American Exceptionalism and Judicial Activism

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The concept of American exceptionalism has recently been the target of heavy criticism. Implicit in "exceptionalism," critics claim, is an attempt to characterize American society as a unified whole, and in a completely multicultural society such as the American any talk of a national character makes little sense. Historian Joyce Appleby is one critic who has taken issue with American exceptionalism. In her presidential address to the Organization of American Historians in the spring of 1992, she described it as a version, or rather perversion, of European Enlightenment ideas. The grand narrative of American exceptionalism, she argued, has been "America's peculiar form of Eurocentrism." It has ignored the "original and authentic diversity" in America's past, especially the Colonial past, and has foreclosed "other ways of interpreting the meaning of the United States." It has cast into the shadows experiences of people whose errand has not been self-promotion and autonomy, and it has imbued with universality particular social traits – virtually all white and male. When looking at the American past and present through the lens of American exceptionalism, therefore, American historians and others have been blinded to the importance of the multicultural agenda, and the time has now come to move beyond exceptionalism "to recover the historic diversity of our past."[1]

1 *Joyce* Appleby, *"Recovering America's Historic Diversity: Beyond Exceptionalism". The Journal of American History*, Sept. 1992, pp. 420,431.

For fashioning out of American exceptionalism an ideology that would unite all Americans, Appleby blames the country's lawyers. At the time of the Revolution, the few things that all Americans actually did have in common were British in origin and consequently had to be redefined. Among ordinary Americans, moreover, there existed no great wish to form "a more perfect union." What mattered to most people were local ties, local politics. When nationalist leaders, most of whom were lawyers, took it upon themselves to turn American exceptionalism into a unifying ideology, they did not enjoy the support of the people:

> The case for a "more perfect union" was made in a lawyerly fashion by nationalist leaders, most of them lawyers. Outside of their circles, there were abroad in the land few common sentiments, fewer shared assumptions operating at the intimate level of human experience, and a paucity of national symbols recognizable from Georgia to Maine.[2]

Appleby is not the only critic to point to the role of law and lawyers in the creation of an exceptional United States. Nor is she alone in criticizing the general unwillingness to deal with America's multicultural histories. Unlike some of her colleagues, however, Appleby fails to point out that American common law and judicial activism are an important part of the legacy of America's colonial past.[3] The very multiculturalism that she celebrates in her presidential address has been fostered by activist lawyers and judges, most notably in the Civil Rights movement. Down through American history, the law and the courts, by providing social definitions for events and transactions, and by extending citizenship to previously "unwanted" groups of people have constituted one of the few fora or "things" all Americans have in common. "Can a multicultural nation of nearly a quarter of a billion people be a community?," asks Kenneth Karst in *Belonging to America.* His answer is a resounding yes; being an American essentially means adhering to the American civic culture and behaving according to that culture's norms. Karst's civic culture is made up of five elements: individualism, egalitarianism, democracy, nationalism, and tolerance of diversity, and what ties these

2 Ibid., p. 422.

3 See e.g. Gordon S. Wood, "The Origins of Judicial Review," *Suffolk University Law Review,* Vol. 22, 1988.

elements together is an ideology, "a creed that is both manifested in our constitutional doctrine and shaped by it."[4] In Karst's version of American exceptionalism, that is, it is the law which translates ideology into behavior.

Lawrence M. Friedinan has talked about an "American legal culture,"[5] Sanford Levinson about an American "faith community" centered around the Constitution[6], and Mary Ann Glendon about American "rights talk" and "law-riddenness"[7] – others have referred to American legalism or legalization. Like Kenneth Karst, these commentators on American culture and society tend to see the law and its practitioners as protectors and translators into actual day-to-day behavior of American exceptionalism. This article will argue that any discussion about American exceptionalism will have to take into account the role of law and lawyers in American culture. Section one will focus, in a general and speculative way, on judicial activism – how it has been used, particularly since *Brown* v. *Board of Education of Topeka* in 1954, in the service of national community, to make America more inclusive, and how its emphasis on a protection of rights and due process originates in the common law.

As illustrations or case studies of how judicial activism works in practice, I shall then turn, in section two, to Melissa Fay Greene, *Praying for Sheetrock* (1991)[8], and David L. Kirp, John P. Dwyer, and Larry A. Rosenthal, *Our Town. Race, Housing, and the Soul of Suburbia* (1995). The former is a study of how civil rights came to McIntosh County, Georgia in the 1970s, and the latter tells the story of the creation of something like a right to fair housing in New Jersey over a period of two decades. In both books, judicial activism markets "a very new commodity: Law. For the poor"[9] – a commodity that seeks to de-segregate, to include those who have hitherto not been seen as welcome additions to American society.

4 Kenneth L. Karst, *Belonging to America. Equal Citizenship and the Constitution* (New Haven, CT.: Yale University Press, 1989), pp. 182,31.

5 Lawrence M. Friedman, "American Legal Culture: The Last Twenty-Five Years," 35 *St. Louis Law Journal* 529 (1991). This legal cnltme is defined as "the attitudes and expectations of the public with regard to law."

6 Sanford Levinson, *Constitutional Faith* (Princeton, *N.J.*: Princeton University Press, 1988)

7 Mary Ann Glendon, *Rights Talk. The Impoverishment of Political Discourse* (N.Y.: The Free Press, 1991)

8 Melissa Fay Greene, *Praying for Sheetrock* (N.Y.: Fawcett Columbine, 1991), p. 175.

9 *Praying for Sheetrock*, p. 158.

In short, the arguments advanced by Kenneth Karst and other believers in American exceptionalism are ultimately more persuasive than are those of Joyce Appleby.

