

**“The United States Federal Judiciary
May Not Be A ‘Third, Co-Equal
Branch’ of Government.
What are the Implications
for the Irish Debate on
‘Judicial Activism?’”**

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I. INTRODUCTION: FRAMING THE DEBATE

While the battle as to the appropriate role of the judiciary in a constitutional democracy has been taken up only relatively recently in Irish legal history, it has been ongoing virtually since the foundation of the United States of America.¹ Central to the debate is the doctrine of

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1. Paul Twomey, *Bork's Originalism: Reconciling Judicial Constitutional Interpretation with the Rule of Law*, (1996) 14 I.L.T. 278, 278.

separation of power, first and most prominently announced by the French philosopher Montesquieu.² In a nutshell, that doctrine provides that there are three separate branches of government: the executive; the legislative; and the judicial. Each branch has its own distinct ambits and functions. To the extent possible, therefore, these branches should not intertwine, but remain separate. Both the Irish and American constitutions, in their own way, are predicated on the separation of powers.³ However, profound differences exist in the text of the two documents in this regard, especially with respect to the role of the judicial branch.⁴

In the twentieth century, and particularly in the wake of multiple controversial decisions by the United States Supreme Court under then Chief Justice Earl Warren, a great deal of criticism was hurled at the federal judiciary.⁵ The bulk, though not all, of that criticism was levied by conservative politicians, academics, and interest groups. These groups disagreed with the current jurisprudence, charging that the courts were encroaching upon territory expressly reserved for the democratically elected federal and state legislatures in violation of the separation of powers doctrine. For those who, to the contrary, agreed with this course of jurisprudence, these critics devised the label of “judicial activist,” which to this day is used to describe judges who would exceed their constitutional mandate.⁶ The debate further intensified in later years when the federal courts made a series of controversial decisions on issues like contraception,⁷ forced busing,⁸ and abortion.⁹ More recently, in 2006, the Court reversed its prior holding and ruled that it was unconstitutional to execute convicted criminals under 18 years of age.¹⁰ Today, the national disagreement as to the role of the judiciary in a constitutional democracy continues to rage as President George W. Bush recently appointed two Justices to the Court.

2. See generally CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, *DE L'ESPRIT DES LOIX*—BOOK XI (1748).

3. DAVID GWYNN MORGAN, *THE SEPARATION OF POWERS IN THE IRISH CONSTITUTION* 5-7 (1997). See also *Sinnott v. Minister for Education*, [2001] 2 I.R. 545, 710 (Ir.) (briefly discussing the separation of powers doctrine in the Irish and American contexts).

4. See *infra* Sections II, III and IV.

5. Vincent Martin Bonventre, *Judicial Activism, Judges' Speech, and Merit Selection: Conventional Wisdom and Nonsense*, 68 ALB. L. REV. 557, 566 (2005). See also John Yoo, Boalt Hall School of Law, University of California-Berkeley, February 1997, Testimony before the American Bar Association (transcript available at: <http://www.law.berkeley.edu/faculty/yooj/professional/writings/aba.html>) (noting that Chief Justice Earl Warren was among the most criticized federal judges in American history) (last visited Feb. 15, 2007).

6. HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 346-84 (7th ed. 1998) (1962).

7. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8. *Morgan v. Hennigan*, 379 F. Supp. 410 (Mass. Dist. Ct. 1974).

9. *Roe v. Wade*, 410 U.S. 113 (1973).

10. *Roper v. Simmons*, 543 U.S. 551 (2005).

