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THE HAWAII SUPREME COURT'S ROLE IN PUBLIC POLICY-MAKING

EDMUND M.Y. LEONG

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Edmund M.Y. Leong

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LIST OF ABBREVIATIONS

BE	Princess Bernice Pauahi Bishop Estate
BT	Charles Reed Bishop Trust
HRS	Hawai‘i Revised Statutes
HSC	Hawai‘i Supreme Court
ICA	Hawai‘i Intermediate Court of Appeals
KS	Kamehameha Schools
LE	King William Charles Lunalilo Estate
MT	Bernice Pauahi Bishop Museum Trust
NH	Native Hawaiian
SSC	state supreme court
USSC	United States Supreme Court

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CHAPTER 1

Introduction

In normative debates about the proper role of the court in democratic government, the issue of judicial policy-making is typically framed as an all-or-nothing proposition. There will or will not be judicial policy-making, which presumes that a decision of this nature can in fact be made. In actuality, judicial policy-making and decision-making are coincident, inseparable activities. In the course of performing the judicial function, a judge establishes public policy as an inevitable consequence of deciding a dispute. Whether intended or not, judges necessarily make policy. Whether they ought to or not, courts unavoidably engage in policy-making.

The view that courts and judges participate in the policy-making, and therefore political, process is in discord with the conception that they are or should be "above politics." Although the judiciary is both an inherently political (i.e., policy-making) and legal institution, tension exists between the conflicting political and legal dimensions. The public's need to believe in the ideals of the basic fairness of the law and judicial institutions, which sustain public confidence in the courts and obedience to judicial authority, helps to perpetuate the myth that courts are nonpolitical institutions and judicial decision-making is neutral. And courts and judges can and often do share in the task of creating and lending credence to this belief, pragmatically pretending to do the opposite of established conduct to gain public support for the judiciary and legitimate their rule.

Critics of judicial involvement in policy-making typically assert that the task of a judge is to say what the law is rather than to make law. This traditional, legalistic perspective views judicial decision-

making as a mechanistic process whereby judges determine what law is applicable and apply the law to the facts of the case. Through deductive reasoning, a judge 1) analyzes the facts of the case to determine the legal category into which it fits, 2) identifies the legal rule governing that category of cases, 3) applies the rule to the facts of the case, and 4) arrives at a decision. This fails, however, to explain decision-making in those instances where a judge deals with novel issues, chooses between competing rules because there is no firmly established legal rule, or departs from precedent and does not apply the settled, established legal rule. During these occasions, extralegal, e.g., a judge's own policy preferences, whether or not this is regarded as a proper basis for judicial rulings, rather than legal factors are likely to influence decisional outcomes.

Critics of judicial policy-making also advocate passive participation by judges in the development of public policy. Judicial restraintism calls for deference to the legislative and executive branches to determine the ideological orientation of public policy. The court's role is to be one of strict neutrality, exhibiting no political, economic, or social preference. Judges are to make their rulings regardless of the interests involved or the impact of the ruling on those interests. This perspective, however, may be more aspiration than fact. Each and every judicial decision rewards some interest and deprives another. If court decisions are inherently value-laden judgments, judges can be influenced by value preferences in making choices among competing values.

That the judiciary has some influence over public policy is ineluctable. The fundamental issue then concerns the character and strength of this influence. It is unlikely that American courts are the powerful and efficacious policy-making institutions supporters and opponents of judicial policy-making alike often implicitly presume them to be when engaged in their normative debates over the proper role of the judiciary in democratic government. Political constraints on judicial (policy-making) power built into the system of governance help secure their accountability to some degree. Their effectiveness is also diminished by both these same constraints and the host of broader forces that ultimately determine the behavior of individuals and organizations in society. Courts simply can neither themselves do nor require others to do whatever, whenever, and however they wish.

On the other hand, courts are not as unimportant and impotent as might be suggested. The judiciary maintains some degree of political independence from majoritarian control, that extent which society desires and deems acceptable for these legal institutions, which results in imperfect constraints on judicial policy-making. And though the judiciary generally lacks the capacity to achieve its intended policy objectives with certitude, judicial action can and does, through different modes of participation, influence and shape policy developments and final policy outcomes in varying degrees. Courts can also enhance their potential effectiveness by properly timing the initiation of policies and designing their enunciated policies so as to raise the likelihood of acceptance and compliance by others.