In "The 'Hegelian Secret': Civil Society and American Exceptionalism," Daniel Bell argues first of all that it does make sense to talk about American differentness and secondly, that this differentness has to do with the United States being a "complete civil society, perhaps the only one in political history." By civil society Bell means a society in which individual self-interest and a passion for liberty reign supreme. In such a society, no institutional structures – no state in a European sense – have been created "to shape and enforce a unitary will over and above particular interests." What has taken the place of a state in the United States, Bell argues, is a government or political marltetplace, "an area in which interests contended (not always equally) and where deals could be made." The foundation for the American civil society has been inalienable, naturally endowed rights inhering in each individual rather than in a group or a community of people, and institutions have been created for the purpose of protecting these rights. Among such institutions, the Supreme Court has played a very special and important role:

> Fortuitously, for it was not planned (nor were these powers specified in the Constitution), the Supreme Court became the final arbiter of disputes, and the mechanism for the adjustment of rules, which allowed the political marketplace to function, subject to the amendment of the Constitution itself – which then again was interpreted by the court. The Constitution and the court became the bedrock of civil society.

The Constitution, Bell suggests, has provided a social contract,

> a contract initially between the several states, yet transferred over time as a social contract between the government and the people. It may be the only successful social contract we know in political history, perhaps because the state was so weak and often non-existent.[10]

10 Daniel Bell, "The 'Hegelian Secret': Civil Society and American Exceptionalism." In *Is America Different?; A New Look at American Exceptionalism*, ed. Byron *E*. Shafer (N.Y.: Oxford University Press, 1991), pp. 60,66,62.

Americans have remained committed to constitutionalism and judicial activism. From the Supreme Court down, courts have generally been perceived to have a special responsibility as arbiters, even legitimators, of change. The degree of authority which American judges exercise is unparalleled among modern Western nations. Americans tend to take this for granted, writes Gordon S. Wood,

> but any foreign observer is immediately overwhelmed by the extent to which the courts not only set aside laws passed by popularly elected legislatures but also interpret and construe the law in such a way as to make social policy. It is not simply the power of the Supreme Court, which tends to be the focus of our attention, but the power of all courts, both federal and state, to interpret the law in accordance with either written constitutions or fundamental principles of justice and reason that is impressive. Nowhere else in the modern world do judges wield as much power in shaping the contours of life as they do in the United States.[11]

Law professors and political experts engage in lengthy and complicated discussions from time to time as to the desirability for a modern democracy of having the courts resolve issues that are essentially political.[12] In other modern democracies issues concerning for example racial desegregation, abortion or the relationship between religion and the government would be looked upon as political matters which ought to be determined by parliamentary legislation.[13]

When legal and political commentators criticize this exercise of judicial authority as unwarranted and issue warnings against judicial encroachment or usurpation, however, their criticism does not seem to meet with much approval from the general public. The staying power of judicial activism as well as of the most important "tool" with which the Supreme Court pursues its activist course, judicial review, "is an

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11 Gordon S. Wood., p. 1293.

12 Cf. Geoffrey C. Hazard, who notes: "In case no one has noticed, it should be reported that these days some ve y intense debates are going on in political and legal philosophy. These debates concern what our society should be like and how decisions about it should be made, and particularly who should make those decisions. One of the primary issues of those debates is the legitimacy of what lawyers and judges do, particularly appellate judges and more particular Supreme Court justices." ("Rising Above Principle," *University* of *Pennsylvania Law Review*, Vol. 135, No. 1, p. 153)

13 For an interesting recent attack on judicial activism see Susan V. Demers, "The Failures of Litigation As a Tool for the Development of Social Welfare Policy." (*Fordham Urban Law Journal*, Vol. *22*, 1995)

undeniable historical fact," according to Karst. He claims that we can talk about an American "natural-rights mentality" – a mentality that, "accompanied by a receptiveness to judicial review, has stayed rooted in the popular folklore for reasons only indirectly related to democracy, either economic or political."[14] As we shall see shortly, natural-rights doctrines such as substantive due process and its modern offshoots in the equal protection field have their origins in the common law.

The Supreme Court first claimed the power of judicial review in *Marbury* v. *Madison (1803).* The practice of judicial review has been "so extraordinary, so pervasive, and so powerful, " however, claims Gordon Wood, that we have to look beyond this particular decision to the history of American jurisprudence and American legal culture as a whole to discover its origins. In colonial America, old beliefs in law as something discovered, not made, lingered on long after such beliefs had been effectively discredited in the mother country by positivist thinkers such as John Austin. The colonists "were much more conscious than their English cousins of the distinctiveness of the common law – as something set apart from statutory law and even from current English judicial decisions and precedents," and persisted in identifying the common law with "right reason or natural justice – with principles that existed apart from current English statutes and judicial decisions."[15]

The continued American preoccupation with the morality of law was a result of the ambiguities and complexities of colonial law. Judges had to take into consideration before handing down their decisions not only English legal sources (common-law reports, new judicial interpretations, and parliamentary statutes) but also local colonial statutes and judicial customs. Often, conditions would be so different in the New World that no suitable precedents could be found in English law, or local customs were so undeveloped that judges had to tale recourse to the immutable maxims of reason or justice. The extraordinary degree of judicial discretion that was needed under these circumstances paved the way for judicial review:

14 Karst, p. 222.
15 Wood, pp. 1296, 1299.

> Amidst tlie confusion and disorder of colonial law, lawyers and judges found that they had really no other basis except reason and equity for clarifying their law and for justifying their deviations from English practice. By resting their law on some principle beyond statutory will or the technicalities of the common law – on justice or common sense or utility – the colonists prepared the way for what we came to know as judicial review.[16]

With the exception of the infamous *Dred Scott* case in 1857, the Court made little use of its power to declare statutes unconstitutional until the late nineteenth and early twentieth centuries.[17] Prior to the Second World War, the Court reviewed mainly cases involving claims of economic right. It was only after the Second World War and in particular with *Brown* v. *Board of Education* that the Court started concentrating on the rights of the underprivileged.

