Spring 1982

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Should Judges Be Politicians?:
The English Experience†

GARETH JONES*

In these lectures I shall try to explain the role of the English judge in the British Constitution. I shall take as a striking demonstration of that muted role the judicial interpretation of politically sensitive legislation, which interpretation is characterized by extreme deference to the words of an Act of Parliament. This will lead me to speculate on whether the sovereign powers of Parliament should be curtailed by the enactment of a Bill of Rights and whether a Bill of Rights is a political and legal possibility. If it is, what form should it take? Finally, even if it were enacted, would it be a lead balloon since its interpretation would be in the hands of a judiciary that will not attempt to escape from its past? But first, a little history; England's problems cannot be understood without it.

"When, if at all, should judges step into the political arena?" is a question which has been a constant source of fascination for successive generations of jurists. The Supreme Court of the United States has demonstrated that, when the mood takes it, it can indeed be a legislator. In England the powers of the courts are necessarily more limited. England has no written constitution and no entrenched Bill of Rights. The Crown is a constitutional monarch and our legislature wholly sovereign. The

† This is an edited version of the Addison C. Harris Memorial Lecture presented April 9-10, 1981, at Indiana University School of Law at Bloomington. Events since April 1981 have been briefly noted.


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legislature is bicameral, but its upper house, the nonelected House of Lords, has only a limited power to delay the enactment of legislation which has been approved in a democratically elected House of Commons. The House of Commons appears to be all powerful; in practice it has become the vassal of the executive—the Cabinet—drawn from the majority party. The third power, the English judiciary, is “above” politics—a dependent of no political party. But that independence may have a hollow ring, for judges have sworn to execute faithfully the commands of the democratically elected sovereign.

In the early seventeenth century, English judges might have accepted certain fundamental and natural laws, given by God, that were sacrosanct and immune from destruction or attrition by the acta of the King in Parliament. They were not to do so. Yet two or more centuries were to pass before it was seen that there could be a conflict between legislative will and judicial responsibility. Blackstone, writing his Commentaries between 1765 and 1769, accepted the reality of a Parliament so powerful that it could make a man a woman and a woman a man and, at the same time, the existence of natural, common law rights which were absolute and immutable. Like his greater mentor Mansfield, Blackstone never saw, or at least did not acknowledge, the absurdity of that antithesis. He and his contemporaries could not conceive that Parliament would ever encroach on the fundamental rights of Englishmen—the rights of personal security, liberty, and (particularly) property—which the judges, he claimed, the oracles of the law, had so jealously guarded against the “wild and absurd” claims of Stuart monarchs, the exponents of the divine right of kings. That encroachment was yet to come. The Old Whigs saw the courts as the guardians of the individual’s natural rights and held those rights superior to the collectivist interests of the State. This was a political powder keg, as any student of the history of the United States Supreme Court well knows (the Four Horsemen can claim to be Blackstone’s American disciples); a powder keg which in twentieth century England has been successfully, or too successfully, defused.

If there was thought to be perfect harmony between the different organs of government in Blackstone’s England, that harmony did not survive unscathed the political and industrial revolution of Victorian England. The nineteenth century saw the growth of a substantial body of legislation (such as the Workman’s Compensation Statutes) which may fairly be described as “collectivist” but which did not consciously plan to regulate, in any grand sense, the day to day affairs of the community. It was the judges, of course, who had to interpret that legislation, which

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3 See id. at *69, *209.
they did, if not with hostility, at least with a lack of sympathy. During this period they so read the precedents of the preceding century as to make preeminent the so-called literal or grammatical rule of interpretation. This required them to glean the meaning of the statute from its words alone and forbade them to consider any extrinsic evidence whatsoever to elucidate the meaning. As early as 1875 one witness before a House of Commons Committee thought that they had done so for a purpose and stated that "it is obvious that there is a sort of antagonism between the courts and the Legislature, and that the judges are not unwilling to exercise their critical faculty, and sometimes very severely, . . . in drawing the fang-teeth of an Act of Parliament." Sir Frederick Pollock, no radical, considered that some of the statutory rules of interpretation could be explained only "on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds." Statute law was alien law, and Blackstone's credo, that the common law was incomparably more perfect than statute law whose innovations were at the root of so many intricacies and delays, was to become part of the juristic philosophy, consciously and unconsciously imbibed, of successive generations of English lawyers.

It is not surprising that true radicals, inspired by Bentham's polemical criticisms, regarded the judiciary as the enemy of any reform and that the trade unionists' picture of the courts was that of the Tory Party in whig and gown. Judges were (and are) drawn from a narrow social class, and judicial appointments were in the nineteenth century (but no longer are) the reward of faithful political service. By the end of the nineteenth century the bench was heavily Conservative. Lord Halsbury, three times Lord Chancellor over a period of over seventeen years, was a particularly influential partisan, earning a sharp rebuke from his own Prime Minister, Lord Salisbury: "The judicial salad requires both legal oil and political vinegar; but disastrous effects will follow if due proportion is not observed." The formative case law in which Halsbury's appointees restrictively interpreted trade union and social welfare legislation earned the judiciary the hostility "not just of Socialists, but of trade unionists

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4 See, e.g., River Wear Comm'nrs v. Adamson, 2 App. Cas. 743, 764 (1877) (Lord Blackburn, dissenting).
5 Hearings Before the Select Committee of the House of Commons (1875) (testimony of Mr. Reilly).
6 F. Pollock, Essays in Jurisprudence and Ethics 85 (1882).
7 See, e.g., 1 W. Blackstone, Commentaries *265; 4 id. at *18.
who were otherwise the mildest of Liberals." It is easy to lose a sense of perspective and proportion in reproducing such criticisms which related only to a segment of the work of the judiciary. The judges' daily bread was still "rich" common law bread which manual workers rarely broke. For that negative reason trade unionists were not mollified by the example of judicial fair-mindedness and craftsmanship in the development of the "pure" common law.