Likewise, in Ireland, the same debate was perhaps most prominently joined in the wake of developments across the Atlantic when the Supreme Court declared that there was a right to marital privacy in its decision in *McGee*.¹¹ The dispute between those who advocate judicial restraint, favouring an absolutist view of the separation of powers doctrine, and those who view judicial intervention as a perhaps undesirable, but undoubtedly necessary, evil continues presently both in the case law of the Supreme Court and in related academic commentary. The recent *Sinnott*¹² and *T.D.*¹³ cases are two prominent examples of this constitutional quandary.¹⁴

The tension inherent in all constitutional democracies is hardly news to any legal observer. But this essay, as portended by its title, proffers an argument that may appear radical in its scope and then ponders the ramifications, if any, thereof on Irish constitutionalism.¹⁵ If one is to adhere strictly to the express language of the United States Constitution—that is, to read the document the way a critic of judicial activism would say that it must be read—the federal judiciary might not truly be a “co-equal partner” in government.¹⁶ The converse is true in Ireland.¹⁷ As such, the case against an “activist judiciary” can be made much more persuasively in the United States, than it can in Ireland. Moreover, cautious judicial restraint and strict fidelity to the separation of powers

11. *McGee v. Attorney General*, [1974] I.R. 284 (Ir.). Cf. *Griswold*, 381 U.S. at 479 (*McGee v. Attorney General* serves as an Irish equivalent of *Griswold*).

12. *Sinnott v. Minister for Education*, [2001] 2 I.R. 545, 545 (Ir.). Here, the Supreme Court ruled that the government was not obliged to expend money on the provision of primary education after the age of 18. It overturned a lower court decision finding that the executive branch had acted unconstitutionally in refusing to continue expending money for the education of the plaintiff, a 23 year old autistic man, and ordering it to do so. *Id.*

13. See *T.D. v. Minister for Education*, [2001] 4 I.R. 259 (Ir.) (where the Supreme Court overturned a lower court decision ordering the executive branch to expend money on the provision of special facilities for children with special needs. The decision was based largely on the separation of powers doctrine).

14. Because this is an essay about constitutionalism writ large, its body proper won't delve into the facts of any cases referenced herein.

15. Gerry Whyte, *The Legitimacy of Judicial Activism on behalf of the Disadvantaged*, in *SOCIAL INCLUSION AND THE LEGAL SYSTEM: PUBLIC INTEREST LAW IN IRELAND 15* (2002) (“Debate in the US about methods of constitutional interpretation forms an important backdrop to Irish academic commentary on the issue.”).

16. Theodore B. Olsen, *Remembering Marbury v. Madison*, 7 GREEN BAG 35, 35-36 (2003) (President George W. Bush's former solicitor general describing the legacy of *Marbury*).

17. It will also be referred to in Irish as *Bunreacht na hÉireann*.

doctrine, while mandated by the United States Constitution, is suggested, but certainly not required, by the Irish Constitution.¹⁸

In support of this argument, this essay first examines the language of Article III of the United States Constitution and then briefly reviews the origins of the widely held perception that the federal judiciary is a “co-equal” branch of government.¹⁹ It next considers “Borkian constitutionalism,” opining that if one is to read the Constitution as Bork urges, this essay’s tentative proposition can’t be far off the mark. The focus then shifts to the express language of the Irish Constitution, which accords a far greater responsibility to the judiciary than its American counterpart. In this context, it reviews some pronouncements in the recent case law of the Irish Supreme Court, notable for language that might alternatively be described as “Borkian,” “Scalian,” or “originalism” in nature, and the academic commentary that has emerged in its wake. This essay posits that the originalism judicial philosophy lacks the merit in Ireland that it rightly claims across the Atlantic and concludes by pondering the implications for the vindication of socio-economic rights in the Irish courts, given this philosophy’s seemingly inexorable ascendancy.

II. ARTICLE III RE-EXAMINED

Strangely enough, partisans on both sides of the debate as to the appropriate role of the American federal judiciary seem to rarely, if ever, look to its enabling legislation, Article III of the United States Constitution. The language in Article III, set forth below in its entirety, is concise and unambiguous.