> The truth is, that where rights pertaining to fair criminal procedure, equal legal treatment, free expression, or privacy are concerned, the United States Supreme Court has only a slightly longer experience than a great number of other nations. For us, too, the great expansion of personal liberties and civil rights began in the post-World War Two period.[18]

The *Brown* decision, says Karst, is "our leading authoritative symbol for the principle that the Constitution forbids a system of caste." With the Warren Court's decision in favor of racial equality, the principle of equal citizenship was revived. That principle had become formal law when the Fourteenth Amendment was ratified in 1868. For almost a century, the Court had been reluctant to realize its potential, however, for fear of fundamentally changing the relation between the federal government and the states. When, after the Second World War, political leaders as well as the population at large showed a certain willingness to reconsider matters concerning race and equal citizenship, the Supreme Court responded. In the late 1940s and early '50s, the Court handed down a number of decisions that had been unimaginable only a few years earlier.

16 Ibid., pp. 1302-03

17 It should be noted, however, that the Court did strike down a number of *state* statutes before the Civil War.

18 Glendon, p. 163.

> The Justices who decided *Brown* v. *Board* of *Education* perceived the Fourteenth Amendment's guarantee of liberty and equality in the way every one of us perceives: through the filters created by the perceiver's acculturating experience. The Justices understood that the whole system of racial segregation was a betrayal of the central values of American civic culture. And political action, from the Niagara movement to the threatened march on Washington, had helped the Justices to understand.[19]

The revival of equal citizenship in Brown amounted to a formal redefinition of the national community. When Chief Justice Warren wrote the opinion for the Court in the Brown cases, he recognized "the strong connection between the meaning of the Constitution and the national community of meaning that is the American civic culture."

Of the five elements that make up Karst's civic culture, the most interesting – at least for the purposes of this paper – is nationalism. The civic culture defines the national community, Karst claims, and nobody has done more to uphold and protect that community than the country's judges. When activist, these judges, and especially the justices on the Supreme Court, have been nation-builders – the prime example being Brown, which expanded the meaning and actual contents of belonging. "Validation of a claim of equal citizenship is not merely important to the individual claimant. It also forms part of the social cement that makes the nation possible." When legislatures have defaulted, courts and lawyers have reacted, thereby providing a "cultural glue," a frame that may hold all Americans together, however uneasily.[20]

Courts have been in a better position than have legislatures to defend the principle of equal citizenship. Not subject to majoritarian domination, courts have generally been insulated from partisan politics. Their point of departure being concrete cases, moreover, judges have acquired a way of thinking that emphasizes prudence or practical wisdom. The training in practical wisdom starts in the country's law schools where students are exposed to the case method of instruction. What the case method essentially consists of, Anthony Kronman has argued, is forced role-playing. In reenacting concrete disputes by playing the roles of the

19 Karst, pp. 74,73. – On the Court's reluctance to embrace the potential of the Fourteenth Amendment, see Karst, chapter four.

20 Ibid., pp. 18,10,29.

original parties and their attorneys, students learn to be sympathetic to a whole range of different points of view. Ultimately, it is the role of the judge that is given priority. This has the effect, according to Kronman, of emphasizing the need to reach a "reasoned" and "publicly justifiable" conclusion to the problems at hand, thereby encouraging student interest in civic-mindedness.[21] In American civil society or the political marketplace where individual interests contend, it would thus seem, it has fallen to lawyers and judges to defend the public good. "If there are possibilities for some realization of the republican vision in today's polity, they appear to lie with the judiciary."[22]

The use of law as an instrument of "policy" and social engineering is a reconstruction of the common law.[23] Naturally preoccupied with the most basic requirements of the law, the common law has provided from the very outset a useful vocabulary in which to talk about conceptions of individually-centered justice. "As against the continental legal system with its powerful inquiring magistrates, Anglo-American legal procedure has been an adversarial one, with an emphasis on rights."[24] The common law and common-law judges have always been held in high esteem. Even though by far the majority of cases that reach the nation's courts are statute-law rather than common-law cases, American lawyers still tend to consider the common law the truest expression and repository of the most basic legal rights and principles. "Not even the most learned treatise can do justice to the fertility, variety, and ambiguity of the case law, its surprising ability to put out new shoots, or to turn an old theme to a fresh purpose. American judges at their best have been virtuosos of practical reason," as Glendon puts it.[25]

The common law dates back to the twelfth century and possibly beyond. Its boundaries have always been defined by prevailing commun-

21 Anthony T. Kronman, *The Lost Lawyer. Failing Ideals of the Legal Profession* (Cambridge, Mass.: Harvard University Press, 1995), p. 117.

22 Karst, p. 225.

23 See e.g. Harry H. Wellington, *Interpreting the Constitution* (New Haven, CT: Yale University Press, 1990) and Lawrence H. Tribe and Michael C. Dorf, On *Reading the Constitution* (Cambridge, Mass.: Harvard University Press, 1991) for recent statements to the effect that modern, activist judicial review is an inevitable (and by and large desirable) effect of the common-law method of adjudication.