The interwar years did not change attitudes. The English judiciary was epitomized, its critics thought, in the person of the Lord Chief Justice, Lord Hewart. In 1928 Hewart wrote *The New Despotism* which expressed his fear that the "rule of law" was in danger of being subverted by unbridled administrative regulation. Judges were under a duty to read the language of statutes restrictively if such statutes attempted to erode fundamental rights (particularly, the right of personal property) and to exclude the jurisdiction of His Majesty's courts. Once again it was through the rigorous application of the literal rule of statutory interpretation that English judges could be faithful to their heritage and protect individual rights from erosion by "alien" collectivist legislation. English judges could not be and can never be as effective as the Supreme Court of the United States, with its self-created power to declare congressional legislation unconstitutional, in frustrating the legislative will. But some vociferous critics naively thought they were; and disparagingly compared them with Brandeis and Holmes, perhaps forgetting that they were the great dissenters. Prominent among the critics was Harold Laski. In his *Parliamentary Government in England*, he wrote:

They [the judges] do not appear to consider that Parliament may have good reason for the decisions it has chosen to make. They do not appear to consider, either, that the grounds for those decisions may lie, in fact, in the very habits of the judges themselves. The whole ethos of their approach is one of hostility to the process of modern administration. They interpret the "rule of law" as though they are themselves the masters of a "higher law" than that of a sovereign legislature the consent of which they themselves determine and the particular relevance of which they themselves decide. It is at least not excessive to say that they bring to the interpretation of the modern State and its processes habits of interpretation which, at least by implication, deny the validity of many of the ends to which its power is devoted.12

Exactly as the Supreme Court of the United States made itself, above all in its hostility to the New Deal of President Roosevelt, a kind of super-legislature engaged in the enunciation of political doctrine under

guise of legal procedure, so the High Court in this country is engaged in a similar task. Its opportunities, of course, are smaller here; it cannot forthrightly annul an Act of Parliament. But it is at least willing to build up a kind of Fourteenth Amendment in this country, and to use it as fully as it can to set a barrier across the road of any social change which interferes with individual rights of which it happens to approve. Latent in this attitude is a potential conflict between Courts and Parliament of which the result would be the immersion of the judges in political controversy. They would not emerge unscathed from that experience.\textsuperscript{13}

Much of that criticism may have been overstated; and Laski himself said that he never doubted the integrity of those whom he castigated, although at times that is hard to believe. Laski believed that judicial conservatism was a stumbling block in the way of social progress. So did many others who could not be accused of sharing his political faith. In a public lecture in 1935 a distinguished parliamentary draughtsman, Sir William Graham-Harrison, reflected the views of Members of Parliament of all political hues and many civil servants when he caustically described the judicial approach to the interpretation of statutes in the following words:

\begin{quote}
We find that when an Act comes before a Court it is quite often held to mean something which we never intended, and we are told that this interpretation is inevitable, in view of well-established rules applicable to the construction of Statutes; it seems to us, however, that these results are arrived at by subtleties and an excessive ingenuity of argument which are out of place in construing legal documents prepared as Acts of Parliament necessarily are. More than that, we feel that the Courts are not altogether sympathetic to our objects and that they take rather a pleasure in showing how much cleverer they are than we are, and how ridiculous our statutes are; and we think it rather unfair that the judges should say such unpleasant things about us, while our mouths are stopped from saying what we think of them.\textsuperscript{14}
\end{quote}

English civil servants and politicians have never loved lawyers, who have rarely gained the ear of the House of Commons. Certainly the courts' interpretation of welfare statutes in the pre-World War II years left the Labour Party deeply distrustful of the judiciary and led that party to resolve that when it came to power it would exclude the courts from the review of its legislation. Between 1945 and 1950 a Labour controlled Parliament did just that. In 1946, Aneurin Bevan, the Labour Minister of Health, issued a solemn warning in the debate on the legislation which was to create the National Health Service; he proclaimed that the Labour Government would not tolerate the judicial sabotage of its welfare legisla-

\textsuperscript{13} Id. at 371-72. See also H. Laski, Studies in Law and Politics 219-21 (1932).
So legislation was drafted in an attempt to exclude any possibility of judicial scrutiny. Was there a confrontation?

Bevan's admonitory words did not fall on stony ground. Quite the contrary. Reading the immediate postwar cases one has a sense that the judges drank too deeply from Aneurin's bitter cup and accepted too readily Laski's colourful indictment of the sins of their predecessors. They became overtly deferential towards the legislature and anxiously avoided intruding into its sacred domain. If they were to act otherwise they would jeopardize their "independence," a possession which they prized above all. And yet their ready acceptance of the exclusion of their jurisdiction to review executive and administrative acts that curtailed individual rights made that independence somewhat inconsequential. One example must suffice: *Smith v. East Elloe Rural District Council*. By statute, a landowner at that time had six weeks to apply to the High Court to question the validity of any compulsory purchase (eminent domain) order. After that time the order "shall not . . . be questioned in any legal proceedings whatsoever." The appellant brought an action more than six weeks after the confirmation of the order claiming, *inter alia*, a declaration that the order was made and confirmed wrongfully and in bad faith. The House of Lords held that the jurisdiction of the courts was ousted by the language of the statute. "[P]lain words must be given their plain meaning." An aggrieved person could not even question the validity of the order on the ground that it was made or confirmed in bad faith. Their lordships comforted themselves with the thought that an aggrieved person had a personal action for damages against any official who had acted in bad faith, even though he could never recover his land which had been acquired through that act of bad faith.

The years 1955-1970 saw some retreat from *Smith v. East Elloe* and a greater readiness to question administrative decisions which statute had described as "final and conclusive." Prominent among these was *Anisminic Ltd. v. Foreign Compensation Commission*, recently described as a "legal landmark." A statute provided that the determination of the Foreign Compensation Commission "shall not be called in question in any court of law." The House of Lords held that those words did not prevent recourse to the courts to determine whether the Commission had

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17 *Id.*
18 *Id.*
19 *Id.* at 738.
20 *Id.* at 751 (Viscount Simonds).
exceeded the limits set by Parliament to its jurisdiction. On the facts the Commission had purported to take into account a factor which they were not entitled to take into account. Any error of law or fact or administrative policy which led an administrative tribunal to ask the wrong question made its decision a nullity. In reaching this decision three members of the House of Lords were highly critical of Smith v. East Elloe.26

Anisminic was not in fact a significant challenge to the dominant political and executive will, although some commentators have looked on that case as a repudiation of judicial pusillanimity and a recognition of a greater willingness to question administrative decisions. Indeed, Lord Wilberforce denied that it should be seen as representing a power struggle between the courts and the executive.27 That was to come dramatically with Mr. Heath's ill-fated Industrial Relations Act of 1971, which created an Industrial Court and sought to solve industrial disputes through the imposition of legal sanctions. Judges were sucked into the battles between employers and employees, as they had been in the trade union cases at the beginning of the century; and they emerged hurt and bruised.