American courts also differ markedly in both their orientation towards policy-making and policy-making contributions. The legal, political, and historical factors peculiar to a society help shape its courts' perceptions of their judicial responsibilities and function(s). For example, some state supreme courts may embrace and aggressively engage in policy-making, whereas others may decline to participate in most instances or prefer to adopt different postures depending upon the policy issues. The opportunities for judicial participation in policy development provided in the American system of governance are also not made equally available to all courts. This differential presentation of the types and numbers of opportunities affects policy-making leadership among courts and the policy-making status of courts vis-a-vis other central political institutions involved in governance. State supreme courts situated in political systems with greater societal diversity and complexity may be presented with more opportunities to decide on matters of first instance, exhibiting judicial innovativeness and leadership as they express positions on the new issues and claims. Those courts lacking these opportunities and unable to contribute to judicial doctrinal development will likely be primarily engaged in policy-making that's more associated with governance, and the depth of their participation will be influenced by the political and legal culture' norms about inviting or discouraging judicial involvement in policy development.

Thus, while all courts engage in policy-making, the actual character and strength of the judiciary's influence over public policy is likely to differ across political systems. Differences in their respective political and legal cultures could lead to variations in the content and

incidence of use of the host of political constraints on judicial power as well as the judiciaries' orientation towards policy-making. The development of social, economic, and political forces and factors affecting both the emergence of judicial policy-making opportunities and the policy-making effectiveness of courts could occur along different paths in their respective communities. Disparity rather than uniformity in the judiciary's policy-making role can be expected across political systems.

But in its discussion, a single, grand role encompassing all the various aspects of policy-making has not been possible of being defined and formulated. Different conceptualizations of the judiciary's policy-making role have been advanced instead, each being based on a specific element of policy-making, e.g., accountability, effectiveness, orientation, and opportunity. Each contributes its own valuable perspective to an understanding, but is not in itself a complete statement, of the overall role. However, integrating these diverse conceptualizations into one composite role may be a task akin to synthesizing the observations of a group of blind men attempting to describe an elephant. And, even if possible, it may be of little value. An ill-integrated composite role that also may not be accurately applicable to all courts could lead to more confusion than elucidation about courts.

What could be constructed, however, is an imperfect approximation of an individual judiciary's overall policy-making role within its own political system, by piecing together findings from analyses based upon the various conceptualizations for this particular court. Although this specific role might not be the same as other courts may play within their own political systems, it could contribute and help lead to a broader understanding of the general policy-making role that the judiciary as a whole plays. As the most powerful and visible judicial institution in American society, the United States Supreme Court's (USSC) role in national politics and public policy-making, encompassing the various conceptualizations, has been extensively studied. But other appellate courts at both the federal and state levels, even though their influence over public policy may be of lesser and more limited impact, are also worthy of study. And, with respect to state supreme courts, there may not be a typical policy-making role that applies to all these courts. This study then seeks to provide a full, initial look at the Hawai'i Supreme Court's (HSC) role in politics and policy-

making within the state and nationally during the approximately first four decades of the statehood era.

The Hawaiian Islands were initially governed as independent island-fiefdoms, which gave way to the formation of a unified kingdom under the control of a single island chief in 1796, about twenty years after the arrival of Europeans to the Islands.[1] The monarchical era lasted less than one hundred years. In 1893, an insurrection by a group of American citizens residing in the Islands led to the overthrow of the monarchy and the establishment of the Republic of Hawai‘i. After annexation by the United States in 1898, the Territory of Hawai‘i was created in 1900. The State of Hawai‘i came into being on August 21, 1959.

An Anglo-American type of court of last resort, typically referred to as a supreme court, has existed in Hawai‘i since 1852.[2] First established during the monarchical period, a supreme court was retained during the short-lived republic era, and transformed into an American-style territorial supreme court in 1900. The HSC was established in 1959. The state's constitution was then amended in 1978 to provide for an intermediate appellate court, the Intermediate Court of Appeals, which began operations in 1980. These two institutions presently comprise the state judiciary's appellate organizational structure.