24 Bell, p. 59.

25 Glendon, p. 169.

ity standards. What gave authority to the common law as a legal order entitled to the highest respect was the belief that it embodied centuries of human wisdom. Emphasizing continuity and peaceful incorporation of change rather than sudden and violent reform, and residing in the customs of the community rather than in the political system, the common law understood law as developing out of and along with the people. "Law by and large evolves; it changes in piecemeal fashion. Revolutions in essential structure are few and far between. That at least is the Anglo-American experience. Some of the old is preserved among the mass of the new."[26]

What all common lawyers share is "an emphasis on the ongoing cultivation of a concrete historical tradition."[27] This ongoing, dynamic, and incomplete tradition encompasses both theory and practice. The common law does not consist only of the legal doctrines derived from binding official legal sources such as statutes and precedents. Under the institutional principles that govern the common law, what Melvin Eisenberg calls "social propositions" – propositions of morality, policy, and experience – are relevant in all cases. One of the key questions in common-law reasoning concerns precisely the interaction of social and doctrinal propositions, and it is not difficult, Eisenberg claims, to see why such propositions must necessarily play an important part in common-law reasoning.

> The common law is heavily concerned with the intertwined concepts of injuries and rights, and moral norms largely shape our perception of what constitutes an injury and a right. Judicial considerations of policies furthers the courts' function of enriching the supply of legal rules: if the courts are to establish legal rules to govern future social conduct, it is desirable for them to consider whether those rules will conduce to a good or a bad state of affairs. Experimental considerations are necessary to mediate between policies and moral norms on the one hand and legal rules on the other.[28]

Not any and every social proposition is acceptable, however. Only "applicable social propositions" that it is "proper for a court to employ"

26 Lawrence M. Friedman. *A History of American Law (N.Y.* Simon & Schuster, 1973), p. 14.

27 Bruce Ackennan, *We the People. Foundations* (Cambridge, Mass.: Harvard University Press, 1993), p. 24.

28 Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge, Mass.: Harvard University Press, 1988), pp. 1-2.

will do.[29] And consensus as to what constitutes "proper" social, non-legal propositions is no longer as stable as it used to be. For some, e.g., the legal positivists, social propositions ought to be discarded altogether, whereas for others, such as the members of the Critical Legal Studies and Critical Race Theory Movements, legal doctrines are hardly worth considering entities in and of their own right but only make sense in connection with social propositions. More often than not, though, the question is one of degree rather than kind – what weight to give to each of the respective propositions. What concerns us here is the fact that the common law is, in its very nature, both material and ideological.

That the common law is not merely fact, but also inevitably has an intellectual and moral dimension, has to do with law being "custom transformed, and not merely the will or reason of the lawmaker. Law spreads upward from the bottom and not only downward from the top."[30] What happens at the grass-roots level carries importance for decisions made at the top. Reflecting and defending on the one hand the interest of the ruling class, on the other hand the law has provided protection against the misuse of power of that very class.

> Law not only expresses and creates power but also serves to limit power – -Law expresses community norms and it applies them to particular situations by interpreting the norms in the light of community morality and other community understandings. The essence of a norm is that it constrains behavior, including the behavior of the powerful.[31]

It is in this doubly dualist nature of the common law, as it were – its being material but also ideological, and its spreading upward from the bottom and not merely downward from the top – that we may find the origins of judicial activism. In many ways, contemporary judges are merely doing what generations of common-law judges have done before them: making law with the self-conscious goal of bringing about social change.

29 Ibid., pp. 1-2,43.

30 Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), p. 556.

31 Karst, p. 194.

Appleby would not find much support for her attack on American exceptionalism among the general public. As already mentioned, most Americans find in the very notion of American exceptionalism – and especially in its legal underpinnings – a viable path to effective inclusion in American society. This is reflected in the nation's cultural life. From the works of Scott Turow, John Grisham and countless other writers of detective novels, or television series such as "The People's Court" and "L. A. Law," to the works of "serious" writers such as William Gaddis and Margaret Atwood, the sacred principles of personal freedoms and rights as outlined in the Constitution are invariably invoked above or beyond the actual plots. A person's decency and human worth are tested against whether or not he or she still – deep-down – believes in the American civic culture. If and when the average American stops believing in American exceptionalism and stops wanting to fight for it, these cultural works suggest, then things do not look good.

One revealing example is the story of a small Southern community's awakening to civil rights in the 1970s – a story told in Praying *for Sheetrock* by Melissa Fay Greene. The development that takes place within just one generation is one from church to court. As the book unfolds, the devoutly Christian black community of McIntosh County, Georgia, who have been "blind and deaf to issues of civil equality, equal employment, and local corruption," discover that the law and its practitioners may actually be of more help to them in their fight for justice and equality than their church leaders.[32]

In the early 1970s, McIntosh County is a completely segregated community. Tom Poppell, the white sheriff, wields all power; he controls everyone and everything. He has been sheriff since 1948, when he inherited the office from his father, Sheriff Ad Poppell, and he rules McIntosh in much the same way that George Washington Plunkitt once ruled New York's Tammany Hall: by "honest graft." In return for votes, he protects and takes care of his constituents. He is famous all over the South, for example, for allowing the local population to loot the cargo spilled onto old U.S. 17 through McIntosh County whenever trucks collide or suffer the mishaps of heavy interstate traffic. Oftentimes, such

32 *Praying for Sheetrock,* p. 3.

mishaps will be caused by Sheriff Poppell himself and his deputies, who will take possession of the scene and call in the locals once the truck driver has gone off in search of help. "Such redistribution of wealth," we are told, "invariably put the sheriff in an excellent mood" and earns him "ever-widening circles of supporters."[33]

Like most successful political bosses, Tom Poppell is a wealthy man. He has acquired his wealth in a number of illegal business transactions over the years. During his reign, McIntosh County has been converted into "a mini-Las Vegas, a mini-Atlantic City, a southern Hong Kong or Bangkok where white men came looking for, and found, women, gambling, liquor, drugs, guns, sanctuary from the law, and boats available for smuggling."[34] The locals do not condone Poppell's activities; indeed, most are sorry for the bad reputation these activities bring to McIntosh. Yet, by playing Robin Hood from time to time and tossing the occasional bonus to law-abiding whites and blacks alike, Poppell has managed to stay in power, thereby continuing one of the longest-running sheriff's dynasties in the state's history.