It is beyond the scope of this lecture to trace the stormy history of the National Industrial Relations Court (N.I.R.C.). From the outset, the unions regarded its jurisdiction with distaste and campaigned for its abolition. Its presiding judge, Sir John Donaldson, was subjected to hostile criticism and abuse. It was inevitable that the court's exercise of its power to sequestrate assets (including funds ear marked for benevolent purposes) and its threat to commit individuals for contempt of its decisions strengthened the conviction of its critics that judges as a class were Tory acolytes, who thoroughly approved of the objects of the 1971 legislation and welcomed the opportunity to castrate the powers of the unions. On more than one occasion, mass trade union defiance of the court's injunctions was only narrowly averted.28 The tone of some of these criticisms was more intemperate and less intelligent than Laski's in the 1930's: the judges were "little Conservatives" from the cradle to the judicial grave, and their middle class prejudices, if innate, led them to question only the legislation of the Socialists and never that of the Tories. Ironically, the repeal of the legislation and the consequent demise of the N.I.R.C. was welcomed by both employers and unions who were united in the view that the courts were not the appropriate forum to resolve industrial disputes. Not surprisingly, Sir John Donaldson disagreed.29 He repudiated charges that the N.I.R.C. was prejudiced and partisan and lamented the

26 See id. at 170-71 (Lord Reid); id. at 181 (Lord Morris of Borth-y-Gest); id. at 200-01 (Lord Pearce).
27 Id. at 208 (Lord Wilberforce).
28 See, e.g., The Times (London), July 12, 1972, at 2, col. 3 (describing the events surrounding the picketing of the Midland Cold Storage Co.); id. July 22, 1972, at 21, col. 1 (same); id. July 28, 1972, at 7, col. 1 (same).
opportunity that was lost to introduce some of Mr. Herbert Wechsler’s “neutral principles” into English labour and constitutional law.\textsuperscript{29}

This history of troubled labour relations, centering around the role and powers of the trade unions, appeared to drive judges into two different camps: one ready and anxious to enter into the political arena, the other ready and anxious to maintain the traditional “neutrality” and “independence” of the judiciary. The recent litigation surrounding certain manifestations of secondary picketing dramatically demonstrates that polarization. But first there is the prelude of two earlier and much vaunted decisions where the courts intervened to annul the exercise of governmental discretion. The first is Freddie Laker’s battle of the Atlantic, \textit{Laker Airways Ltd. v. Department of Trade}.\textsuperscript{30} The Court of Appeal held that the Secretary of State could not exercise his prerogative power to amend and effectively revoke the Sky-train license. This power was a power which could only be exercised in accordance with the words of the enabling statute, and that statute did not permit the Secretary of State to withdraw Laker’s designation as an authorized carrier under the Bermuda Agreement. \textit{Laker} was not then a remarkable legal path-breaker. But that decision was seen as a popular judicial tilt at the windmills of Whitehall, and was even welcomed by some members of Mr. Callaghan’s own party.

The case of \textit{Secretary of State for Education and Science v. Tameside Metropolitan B.C.}\textsuperscript{31} was a different kettle of fish. As a result of a local government election, the Tories gained control of the Tameside local education authority which then modified its proposals for the education of eleven-year-old children by deciding to reverse its predecessor’s decision and to retain the existing “grammar schools,” the admission to which would continue to be on a selective basis.\textsuperscript{32} The Secretary of State, who was a member of Mr. Callaghan’s Cabinet, applied to the court for an order of mandamus requiring the authority to exercise its power in accordance with his directions; and he directed Tameside to abolish this selective admission procedure.\textsuperscript{33} By statute he had power to do so if he was “satisfied” that the authority had acted or was proposing to act “unreasonably” with respect to the exercise of its powers.\textsuperscript{34} The Secretary of State contended that the local authority was acting unreasonably because it could not reintroduce and implement, in the time available before the new school year began, its new selection procedure. He had, therefore, proper and reasonable doubts about the educational validity

\textsuperscript{32} Id. at 1014-15.
\textsuperscript{33} Id. at 1015.
\textsuperscript{34} Education Act, 1944, 7 & 8 Geo. 6, c. 31, § 68, as amended by Education Act, 1968, c. 17, § 1(2), reprinted in [1977] A.C. at 1024 (Lord Denning M.R.).
of the revised Tameside plan. The House of Lords, affirming the Court of Appeal, held that the Secretary of State’s direction was ultra vires. He had to satisfy himself that the authority was acting unreasonably in the sense that its conduct was such that no reasonable authority would or could engage in it, and on the facts that burden was not sustained. It was irrelevant that the Secretary of State regretted the educational change and regarded it as misguided.

For many members of the Labour Party, Tameside was worse than hemlock. It confirmed their old prejudices about the integrity and bias of English judges. The New Statesman and its cohorts burst at the seams in righteous indignation. Professor John Griffith of the London School of Economics pronounced that it killed stone-dead any prospect of a Socialist administration introducing a Bill of Rights. In contrast the more sedate newspapers and journals were fulsome in singing the praises of “our” impartial judiciary.

Mr. Justice Holmes was in many ways an exceptional man. For example, he never read a newspaper. Most judges do. It is more than possible that the tabloid strictures of the Left may have made some of them less ready to take on the legislature when the next battle came a few years later over secondary picketing. I say some of them because there was soon to come a conflict of jurisdiction and approach, between the activist Court of Appeal, led by the indefatigable Lord Denning, and the passive House of Lords.