Since an understanding of any judiciary's overall role in politics and policy-making may be reached by piecing together the knowledge gained from an analysis of each of the different role conceptualizations, this is the approach used for this study. Role conceptualizations developed from the perspective of policy-making accountability and effectiveness are covered in Chapters 2 (judicial review of legislation) and 3 (judicial path to social change), respectively. Those from the perspective of policy-making orientation and opportunity are covered in Chapters 4 (judicial function) and 5 (extrajudicial). A synthesis of these components is constructed in Chapter 6.

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CHAPTER 2

Judicial Review of Legislation

Within the constitutionally mandated separation of powers framework, government policy-making is a shared political activity and the judiciary functions as a full-fledged partner in the public policy-making process. The judiciary's influence over public policy operates through different types of judicial policy-making. They include 1) constitutional, 2) statutory interpretation, 3) oversight of administrative activity, 4) common-law, 5) remedial, and 6) cumulative policy-making.[1] Of these, constitutional policy-making is considered to be the most dramatic and classic conception of judicial activism, and is this chapter's focus.

Judicial review refers to the power of a court to enforce constitutional norms and determine whether the government's action is consistent with the constitution and to invalidate it if it is not. These constitutional rulings encompass a wide range of government activities and policies. For purposes herein, constitutional policy-making will refer only to the exercise of the power of judicial review in ruling on the constitutionality of legislation and striking down those determined to be unconstitutional.

CONSTITUTIONAL POLICY-MAKING AND PARTISAN REALIGNMENT

American politics is characterized by long-term one-party dominance and periodic partisan realignment. After an extended period of political control by one party, critical political issues emerge anew that result in the passage of control of the government to a new majority party. Since

partisan interests influence the formulation and administration of public policy, the recurring rise and fall of majority parties result in periodic reorientation of public policy. This link between elections, institutions, and public policy for the overtly political legislative and executive branches of government is considered legitimate and proper in democratic governance.

Unlike their partners in governing, it is unclear whether judicial institutions also exhibit a link between policy-making and partisan realignment, or should even if it does. Research on this relationship has been conducted primarily for the USSC, with little research directed at the state supreme court (SSC) level. This section looks at the link between constitutional policy-making and partisan realignment for the HSC.

The United States Supreme Court

The USSC's overall caseload indicates that it deals with a broad range of subjects, but mostly contained within a few issue categories, and the overwhelming majority of cases involve disputes that arise out of government activity.[2] About one-half of the caseload involves civil liberties issues, which primarily concern the procedural rights of criminal defendants, the right of disadvantaged groups to equal treatment, and the rights of freedom of expression and freedom of religion. Much of the other half concerns issues about either government regulation of economic activity or federalism, the division of power between federal and state governments. Thus, the USSC primarily deliberates over issues pertaining to government power and government policy.

With respect to its judicial review of legislation activity, the USSC invalidated provisions contained in 126 federal statutes from 1803 through 1990. This represents a minuscule proportion of the federal laws that have been enacted by Congress during this time span. Although some of the invalidated legislation dealt with public policies of great social significance, the majority of the invalidated legislation was of relatively minor policy importance to Congress. A majority of the invalidations also involved older legislation, enacted more than four years prior to being invalidated, and may not have been of much concern to the members of Congress at the time of the invalidation. Lastly, although the overall number of invalidations tended to rise over

time, their incidence did not occur evenly over time and rose and fell at different time periods.

The USSC also invalidated 1,190 state statutes and local ordinances from 1803 through 1990. The level of invalidations also tended to increase over time and peaked between 1960 and 1990, when an average of sixteen laws were invalidated each year. The invalidated legislation involved an admixture of the important and the minor. But of greater political significance, these invalidations helped to influence the development of state policies and shift policy-making power further toward the federal government and away from the states.

Based upon the pattern of invalidation of federal statutes, Dahl argued that the USSC primarily performs a legitimator role in the exercise of its policy-making power.[3] When one political party is dominant and able to form a law-making majority within the two elected government branches, this party also effectively controls the selection of judges (assuming an appointive rather than elective judicial selection system is in use). Therefore, the policy views and goals that are dominant on the USSC can generally be expected to be consistent with those of the law-making majority. When federal legislation advancing these policy views and goals are challenged on constitutional grounds in the courts, the USSC will tend to uphold the legislation and affirm these policies. In doing so, the Court places the imprimatur of legitimacy that emanates from the revered constitution upon them and, thereby, enhances majoritarian rule.