Between the black and the white communities of McIntosh, there are "close and long-time connections – unlike anything in the North." Half of the population are white and for the most part they live in Darien, where they own all the major shops and businesses and occupy all the important offices. All the menial tasks are performed by the blacks, the majority of whom still inhabit slave or sharecropper shacks to the north of Darien between the shoreline and the pine woods. They live their lives much as they have since emancipation, trusting in the Lord to provide for their needs and relying on the sheriff to maintain the racial equilibrium.

> The historic black community of McIntosh lived in a sort of pale outside a century of American progress and success. They survived by raising vegetables and keeping chickens and pigs, by working menial jobs in Darien, and by fishing the network of tidewater rivers and blackwater swamps. They lived without plumbing, telephones, hot water, paved roads, electricity, gas heat, or air-conditioning into the 1970s.[35]

33 Ibid., pp. 3,241.
34 Ibid., p. 14.
35 Ibid., pp. 16-17,20.

When finally the call for civil rights disrupts the silent understanding between blacks and whites in McIntosh, everybody – blacks and whites alike – has a hard time understanding how acquaintances, people they have known all their lives, now turn into adversaries. It all starts when Thurnell Alston, an uneducated and unemployed black man with a keen sense of justice, has finally had it. Years before he first hears about Martin Luther King and his fight for racial equality, Thurnell starts becoming conscious of the systematic attacks on his own dignity and that of his black brothers. In "a series of rude awakenings" – one of which consists of his overhearing Sheriff Poppell remarking how the "only way you can control the Negroes is to keep them hungry" – Thurnell undergoes a gradual, but effective "education,""until the day he had heard and seen enough and could not, in good conscience, remain passive any longer."[36]

What turns Thurnell's passive knowledge of racial discrimination into an active will to fight for change is the senseless shooting of a black man named Ed Finch by Darien's white chief of police, Guy Hutchinson. Annoyed at Finch, who is engaged in a drunken and loud quarrel with his girlfriend on the front porch of her house and refuses to be quiet when Chief Hutchinson tells him to, the Chief simply sticks his revolver into Finch's mouth and fires. He then takes Finch, bleeding, to the jail, charges him with aggravated assault and drunk and disorderly conduct and leaves him without any medical attention. What chiefly upsets the black community is not so much the fact that a violent act is committed by a white person against a black neighbor – after all, the black community is used to far worse! – but rather the fact that all of this happens in broad daylight within a residential area.

> Clearly an attack such as Hutchinson's upon Finch was not allowed: the blaclts were not, after all, to be slaughtered like hogs; the fiction was to be maintained of two separate societies living rather gingerly side-by-side, each with its own hub of social and business life. Such a vicious and unprovolted attack by the chief of police against a citizen was a violation of the unspoken social contract that allowed the whites and the outcast blacks to live in peace.[37]

36 Ibid., p. *38.*
37 Ibid., p. *122*

The night Chief Hutchinson shoots Ed Finch, black McIntosh gathers around Thurnell Alston, and from now on it is Thurnell to whom they turn for advice and leadership. Thurnell teams up with two old pals, Reverend Nathaniel Grovner and Sammie Pinkney. Together, these "Three Musketeers" set out to do something. For various reasons, all three of them have independent sources of income and thus need fear no economic reprisal from the sheriff and the rest of white McIntosh. They hold meetings, around Thurnell's kitchen table, but also in church where they try to raise the political consciousness of their devoutly Christian black brothers and sisters. At some point, Sammie Pinlney, who as a former New Yorlt City policeman with experience of the American West and of Europe ltnows about the ways of the world, becomes impatient, however. Alston and Grovner's reiterating every evening in church "the same half-dozen painful facts" which are then swept away by the congregation "with another mighty hymn," does not get them anywhere.[38] Outside intervention is needed, Pinkney decides, so he contacts Georgia's controversial legal aid network, the Georgia Legal Services Program and hires a lawyer.

Alston and Grovner are not immediately persuaded that the move from church to court is a wise one. Not long after their first appointment at the Brunswick Legal Services office, however, they find themselves commuting back and forth between McIntosh and Brunswick nearly every day. The meeting with the young legal aid lawyers, whom they initially view with much skepticism, turns out to be a revelation:

> The amazing thing, to Thurnell, was how quickly and easily the young white lawyers had named the ill health of the county; how they had listened as the three McIntosh men tumbled out their tales of poverty, underemployment, and a sense of being the untouchables in McIntosh's caste system – It was as if he'd come to them delirious, a feverish child, and they had smoothed his hair, laid a cold cloth on his forehead, and explained to him that he had the mumps and this was the cherry syrup he must sip from a spoon to be all better.[39]

Time and again, Thurnell and his fellow-Musketeers hear the white lawyers talk about and refer to one particular document: the American

38 Ibid., p. 151.
39 Ibid., pp. 178-79.

Constitution. This document, the lawyers promise, has something to say about every fight for equality – even when that fight occurs in such a far-away and seemingly insignificant place as McIntosh County, Georgia. The Constitution, the blaclc men soon come to understand,