The battleground was section 13(1) of the Trade Union and Labour Relations Act 1974 (now repealed) and the meaning of the phrase: “[a]n act done by a person in contemplation or furtherance of a trade dispute.” Such an act is deemed not to be tortious simply because it induces another to break or to threaten to break a contract with a third party. The question at issue was whether and when secondary picketing could ever be described as an “act done in contemplation or furtherance of a trade dispute.” In Express Newspapers Ltd. v. McShane, Express Newspapers, a national daily newspaper, sought an injunction to restrain the defendants, representatives of the National Union of Journalists (N.U.J.), from inducing Express employees to break their contracts with Express Newspapers. Their dispute was

37 Trade Union and Labour Relations Act, 1974, c. 52, § 13(1), as amended by Trade Union and Labour Relations (Amendment) Act, 1976, c. 7, § 3(2).
38 Id.
40 Id.
41 Id.
with the owners of certain provincial newspapers whose journalists were on a strike but which were able to go on publishing from copy supplied by the Press Association. The defendants gave evidence that they honestly believed that the decision to “black” copy from the Press Association to the Express would advance the cause of the striking provincial journalists by putting pressure on the provincial owners. It would be a serious blow to the morale of the provincial journalists if fellow journalists in London handled Press Association copy; provincial journalists would then be reluctant to continue the strike. Consequently, it was argued that their action was in “contemplation or furtherance of a trade dispute” and protected by section 13(1). The Court of Appeal granted the injunction; but the House of Lords reversed its decision and discharged it.

The Court of Appeal concluded that the words “in contemplation or furtherance of a trade dispute” must be given a narrow construction. The defendants’ conduct in “blacking” Press Association copy to the Express was protected only if it could be said to have a reasonable prospect, in a practical and objective sense, of furthering their dispute with the provincial newspapers. As a matter of fact, it could not and did not. The Court rejected the wider construction that it was enough that the defendants honestly believed that their acts would have that effect. Lord Denning M.R. could not accept that argument. It would confer on the union too wide an immunity, and would legitimate unbridled trade union power:

I draw attention to those rules to show the quandary in which they place a member who is employed by the “Daily Express.” Suppose he disagrees with the “blacking” and wants to go on working normally. He wants to keep to the law and fulfil his contract with his employers. The leaders of the union order him to break it. He then has no option. His freedom is taken away. He must obey the union instead of obeying the law. If he fails to obey the union, he is automatically guilty of conduct detrimental to the interests of the union; and for such conduct he can be expelled from the union and then lose his job, because it is a “closed shop”: and he may never be re-admitted to it or any other “closed shop” in the trade. In short he can be turned out of his calling—the only calling he knows. That is a tremendous coercive power vested in the leaders of the union. So tremendous indeed, that its officers must be careful to keep themselves within the immunities given to them by Parliament. If they should overstep the mark, it is the duty of the courts to intervene so as to protect—so far as they can—the freedom of the individual

42 Id.
43 Id. at 675.
44 Id. at 671 (Lord Wilberforce).
45 Id. at 674.
47 Id. at 396 (Lord Denning M.R.).
under the law—his freedom to choose for himself what he should do—
to say: “I wish to do my duty by my employers.”

The other members of the Court were not as frank, and took refuge
behind a smokescreen of formalism. They did not think that the facts
raised any fundamental issues of freedom of the press or individual
liberty. The question was simply one of the construction of the words
of the statute; nonetheless they recognized how “fearsome” was the san-
tion of blacking for the plaintiffs.

The House of Lords, in reversing that judgment, held that the plain
and unambiguous meaning of “in contemplation or furtherance of a trade
dispute” was: did the defendants believe that their conduct furthered a
trade dispute? It was not proper to assume that Parliament could not
have intended so wide an immunity; for the “manifest policy” of the 1974
Act was to exclude trade disputes from the ambit of judicial review. Nor
was it proper to take into account in interpreting those words the damage
which would or might be caused to innocent and disinterested third par-
ties, like the Express. “The function of the court is simply to ascertain
and pronounce upon the purpose with which the act was done.” Lord
Scarman was relieved that “this is the law.” It would be embarrassing
for a court to review tactics pursued in a trade dispute in order to deter-
mine whether those tactics were likely to advance a particular party’s
side of that dispute. Very clear language would be necessary to per-
suade him that Parliament meant the courts to be “some sort of a backseat
driver in trade disputes.”

These very different conceptions of the role of the judge in construing
industrial legislation are even more sharply highlighted in a second case
of secondary picketing which followed within months of McShane: Duport
Steels Ltd. v. Sirs. The defendants were members of a trade union in
dispute with the British Steel Corporation (B.S.C.). In order to put
pressure to make a favourable settlement on B.S.C. and the government,
which is its financial angel, the union decided to extend the strike to
private steel companies even though it had no dispute with them. Once
again the House of Lords reversed the decision of the Court of Appeal
and held that the defendants could not be enjoined from engaging in secon-

\[48 \text{Id. at } 395 \text{ (Lord Denning M.R.).}
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\[49 \text{See id. at } 398-400 \text{ (Lawton L.J.); id. at } 400 \text{ (Brandon, L.J.).}
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\[50 \text{See, e.g., id. at } 398 \text{ (Lawton L.J.).}
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\[51 \text{See, e.g., id. at } 399 \text{ (Lawton L.J.).}
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\[52 \text{[1980] A.C. 672 (1979).}
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\[53 \text{Id. at } 692 \text{ (Lord Keith of Kinkel).}
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\[54 \text{Id. at } 694 \text{ (Lord Scarman).}
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\[55 \text{Id. (Lord Scarman).}
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\[56 \text{Id. (Lord Scarman).}
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\[57 \text{[1980] 1 W.L.R. 142.}
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\[58 \text{Id. at } 143.
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\[59 \text{Id.}
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dary picketing. They were acting in furtherance of a trade dispute and were protected by section 13(1). The facts could not be distinguished from McShane on the ground that the object of the secondary picketing was political, to bring pressure on the government to intercede with more cash for B.S.C. Moreover, there was no residual discretion to grant an injunction simply because the defendants' action brought great danger to the economy and life of the country.