The long-term policy-making relationship between the appointed court and the two elected nonjudicial branches is expected to be more one of ideological and political consensus than conflict. Judicial restraintism rather than activism, defined here as policy consensus rather than conflict between the court and the law-making majority, respectively, becomes the norm. However, short-term episodes of policy conflict could arise, particularly during the early period of a partisan realignment, because of a lag in membership changes on the court. When the extant court challenges the new law-making majority, judicial activism serves to impede the workings of electoral democracy. But, as new court members whose views are aligned with the majority are appointed, the law-making majority will eventually prevail.

In addition to the law-making majority's appointment power, an array of other political checks also acts to constrain judicial power.[4] Congress can initiate court-curbing actions, derived from its power to

determine the size, funding, and jurisdiction of federal courts, that threaten the independence of the judiciary. Anti-court legislation that modify or nullify the impact of judicial decisions can also be enacted. Furthermore, judges themselves understand the risks to the judiciary's long-term survival and prestige associated with challenging the law-making majority. Judicial self-restraint can enhance judicial power and institutional legitimacy. All these various checks on judicial power then serve to channel judicial policy-making into consensus with the popularly elected law-making majority in the long run.

Others regarded Dahl's emphasis on the limits of judicial power and the USSC's consequent legitimator function to be unduly restrictive. Directing their attention to the court's ability to invalidate the legislation and policies of the law-making majority, they emphasize the court's countermajoritarian role. Adamany argued that, because of time lags in the replacement of court members, a majority of the members on the USSC could find themselves in ideological conflict with the law-making majority at the beginning of a partisan realignment period.[5] Seeking to protect what are perceived to be fundamental minority rights, the members of the USSC participating in the countermajoritarian confrontation elect to substitute their own policy views and goals in opposition to the political agenda of the law-making majority.

Funston, attempting to verify that the USSC performed a countermajoritarian role as Adamany had proposed, looked at invalidation patterns during realignment periods.[6] This was defined as a period beginning four years before a critical election and ending after the newly elected coalition appoints a majority of new members to the court. Averaging the invalidations over all realignment periods, he concluded that the USSC was slightly more likely to invalidate legislation during critical periods. But Funston's methodology was criticized. Beck argued that the appropriate time frame for examining conflict should begin with the onset of realignment, when the new party gains control of the popularly elected branches.[7] Canon and Ulmer examined the specific invalidation levels for individual realignment periods and concluded that there was a significant increase in invalidations only during the New Deal period.[8] If this period was eliminated, the USSC was more likely to strike down legislation in noncritical rather than critical periods.

Dahl's analysis was also attacked for limiting itself to invalidations of federal legislation. By excluding state (and local) legislation, Casper argued, policy conflict between the USSC and the national (i.e., federal and state governments together) law-making majority was significantly understated and the USSC's countermajoritarian role was seriously underestimated.[9] State legislation, especially prior to the twentieth century, frequently dealt with issues of national concern and they were invalidated much more frequently than federal laws. The USSC wielded considerably more influence in public policy-making at the state rather than federal level. Also, since statutory interpretations could alter public policy favored by the law-making majority just as effectively as the invalidation of a statute, conflict between the USSC and the federal government's law-making majority was also being underestimated by not including the Court's statutory interpretation activities.

Caldeira and McCrone examined the pattern of USSC invalidations of federal and state laws combined.[10] They found that invalidations, although rising over time, seemed to occur nonsystematically. When analyzed within a national law-making majority context, there appeared to be no link at all between policy conflict and partisan realignment. Further, many of the state laws that were invalidated did not concern matters regarded as critical national issues.

Besides the legitimator and countermajoritarian roles, the USSC may also perform an agenda-setting role. Both Adamany and Lasser have suggested that the USSC could provoke and accelerate partisan realignment in the political system.[11] In the period just prior to a partisan realignment episode, the Court is still aligned with the majority party. But its decisions helping to shape the majority party's position on the critical, realigning issues could act to advance the polarization and destabilization of the majority coalition. The Court serves as a catalyst for polarization and realignment.

Gates attempted to systematically and comprehensively test the relationship between judicial policy-making and partisan realignment.[12] Each of the three policy-making roles is expected to be performed at different points in time within a partisan realignment episode. An agenda-setting role should be found just prior to the start of realignment. The court should then perform a countermajoritarian role for a short period of time immediately after the start of realignment. This should then give way to a legitimator role as realignment