal commitments to racial or ethnic preferences—a federal counterpart to the California Initiative—would do a lot to focus and reinforce the current public mood on this issue. Last year's Defense of Marriage Act might look less like a pre-election ploy—ripe for judicial overruling—if Congress now supplemented it with legislation clarifying what sorts of "marriage" would be recognized in federal tax law or in the award of Social Security benefits. And so on. If Congress is not prepared to mobilize public opinion on particular issues, however, it can't expect to muster public support for an overall attack on judicial authority in the name of an abstract theory.

> *"Is the public now so much angrier at the Court than it was in the 1930's?"*

The Federalist famously urged the need for "republican remedies to the diseases most incident to republican government." One of the enduring infirmities of republican government is inattentiveness on the part of the general electorate. Critics of judicial usurpation should be the last to suppose that this problem can be remedied by a constitutional quick-fix.



by Bill Croke

Chinook Winter

Subzero cold is no match for a warm melting wind.

Cody, Wyoming

To write about the weather, you have to be where the weather's interesting, or preferably lethal. Here winter has been punctuated in a cadence of blizzard, dead cold, wild chinook—at twenty below, thin ribbons of smoke from chimneys and exhaust pipes rise upward for what seems a hundred yards or more, finally fading into the cobalt sky. Tires rolling on the frosty pavement make a sound like ripping Velcro, and at night you can just about hear the firmament throbbing. It is the paradox of the frozen: cold brings quiet, yet in the quiet you hear everything. In Wyoming, madmen hear the stars.

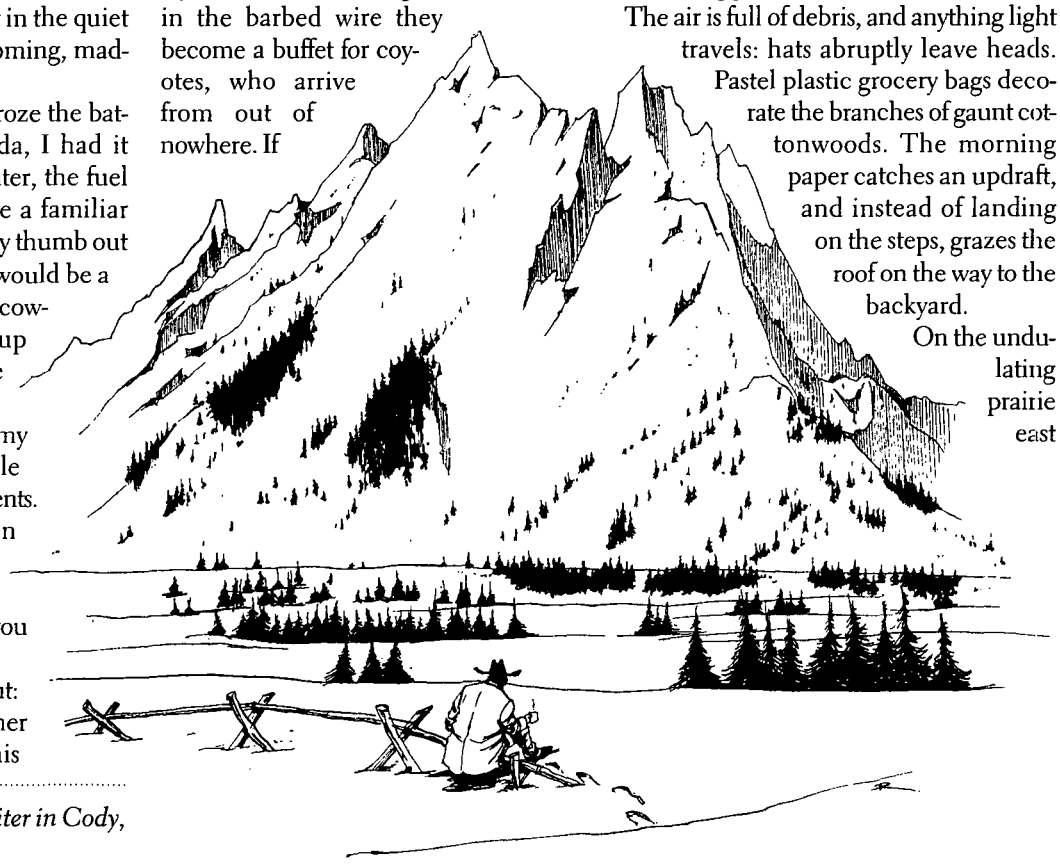
After a subzero blizzard froze the battery in my senescent Honda, I had it replaced; then, a few days later, the fuel pump went too, making me a familiar roadside figure for a while, my thumb out hoping for a ride. Usually it would be a male retiree, topped off in a cowboy hat and driving a pickup with a cab bigger than the room I write in. Each time they insisted on taking me to my exact destination, all the while talking politics and current events. A couple of these gentlemen picked me up more than once, and invariably they'd get around to asking, "When you gonna git your outfit fixed?"

Not in time, as it turned out: Christmas Day brought another eighteen inches of snow. This time my friend Joe rescued me, while his wife held down the fort at home and kept early-rising children away from the presents. Off we went to round up stranded in-laws, crashing through drifts in his big truck and following country roads that hadn't seen the plow and were awash in scalloped waves of white.

The big snowstorms bring antelope crowding into the sheltered draws. When the draws drift over the poor things drown. Other times the antelope entangle themselves in fencelines hidden beneath the layers of snow. Stuck together in the barbed wire they become a buffet for coyotes, who arrive from out of nowhere. If the pronghorn is unlucky, it will escape bloody and only maimed, and will be followed. The lucky ones die of exhaustion and exposure right there on the wire, before the coyotes get close.

The chinook—in Salish it means "snow-eater"—is both friend and enemy. "Warm as milk," as Wallace Stegner put it, the chinook can erase a foot or more of snow overnight. The hard ice at dusk will be nothing but slush and mud by morning. Yet any time wind—no matter how balmy—blows for three or four days at 40 to 60 miles an hour, it tends to get on your nerves. Open the car door and it threatens to fly off. You are constantly leaning forward. My front storm door bangs all night as if being pounded on by a violent drunk. The air is full of debris, and anything light travels: hats abruptly leave heads. Pastel plastic grocery bags decorate the branches of gaunt cottonwoods. The morning paper catches an updraft, and instead of landing on the steps, grazes the roof on the way to the backyard.

On the undulating prairie east



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