In Duport Steels the philosophies (or prejudices) of the judges were frankly revealed. The judgments of Lord Denning M.R. and Lawton L.J. (in the Court of Appeal) stand in sharp contrast to those of Lord Diplock and Lord Scarman (in the House of Lords). In the Court of Appeal, Lord Denning M.R. stated:

There is evidence of the disastrous effect which this action will have, not only on all the companies in the private sector, but on much of British industry itself. The turnover in the private sector is about £30,000,000 a week. If the men are called out in the private sector, all these companies would have to shut down at enormous loss. Not only will they have to shut down, but all the firms which they supply will not be able to carry on with their work. They will not be able to make their steel. British Leyland, who depend on 80 per cent of their supplies from the private sector, will have to shut down much of their works too. Not only that: we will lose trade here in this country, and our competitors abroad will clap their hands in anticipation of being able to send their products into England: because our industry is at a standstill.

Lawton L.J. stated:

Why did [the union] want to involve the private sector? The answer is clear. Pressure could be brought to bear upon the government. There would be a stoppage of steel going from the private sector to industry; and industry would in consequence grind to a halt. There would be mass unemployment, and then both workers and employers would start beseeching the government to intervene.

In the House of Lords, Lord Diplock stated:

[It cannot be too strongly emphasised that the British Constitution, though largely unwritten, is firmly based on the separation of powers; Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that

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61 Id. at 163 (Lord Diplock).
62 Id. at 161-63 (Lord Diplock).
intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our Constitution it is Parliament's opinion on these matters that is paramount.  

Lord Scarman stated:

But below the surface of the legal argument lurk some profound questions as to the proper relationship in our society between the courts, the government and Parliament. The technical questions of law pose (or should pose) no problems. The more fundamental questions are, however, very disturbing; nevertheless it is upon my answer to them that I would allow the appeal. My basic criticism of all three judgments in the Court of Appeal is that in their desire to do justice the court failed to do justice according to law. When one is considering law in the hands of the judges, law means the body of rules and guidelines within which society requires its judges to administer justice. Legal systems differ in the width of the discretionary power granted to judges: but in developed societies limits are invariably set, beyond which the judges may not go. Justice in such societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree.

...[I]n the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes, and un-makes, the law: the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purpose of the statute may the judge select the construction which best suits his idea of what justice requires. ...  

Within these limits, which cannot be said in a free society possessing elective legislative institutions to be narrow or constrained, judges, as the remarkable judicial career of Lord Denning himself shows, have a genuine creative role. Great judges are in their different ways judicial activists. But the constitution's separation of powers, or more

\[44 \text{Id. at 157 (Lord Diplock). See also N.W.L. Ltd. v. Woods, [1979] 3 All E.R. 614, 621-24 (Lord Diplock).}\]
accurately functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right (or, as Selden put it, by the length of the Chancellor's foot), confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today.68

It is evident that both Lord Diplock and Lord Scarman reached the conclusion that the injunction must be discharged with regret if not distaste. But they saw their duty as Mr. Justice Black saw his duty to interpret the Constitution: the letter of the statute must prevail if it were to conflict with an individual's philosophy of liberalism. Louis Jaffe, in his English and American Judges as Lawmakers, elegantly castigated the English judiciary for meekly surrendering their historic role as the guardian of individual rights and the bulwark against arbitrary executive discretion.69 The picture which I have just sketched shows that the issues are more complex than Jaffe would suggest or accept. It is very questionable how far English political, social, and legal history can now be rewritten, without Parliament's blessing and intervention, in order to endow the judiciary with any greater power to protect "human rights," whatever they may be. Lord Denning may be as bold a spirit as John Marshall, but his is a different ball game, played in a different ball park, under different rules and at a different time.70 What is ironic is that the literal rule of interpretation which was once the instrument of a judiciary said to be bent on frustrating the will of the legislature should now be applied to prevent any possibility of a clash between the legislature and the courts. Of course, labour law is peculiar, sensitive and explosive. Yet the House of Lords has shown the same "withdrawal symptoms" in other contexts; for example, when required to consider the ambit of the powers of investigation conferred by statute on the Inland Revenue. Regina v. Inland Revenue Commissioners, ex parte Rossminster Ltd.71 concerned the interpretation of section 20c of the Taxes Management Act 1970.72 Under that statutory provision an Inland Revenue officer may lay an information against a taxpayer before a circuit judge.73 If the judge is satisfied from that information that there are reasonable grounds for suspecting

68 Id. at 168-69 (Lord Scarman).
73 Id. § 20C (1).
that a tax fraud has been committed and that incriminating documents will be found on the premises of the taxpayer, he can then issue a search warrant.\footnote{Id.} In Rossminster warrants were issued to search the homes and business premises of the plaintiffs.\footnote{[1980] A.C. 952, 953 (1979).} The warrants did not specify any criminal offence but merely stated that there were reasonable grounds for suspecting an offence involving fraud.\footnote{Id. at 957 (Eveleigh L.J.).} The warrants authorized the officers of the Inland Revenue to seize and remove "anything whatsoever found there" that they had reasonable cause to believe may be required as evidence for the purpose of proceedings in respect of such an offence.\footnote{Id.}

Let me give you the facts of Rossminster in the colourful words of Lord Denning:

It was a military style operation. It was carried out by officers of the Inland Revenue in their war against tax frauds. Zero hour was fixed for 7 a.m. on Friday, July 13, 1979. Everything was highly secret. The other side must not be forewarned. There was a briefing session beforehand. Some 60 officers or more of the Inland Revenue attended. They were given detailed instructions. They were divided into teams, each with a leader. Each team had an objective allotted to it. It was to search a particular house or office, marked, I expect, on a map: and to seize any incriminating documents found therein. Each team leader was on the day to be handed a search warrant authorising him and his team to enter the house or office. It would be empowered to use force if need be. Each team was to be accompanied by a police officer. Sometimes more than one. The role of the police was presumably to be silent witnesses: or maybe to let it be known that this was all done with the authority of the law: and that the householder had better not resist—or else!