> was the white boys' Bible; and the lawyers quoted it often, chapter and verse, taking secular pleasure in its ornate language every bit as much as the rural people relished the antiquated resonance of biblical thou shalts and wherefores and cometh and goeths.[40]

For their part, the young white lawyers rejoice in the chance to leave their offices in Brunswiclc and do some active service in the black community. Fresh out of the nation's best law schools, these "young, upper-middle-class, mostly urban, mostly Yankee lawyers" have no idea what awaits them in the South. They are taken aback by the Third World conditions under which people, white and blaclc, are still living and consider the challenges they meet in Georgia "akin to those of their friends who had joined the Peace Corps instead of VISTA and who now dwelled in Asian or African villages. The exoticism and foreignness of the surroundings were vivid, and they themselves were looked upon as bizarre implants." Their social commitment is genuine and deep-felt. They had gone to law school in the first place out of a desire to perform public service, and consider a legal career the best instrument for creating social change. Their will to a judicially activist life is founded on an understanding of law as "self-evident truths about fundamental human rights," and when they set up shop in the small rural towns, they are "prepared to work heroic hours."[41]

The course upon which the lawyers decide to embark is to bring suit in federal court, contending that the electoral system for electing city and council officers presently in operation in the city of Darien and McIntosh County, respectively, dilute the votes of black citizens. *The NAACP* v. *McIntosh County* is resolved with a consent order, which divides McIntosh into five voting precincts. As for the second voting rights suit, *The NAACP v. The City of Darien,* the Georgia Legal Services Program lawyers fail to convince Judge Alaimo of the Southern District that

40 Ibid., p. 180.

41 Ibid., pp. 161,156.

anything is wrong with the way the city of Darien runs its elections, and the judge dismisses the suit. The legal aid lawyers appeal. This time they win; in October, 1979 the U.S. Court of Appeals for the Fifth Circuit reverses, "and Darien, like McIntosh before it, was sliced into districts, including a majority-black district."[42]

The way is now paved for black citizens to run for both city and council officers. The first to benefit from the court order that has created a majority-black district is Thurnell Alston. Running, at age forty-one, for county commissioner for the fourth time, he finally succeeds in placing himself squarely in the midst of McIntosh County politics. Politically, he is a success, forcing the white commissioners to dedicate the sparse budget to the most fundamental needs of the poor. What Thurnell has not anticipated, however, is that after his election, the black community, tired of fighting and wishing merely to go back to their lives, lose interest in him and his continued struggles with the white commissioners.

> In a strange collapse of vision, the election of Thurnell Alston to the County Commission now appeared to everyone to be the chief thing they had worked for, the ultimate victory – -He became, to the black people, simply the Coinmissioner; not the Barber, not the Undertaker, not the Preacher, but the Commissioner, as if the larger community had no more vested interest in his daily work than in anyone else's.[43]

Without the support of the close-knit black community, Thurnell is lost. None of what he has fought so hard for over the past years, seems worth it. When furthermore he and his wife suffer the loss of a favorite son, Thurnell feels so alienated, so tired and depressed that he starts loafing and drifts in the direction of the criminal milieu in McIntosh. He is indicted on charges of accepting bribes and possessing and distributing drugs and eventually has to go to jail.

"What might have happened differently," muses one of the young white lawyers as the two voting rights suits are about to be filed, "if Sammie and Thurnell and Reverend Grovner – had contacted say, political organizers, the national NAACP or SNCC. There might have been a

42 Ibid., p. 219.
43 Ibid., p. 253.

different approach to this stuff. But they came to lawyers, you know, what can you do?"[44] The question as to whether the course of events would have been a different one, had the Three Musketeers decided to fight in the political rather than, the legal arena, is never addressed by Melissa Fay Greene. In fact, the author of *Praying for Sheetrock* does not even seem to find it a relevant question. The reader cannot help wondering if the backing of a political group or organization might not have prevented Thurnell's sad fall from grace. As far as Greene is concerned, however, the real heroes are the lawyers whose judicial activism makes it possible for Thurnell to embark on a political career in the first place. As the book closes, a black man has replaced Thurnell as county commissioner, a black woman is elected to the post of superintendent of education, another black woman runs the tourism office, and yet a third black woman teller works in Darien's bank. Of course, says Greene, "it is not enough, but it is a beginning."[45]

Like *Praying for Sheetrock,* David *L.* Kirp, John P. Dwyer, and Larry A. Rosenthal's *Our Town. Race, Housing, and the Soul of Suburbia* is about the use of law to make America more inclusive. As the title implies, the issue discussed in the more recent book is zoning and its implications for the racial make-up of America's suburban landscape. We are in Mount Laurel, New Jersey – a state, we are told, which is the most suburbanized state in the nation, and in which judicial activism is "the byword," New Jersey's Supreme Court Justices having been "more openly political and politically strategic in their decrees than other states' judges."[46]

The story of Mount Laurel – the township and the landmark case – begins on a Sunday in 1970, when the congregation of the all-black African Methodist Episcopalian Church has invited the Mayor of Mount Laurel to announce the town's response to a housing proposal which will open up suburban Mount Laurel to local, poor and mostly black families. After praising the new prosperity that is fast changing small rural Mount Laurel into a booming suburb the Mayor comes to the point: the township

44 Ibid., p. 175.

45 Ibid., pp. 175,335.

46 David L. Kirp, John P. Dwyer, and Larry A. Rosenthal, *Our Town. Race, Housing, and the Soul of Suburbia* (New Brunswick, *N.J.:* Rntgers University Press, 1995), p. 65.

has no intention of ever approving the proposed housing project. Indeed, he goes on, "*'if you people' – you poor and black people, that is – 'can't afford to live in our town, then you'll just have to leave'.*"[47] These words are like a slap in the face to the blaclts present; the Mayor as good as tells them that for them and their families, whose roots in Mount Laurel after all go back to before the American Revolution, there is no room. This leaves them no option but to move to the riot-torn slums of nearby Camden.