Everything went according to plan. On Thursday, July 12, Mr. Quinlan, the senior inspector of the Inland Revenue, went to the Central Criminal Court and put before a circuit judge—the Common Serjeant—the suspicions which the revenue held. The circuit judge signed the warrants. The officers made photographs of the warrants, and distributed them to the team leaders. Then in the early morning of Friday, July 13—the next day—each team started off at first light. Each reached its objective. Some in London. Others in the Home Counties. At 7 a.m. there was a knock on each door. One was the home in Kensington of Mr. Ronald Anthony Plummer, a chartered accountant. It was opened by his daughter aged 11. He came downstairs in his dressing-gown. The officers of the Inland Revenue were at the door accompanied by a detective inspector. The householder Mr. Plummer put up no resistance. He let them in. They went to his filing cabinet and removed a large number of files. They went to the safe and took building society passbooks, his children's cheque books and passports. They took his daughter's school report. They went to his bedroom, opened a suitcase, and removed a bundle of papers belong-
ing to his mother. They searched the house. They took personal papers of his wife.\textsuperscript{75}

The taxpayer sought, in an interlocutory application, to quash the seizure and to obtain an order for the return of the documents. He argued that the warrants were not sufficiently specific in that they did not specify the particular offences committed and that the seizure was on such a scale and so indiscriminate that the Revenue officers could not possibly have had reasonable cause to believe that all the documents were required for the purpose of proceedings in respect of such offences.\textsuperscript{76}

The Court of Appeal granted a declaration against the Crown, allowing the taxpayer's application. They were shocked by the dawn raid and viewed with dismay the legislation under whose authority the Revenue had purported to act. As Browne L.J. said: “The events of this case are deeply distasteful to my old-fashioned, and perhaps now unfashionable, instincts.”\textsuperscript{77} Predictably, Lord Denning M.R. gave scant attention to the words of the statute. He invoked the ghost of John Wilkes and the seminal cases on general warrants, which inspired the fourth amendment of the United States Constitution: “Once great power is granted, there is danger of it being abused. Rather than risk such abuse, it is . . . the duty of the courts so to construe the statute as to see that it encroaches as little as possible upon the liberties of the people of England.”\textsuperscript{78} The warrant was bad; it should have specified the particular offence, and it did not.\textsuperscript{79} Moreover, it was for the court to determine whether the Revenue officers could have had reasonable cause to believe that the documents seized might be required as evidence of the alleged offence.\textsuperscript{80} There was a strong prima facie presumption that many of the documents were not examined at all, and certainly not in such detail that the officers could form an opinion of their evidential value.\textsuperscript{81} Some may have been examined. But this was a case of “all or nothing,” for there was no way of distinguishing those documents properly seized from those improperly seized.\textsuperscript{82}

The House of Lords; Lord Salmon dissenting, once again reversed the Court of Appeal. The eighteenth century cases on common law search warrants were irrelevant. It was only the language of the statute which was critical. The statute envisaged that the warrant could be in general terms and hence it was not necessary to state a specific criminal offence involving fraud. Moreover, public interest immunity entitled the Revenue

\textsuperscript{75} Id. at 968-69 (Lord Denning M.R.).
\textsuperscript{76} Id. at 972-73 (Lord Denning M.R.).
\textsuperscript{77} Id. at 977 (Browne L.J.).
\textsuperscript{78} Id. at 972 (Lord Denning M.R.).
\textsuperscript{79} Id. at 974 (Lord Denning M.R.).
\textsuperscript{80} Id. at 975 (Lord Denning M.R.).
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 976 (Lord Denning M.R.).
and its officer to refuse to give any reason for their decision to seize the documents. In proceedings for judicial review, the burden was on the taxpayer to show a prima facie case that the seizure was ultra vires and that the Revenue officers had no reasonable cause to believe that the documents seized might be required as evidence in any tax fraud proceedings. The taxpayer's right to claim damages in a civil action was not thereby impaired; in that action the burden would be on the Revenue to show that they had acted reasonably. Lord Diplock thought that this was an obvious reconciliation of two competing public interests: "that offences involving tax frauds should be detected and punished; and that the right of the individual to the protection of the law from unjustified interference with his use and enjoyment of his private property should be upheld." Lord Scarman admitted that a claim for damages, even punitive damages, is "cold comfort" for the taxpayer. The public interest in ferreting out tax frauds is not to be compared with the public interest "in the right of men and women to be secure in the privacy of their homes." Yet the letter of the statute was paramount and had to prevail. In Lord Wilberforce's laconic words: "Many people, as well as the respondents, think that this process has gone too far; that is an issue to be debated in Parliament and in the press."

Undoubtedly there are English judges who are ready to accept a more activist judicial role if it would be constitutionally proper to do so. Lord Scarman has publicly said so. I think that this caution is sensible, and I believe that it is wise that English judges should insist that fundamental constitutional changes must come before they undertake any new responsibilities. One change must be the enactment of a Bill of Rights. There are today in the United Kingdom many commentators and politicians, most but not all drawn from the Liberal and Conservative parties, who actively support a Bill of Rights in one form or another. They are alarmed by the unbridled power of a sovereign Parliament, controlled by one of the two major political parties whose policies are becoming more and more polarized. The conventional and unwritten checks and balances are too frail a barrier against the "fundamental and irreversible changes" which a simple political majority can achieve. Fundamental human rights

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83 Id. at 999 (Lord Wilberforce) (adopting Conway v. Rimmer, [1968] A.C. 910, 953-54 (Lord Reid)).
84 Id. at 1006-07 (Viscount Dilhorne).
85 Id. at 1011 (Lord Diplock).
86 Id. at 1007 (Lord Diplock).
87 Id. at 1022 (Lord Scarman).
88 Id.
89 Id. at 997 (Lord Wilberforce).
should be enshrined in a Bill of Rights which should be interpreted by
“independent” judges.

But other jurists and politicians see these proposals as nothing more
than a thinly disguised attempt to reintroduce, in a different dress, im-
imutable natural law rights and thereby to repudiate the democratic pro-
cesses. There are even Americans who warn us against the dangers of
this creeping Blackstonism. Richard Thomas Tench, writing recently in
the Yale Review about the Constitution of the United States and the role
of the Supreme Court,92 sees Marshall’s “gorgeous gossamer of words”
as having created an awesome power vested in unelected Supreme Court
Justices to veto the powers of elected Congresses and Presidents.92
Americans are indoctrinated from the cradle to the grave, so Mr. Tench
assures us, to accept the divinity and infallibility of philosopher kings
“reaching down benign hands to protect the individuals’ inalienable—but
ill-defined rights.”94 The “Supreme Court interpreting an Infallible Docu-
ment preempts, like a benign dictator, the ultimate power of the people
to govern themselves.”95 Tench is a vigorous polemicist, and Bostow,96
Bickel,97 and more recently Ely98 have grappled with these problems in
a far more sophisticated way. But there are many politicians in the U.K.,
not all on the Left of the political spectrum, who will say “Hear! Hear!
Mr. Tench.” They would agree that the law can never be the substitute
for politics. Written constitutions and Bills of Rights take political deci-
sion out of the hands of politicians, who can be kicked out of office, and
place such decision into the hands of judges, who (in practice) cannot.
“To require a supreme court to make certain kinds of political decisions
does not make those decisions any less political.”99 To conceal that truism
in the formalism of the provisions of a Bill of Rights is dangerous subver-
sion; for a Bill of Rights would seek to insulate from the breath of change
institutions and principles which its supporters wish to preserve im-
maculate. For such politicians, there are no overriding fundamental human
rights; there are simply political claims by individuals and groups.

Here I must state my prejudices. I am afraid that I do not have that
degree of faith in the political process, at least not in the political process
in the United Kingdom in 1981. In the U.K. a majority government can
be elected on a minority of votes; a third party such as the Liberals can
poll 4,305,324 votes (from a poll of just over 29,500,000) and yet gain only
eleven seats (out of 635). Parliamentary constituencies are grossly une-

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93 Id. at 346-47.
94 Id. at 348.
95 Id. at 353.
98 J. ELY, DEMOCRACY AND DISTRUST (1980).
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qual in numbers, and Wales and Scotland are overrepresented. Elected representatives are not bound by any electoral mandates and are chosen by inner-party cabals. The political pendulum may swing dramatically and sharply in five years, from a Mrs. Thatcher to a Mr. Wedgwood Benn, with disastrous results for the country. Then there are the minorities, who once did not exist. As a nation we have long had a tradition of civilized tolerance. But it is sad to relate, as recent events in Brixton, Southall and Liverpool demonstrate, that that tolerance is under very considerable strain; the unemployed and racial minorities of the inner cities do not live in the poet's "green and pleasant land."

It is idle to think that our economic and social problems can be solved through the magic wand of constitutional change; but constitutional change should help to create a new temperate climate. Yet that constitutional change will only come if a real alliance can be forged between the newly formed Social Democratic Party and the Liberals. It is only these parties which are committed to constitutional reform, to the introduction of some form of proportional representation and to a Bill of Rights. But I doubt, even given a new political Utopia, that a Bill of Rights will be a political reality.

If a Bill of Rights is enacted, it will, in all probability, follow closely the European Convention on Human Rights, which the U.K. ratified as long ago as 1950.100 The Convention set out specific rights that are protected: for example, the right to life; protection from torture or inhuman or degrading treatment; protection from slavery; liberty and security of the person; the right to a fair trial; prohibition of retrospective criminal offences; the right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; freedom of peaceful assembly and association; the right to marry and found a family. The protocols to the Convention mention other rights, including the right to peaceful enjoyment of possessions, education and free elections.101

There is no due process or equal protection clause akin to that of the fourteenth amendment. The nearest thing is article 14 which reads as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."102 But only the rights and freedoms "set forth in this Con-

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100 On four occasions, Liberals have attempted unsuccessfully to initiate legislation along these lines; bills have passed through the House of Lords, only to be killed in the House of Commons.
102 Id. art. 14 at 106.
vention” are protected; so, the Convention does not expressly mention sexual and racial discrimination, although there is U.K. legislation dealing specifically with that question. Nonetheless, even so limited, article 14 is potentially far-reaching and may well frighten a U.K. Government, particularly if it knows what the Supreme Court has done with the fourteenth amendment. For example, article 14 could enable the judges to challenge U.K. social-welfare legislation that provides different retirement ages for men and women.

Other articles are also dynamite. Article 11 provides that everyone has “freedom . . . to form and to join trade unions for the protection of his interests,” but it says nothing about whether the converse right, namely, not to join a trade union, is thereby implied. In the U.K., management and unions can agree that an employee may obtain and retain a particular job only if he becomes and remains a member of a particular trade union. This is the so-called “closed shop.” (The present Conservative government has not yet gone to the length of outlawing the closed shop, although it is being pressed to do so; it has only taken steps to provide fuller safeguards for individual workers affected by the closed shop.) Individuals who lose their jobs because they refuse to join a union feel, not unnaturally, very strongly on this issue; and three dismissed employees of British Rail have challenged their dismissal in the European Court, claiming that a closed shop agreement which was introduced after their employment infringed articles 9, 11, and 13 of the European Convention. The European Court of Human Rights has recently held the dismissal infringed article 11. But the Court ducked the question whether that article protected an individual’s right not to join a union, preferring to rely on the special facts that the closed shop had been introduced after the employment, that other closed shop agreements had not required existing non-union employees to join a union, and that more than ninety-five percent of British Rail employees were members of the designated unions.

The outcry of horror and anguish from the Labour Left and the British trade unions reverberated through the public media. The Strasbourg court was condemned as alien, ignorant of the history and role of the British unions, and insensitive to the delicate balance of British industrial relations. Here was chauvinism triumphant, an eloquent demonstration of how difficult it would be to persuade some of the electorate to accept a Bill of Rights.