Appalled at Mount Laurel's rejection of the idea of housing for the poor, the minister of the African Methodist Episcopalian Church approaches Camden's radical Legal Services lawyers. Upon hearing about the Mayor's message to the black population of Mount Laurel, the Camden lawyers decide "to bring their equalitarian agenda to the suburbs." Like their colleagues in *Praying for Sheetrock,* these lawyers

> had gone to law school in the sixties, not with the intention of becoming partners in some stuffy Wall Street firm, but instead meaning to accomplish a quiet social revolution in the nation's courtrooms. These children of the Warren Court era regarded the law almost as a secular religion, and they had faith in its power to undo injustice.[48]

With the involvement of the Camden Legal Services lawyers, the housing controversy ceases to be a matter for the citizens of Mount Laurel to settle among themselves. For the lawyers, affordable housing is a matter of simple justice, and they see in the Mount Laurel controversy a potential "frontal challenge to the ever widening divisions between blacks and whites, as well as between the poor and everyone else." Together with local community organizers they decide to take the controversy to the courts, contending that Mount Laurel's zoning ordinance unconstitutionally excludes poor and minority citizens from affluent neighborhoods. Among the local organizers, it is especially a black woman by the name of Ethel Lawrence with whom the lawyers deliberate, as they pursue their legal course. Ethel Lawrence is the Thurnell Alston of *Our Town.* The book is dedicated to her for, as the authors put it, without her it "would have been simply an account of how

47 Ibid., p. 2.
48 Ibid., pp. 3,70

policy gets made, not a textured human drama as well." It is Ethel who first educates the authors on "the folk-ways and law-ways" of New Jersey, just as it is her constant presence in court which serves to remind attorneys and judges that real people, not just legal principles, are involved.[49]

When the lawyers file *Southern Burlington County NAACP et al. v. Township of Mount Laurel* in May 1971, they have no idea that *Mount Laurel,* as the zoning litigation comes to be collectively known, will continue to be argued in court for a decade and a half, and will become "the *Roe v. Wade* of fair housing, the *Brown v. Board of Education* of exclusionary zoning." The first to hear the case is trial court judge Edward Martino. Judge Martino is so overwhelmed by the stories told in court' by the township's poor of neglect and abuse on the part of Mount Laurel's politicians, that he pronounces Mount Laurel's zoning ordinance unconstitutional on grounds of economic discrimination. Writing his opinion, Martino has to do some creative legal thinking as he has no New Jersey precedent to rely on. Instead, he "cobbled together an opinion that relied on dissents, decisions from other states, and law review commentary."[50]

Judge Martino's opinion, delivered in May 1972, is bold, though not as bold as the judgment delivered three years later by Justice Frederick Hall for a unanimous New Jersey Supreme Court. Upon the township's appeal of the trial court's ruling, the Supreme Court decides to hear the case directly, skipping the intermediate appellate court. Picking up on Judge Martino's notion of economic discrimination, Justice Hall speaks of a moral obligation on the part of America's suburbs toward the poor and homeless and demands that "developing towns across the state rewrite their zoning laws so that private developers, taking advantage of federal subsidies and market forces, could build homes for a 'fair share' of the region's poor and moderate-income families."[51] As had been the case for Judge Martino before him, Justice Hall has no specific text other than the New Jersey Constitution's vaguely formulated concern for the general

49 Ibid., pp. 70,ix.
50 Ibid., pp. 3,75.
51 Ibid., p. 77.

welfare to rely on in his call for constitutionally mandated municipal obligations.

The politicians are enraged at Justice Hall's demand for an ordinance providing "realistic opportunity" for affordable housing. They refuse to play this game of "judicial dictatorship" and submit a "farcical document, every bit as defiant of the judiciary as southern school districts' responses to desegregation in the 1950s and 1960s." To the lawyers' dismay, the trial court approves of the town's sham zoning changes, and they decide to mount a new Mount Laurel lawsuit. In *Mount Laurel II*, as the suit comes to be known, they are defeated at the trial court level, but vindicated by the New Jersey Supreme Court in 1983. The opinion delivered by Chief Justice Robert Wilentz himself gives "developers, lawyers, and poor families eager to prise open the suburbs expansive declarations of rights, detailed remedies to make those rights real, and even the apparatus of a new mini-administrative system to enforce them."[52]

The lawyers rejoice in Chief Justice Wilentz' public interest-oriented call for each town to take affirmative responsibility for its "fair share" of the state's poor. As it turns out, they rejoice too soon, however. Prodded into action by Wilentz' specific warning in *Mount Laurel II* that the Supreme Court will continue its judicial activism until the Legislature acts, members of the State Legislature start negotiating a compromise. After several failed attempts at reconciling liberal hopes of preserving in legislation the most central elements of *Mount Laurel II* and conservative plans of aborting the court's ruling, the Legislature finally produce the 1985 Fair Housing Act. Along the way, Republican Governor Thomas Kean has done his best to transform "the fair-share problem *Mount Laurel II* had addressed into another kind of problem – runaway judges."[53]

The 1985 Fair Housing Act, it is generally understood, sends an unequivocal signal to the New Jersey Supreme Court that further judicial activism is neither needed nor wanted. It takes the high court barely six months to respond. In February 1986, in a case formally known as *Hills*

52 Ibid., pp. 86-87,93.
53 Ibid., pp. 101,123.

Development v. Bernards Township but more commonly called *Mount Laurel III*, the Supreme Court unanimously upholds the new law. To some, this is a realistic, even pragmatically wise peace offering from the bench; to Ethel Lawrence and the Legal Services lawyers, who have made the cause of affordable housing central to their lives over the years, *Mount Laurel III* amounts to retreat, even capitulation on the Justices' part.