A second illustration from recent history that demonstrates the sensitivity of the question of a potential Bill of Rights is the legality of telephone tapping. This arose directly for the first time in England in

103 Id. art. 11 at 105.
105 Id. at 21-26.
1979. In *Malone v. Commissioner of Police of the Metropolis (No. 2)*, the court held that the plaintiff had no statutory or common law right of property, privacy, or confidentiality in respect of conversations on his telephone lines. Telephones may be tapped on the warrant of the Home Secretary, personally signed by him. He has no statutory or common law right to do so, but, by doing so, he does not infringe the citizen's rights. The citizen has none. England is "a country where everything is permitted except what is expressly forbidden." Malone also argued that article 8 of the European Convention conferred on him a direct right to have his "private and family life, his home and his correspondence" respected. The judge, Megarry V.-C., rejected this argument on the ground that the Convention was a treaty and was not part of English law; it was not therefore justiciable in an English court. Mr. Malone is now on his way to Strasbourg and the European Court of Human Rights. Judging from a previous opinion of that Court, and the comments on it by Megarry V.-C., he is going to win. In the *Klass* case, which came from West Germany, the European Court was convened to determine whether the German wiretapping legislation provided "adequate and effective safeguards against abuse." The European Court held that in principle it was desirable that there should be judicial control of wiretapping but that the German independent board and commission was an adequate substitute. Megarry V.-C. had no doubt that the U.K. will be held to have infringed article 8, and that legislation was an urgent necessity. It is still an urgent necessity.

It is easy to see why many British politicians and civil servants who have hitherto rarely been constrained or irritated by judicial supervision should view the enactment of a Bill of Rights with an enthusiasm on the cool side of lukewarm. A U.K. Bill of Rights would have, unlike its European counterpart, U.K. teeth. In contrast, the adverse judgment of the European Court of Human Rights is only a moral censure although it is evident that successive governments are increasingly sensitive to the adverse publicity which inevitably follows. So, it took the intervention of the European Court before a prisoner acquired the right to consult a solicitor in relation to contemplated, as distinct from actual, legal proceedings against prison officers.
It is not only the politicians and civil servants whose decisions may be questioned if a Bill of Rights is enacted. So, too, may the common law of England. In the well-known Thalidomide case, the House of Lords enjoined The Sunday Times from publishing an article which was designed to put pressure on the U.K. manufacturer of Thalidomide to make more generous settlements in favor of the grievously deformed children. Publication would constitute a contempt of court in that it would inhibit the parties from reaching a fair settlement and from enforcing their rights in court. Fleet Street has always resented the "narrow" interpretation of the law of contempt, an interpretation designed, so it says, to protect from the breath of criticism the "independent" judiciary. The inevitable challenge before the European Court of Human Rights succeeded: the injunction constituted a breach of article 10 of the European Convention, namely "the right to freedom of expression." It is true that article 10 expressly envisages that the exercise of this right may be subject to conditions, in particular those which are "prescribed by law and are necessary in a democratic society... for maintaining the authority and impartiality of the judiciary." But, in the opinion of the European Court, the interference with The Sunday Times' freedom of expression was not necessary to maintain that authority and impartiality. When the prescribed article was due to appear in 1972, the Thalidomide litigation had been dragging on since 1962; some settlements had been reached and most of the other suits were dormant. The public interest in freedom of expression, its right to be fully informed, within article 10, outweighed any social need to impose conditions or restrictions on The Sunday Times' right of publication.

Such a decision reflects a different judicial view of the object and hence the scope of the law of contempt. But article 10, so interpreted, is wide enough to affect other areas of private law, for example, to introduce principles akin to those formulated by the Supreme Court of the United States in New York Times v. Sullivan. There are many other legal questions which will have to be answered before a Bill of Rights is enacted. If it is enacted, should its interpretation be entrusted to a separate Constitutional Court? Even more important is whether any Bill of Rights could possibly be entrenched so as to

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118 Human Rights Convention, supra note 101, art. 10.
119 Sunday Times Case, supra note 117, at 404, 406.
120 Id. at 402, 406.
121 Id. at 408.
prevent its repeal by the simple majority of a sovereign Parliament. If the answer is, as it probably is, no, it will be the moral force of the Bill which will be its salvation. The longer it remains on the statute book the greater will be the burden on its political enemies who wish to justify any repeal or modification of its provisions.

There is a final problem—judges. For it is they who will interpret any Bill of Rights. The lawyer in the United States has always played a different, and more varied, role in society; floating in and out of law schools, Wall Street, and the Administration, he brings to constitutional adjudication a breadth of experience and (it is to be hoped) a vision which a professional lawyer can never enjoy. It is no bad thing that many of the Justices did not ascend to the Supreme Court on the judicial escalator of success. In contrast the English barrister, from whose ranks judges are chosen, is a professional, an expert in black-letter law, drawn (virtually exclusively) from the middle classes, apolitical, conservative and traditionalist. Not every supporter of a Bill of Rights will find that picture a comforting prospect. Undoubtedly there will be pressure to choose judges from outside the English Bar, including from solicitors, many of whom have the same social and cultural failings! The government of the day will become concerned to nominate politically sympathetic acolytes whose views on such topics as the “closed shop” are thought to be its views. Most important, English lawyers will have to think in different and wider terms, particularly to learn that the object of, and the skills for, constitutional adjudication are not the same as those necessary for statutory interpretation. They will have to overcome the horrible shock that one day they may have to annul an Act of Parliament. Unless they accept that new responsibility, which is the natural burden of those who are seen to make decisions which once only Parliament could make, the Bill of Rights will be a broken reed and the hopes and aspirations of its Founding Fathers frustrated. This is a real possibility, as a study of the decisions of the Supreme Court of Canada’s interpreting its former Federal Bill of Rights quickly reveals.

There are so many inponderables, so many tank traps which the opponents of any Bill of Rights will say are insurmountable, so many innovations which they say are alien to our constitutional heritage. In all probability we shall never have the opportunity of trying to refute them; for the history of third parties, who might let us do so, is a gloomy one in the United Kingdom. *Marbury v. Madison* was decided over 178 years ago. We, in the United Kingdom, live in a very different world, a world which is unlikely to accept any surrender of what is conceived to be its political power to a nonelected professional elite.

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124 Things may change, however, with the enactment of the new (1982) *Charter of Rights*.

125 5 U.S. (1 Cranch) 137 (1803).