In the assessment of the authors of *Our Town,* neither response is entirely fair. The New Jersey Supreme Court must be commended first of all for forcing the Legislature to recognize the state's responsibility to solve the housing needs of the poor, and secondly for knowing exactly how far to pursue a legally activist course without loosing its autonomy and integrity. Unlike what has happened in other states where justices have been forced to resign for being too openly political, New Jersey's justices "have continued to be legal innovators, and appointments to the Supreme Court still stress professional competence, not partisan politics." On the other hand, *Mount Laurel III* raises questions about the high court's willingness and ability to keep a reform agenda going. Just as the court had demonstrated, in *Mount Laurel II*, a willingness to "craft broad remedies for systemic social problems and transcend the limitations of traditional litigation," it draws back and leaves the issue of affordable housing in the hands of New Jersey's politicians for whom the needs of the prosperous middle class have always been more important than those of the poor. The unfortunate result has been that Justice Hall's talk, in *Mount Laurel* **I,** of a moral obligation toward Mount Laurel's poor, essentially black population, has been conveniently forgotten, and that "there has been relatively little low- and moderate-income housing built in New Jersey since the Fair Housing Act was passed in 1985."[54]

For a brief moment, it looks as if a handful of judicially activist justices may succeed in forcing Middle America to commit itself to the principle of fair shares for the Haves and the Have-Nots alike. But then the justices retreat from "that bold new conception of the commonwealth," allowing Middle America to slip back into its old beliefs in the power of a free market economy to resolve America's problems. *Our*

54 Ibid., pp. 147,113,159.

Town is very much about judicial activism – its potential for "defining and enforcing newly created social rights and obligations." Above and beyond the issue of whether affordable housing is a matter for the judiciary or for the legislature, however, it is the actual – and very real – needs of the poor, the human problem, that concerns the authors. At a time when "the very idea of our being a 'good society,' a city on a hill, commands little credence," and when "compassion, once a byword, has become a political liability," Kirp, Dwyer and Rosenthal ask, to whom are the poor going to look for support? Until Middle America finally wakes up and recognizes that help is needed, "it is vital that the idealists keep talking the talk."[55] And for the time being there seem to be more idealists among America's judges than among its politicians.

Down through American history, the common law has served as a basis for social and political inclusion. As some critics see it, the inclusiveness enabled by the common law has had the unfortunate effect of undermining multicultural identity. According to Appleby it is the very inclusiveness of the common law, and not merely its use as a tool of WASP exclusivity, that has threatened multiculturalism. To such attacks on legal universalism, other critics have responded that legal universalism has in fact enabled the nation's subcultures to seek and obtain integration. Karst is one such critic who has attempted in his writing to demonstrate that,

> not every form of 'legal universalism' threatens to undermine the nation's subcultures. To one who self-identifies within a culture or a social group partly or wholly defined by race or sexual orientation, equal citizenship implies that she can belong to America and at the same time keep that particularized orientation if she wants it. An increasing recognition of the mythical qualities of racial or sexual orientation identity should make no difference at all to the antidiscrimination component of the guarantee of equal citizenship. Nor should the recognition of race as a myth be taken to undermine the constitutional or statutory foundation for race-conscious group remedies that are appropriate for group-based harms. In the end, both the antidiscrimination principle and race-conscious remedies should be seen as the instruments of integration. Not 'assimilation' in the sense of identity lost, but integration in the sense of a reality renamed, an identity renewed, a myth retold.[56]

55 Ibid., pp. 173,79,174.

56 Kenneth L. Karst, "Myth of Identity: Individual and Group Portraits of Race and Sexual Orientation," UCLA *Law* ***Review,*** Vol. 43, No. 2, 1995, p. 369.

Karst's attempt to combine in his work legal universalism with the search for particularized identification, in which so many of America's diverse cultures have been engaged over the past many years, is an important and interesting one. It is one, moreover, which is reflected in a variety of American cultural works. Two recent examples are Praying for Sheetrock and Our Town. For Thurnell Alston and Ethel Lawrence the fight to be included into American society is a long and arduous one. Not knowing at first where to turn for support and understanding, they approach the Legal Services Programs of their respective states. The idealism and willingness to fight for a better and more just society that characterize the young white lawyers who man these programs impress the two protagonists. As they befriend these lawyers, they cannot help but being swept along by the lawyers' belief in the law's ability to do good. The law of the land, they come to believe, is there for them too.

Central to the authors of Praying for Sheetrock and Our Town is the belief in judicial activism – the belief that in a civil society the courts will have to step in to protect the rights of the underprivileged. Both books illustrate how intimately the idea of American exceptionalism is related to the role of law and lawyers in American society. It is especially since World War II that Americans have come to associate judicial activism with an expansion of constitutional rights for America's needy. Earlier, the country's activist judges were not always instrumental in extending the rights of citizenship to previously unwanted groups of people. After Brown, however, the ideal of a compassionate and activist judiciary has served to remind the nation that what makes America exceptional are not only certain constitutional rights and liberties, but also the very idea that such rights are for everybody – high and low, white and non-white, man and woman. When therefore critics such as Appleby attack the notion of American exceptionalism for excluding down through American history all that is non-white and non-male, they miss the point.