Article III

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which

18. See *infra* Sections II, III, and IV.

19. Olsen, *supra* note 16, at 35-36.

shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.²⁰

The relative brevity of entire Article III is immediately apparent upon a review of the other Articles—I and II—prescribing the nature and scope of power to be accorded the legislative and executive branches respectively. In fact, there are 2,268 words devoted in Article I to the powers of the legislature and 1,023 words are used to detail the powers of the executive in Article II, but Article III is comprised of only 375, and 80 of those describe the offence of treason.²¹ Only 295 words are allocated the judiciary. The first sentence of Article III makes it clear that there is only one “constitutional” court, the United States Supreme Court, and that all other inferior federal courts are to be created legislatively, by the Congress.²² Furthermore, as is described in Section 2, the Congress has total control of the Supreme Court’s appellate

20. U.S. CONST. art. III.

21. U.S. CONST. arts. I, II, III.

22. U.S. CONST. art. III, § 1.

jurisdiction.²³ Constitutionally, then, the Congress possesses the authority both to eliminate every federal court in the United States tomorrow, if it so chooses, and, on the very same day, to eliminate the appellate jurisdiction, in its entirety, of the Supreme Court. Were Congress to embark on this admittedly radical course of action, the nation's highest court would be restricted to hearing those categories of cases over which it is allocated original jurisdiction and the "law of the United States" would resemble a patchwork quilt of precedents established by the highest courts of each of the 50 states. While, as one current Supreme Court Justice observes, this course of action would precipitate "chaos," some fanciful lawyering and judging would be required to convince even a newly emasculated Court that doing so is prohibited by the Constitution.²⁴ What then is the source of the oft-repeated maxim that the government of the United States is composed of "three, co-equal branches?" And even if there is a historical wellspring or theoretical framework for the proposition of equality among the branches, doesn't the crystal clear and very circumscribed language of Article III render the maxim a fallacy?

The traditional answer to the former question is that the principle of inter-branch equality derives from the Supreme Court's 1805 decision in *Marbury v. Madison*.²⁵ That case is commonly, albeit incorrectly, regarded as the source of the power of judicial review, i.e., that the Court has the authority to strike down unconstitutional legislative acts.²⁶ The Court has said subsequently that *Marbury* represented "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."²⁷ And most recently, the Court has boldly reaffirmed the principle emanating from *Marbury* that "it is emphatically the province and duty of the judicial department to say what the law is."²⁸ Hence, so goes the argument, and the judiciary is the arbiter of the constitutionality of the acts of the legislative and executive branches, a "check" on the awesome powers allocated to each, and thus an entirely independent, but co-equal, branch of government.

The truth of the matter, however, is that the notion that the Court had the authority to review the actions of the other branches in light of the structures of the Constitution predates *Marbury* in American constitutional

23. U.S. CONST. art. III, § 2.

24. Comment of United States Supreme Court Justice Antonin Scalia in February 2005 visit to the Faculty of Law, National University of Ireland, Galway.

25. *Marbury v. Madison*, 5 U.S. 137 (1803).

26. Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401, 403 (2005).

27. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

28. *United States v. Morrison*, 529 U.S. 598, 616-17 n.7 (2000).

jurisprudence.²⁹ Indeed, “[s]uch a power and duty was contemplated by the Framers of the Constitution, publicly defended in Alexander Hamilton’s brilliant Federalist No. 78 (as well as other ratification debates), and well-recognized in the courts of many states for years prior to *Marbury*.”³⁰ The Framers’ recognition of the Court’s authority to judicially review the actions of the other branches, however, in no way encompassed a belief in judicial supremacy in matters of interpretation.³¹ In fact, the Framers painstakingly argued to the contrary in the debates over ratification.³² What’s more, the paucity and limiting nature of the language of Article III militate against judicial supremacy in *any* arena. Even co-equality does not spring from the writings of the Framers and it certainly cannot reasonably be derived from the constitutional text. Yet this principle of supremacy has been espoused by the Supreme Court throughout the last century under the stewardship of Chief Justices as far to the left as Earl Warren and as far to the right as William Rehnquist. It is largely to discussing the supremacy of the judiciary in matters of constitutional interpretation that Professor, Judge, and former Supreme Court Justice nominee, Robert Bork has devoted a career in academia and on the federal bench. He argues persuasively that the unintended consequence of the Framers’ design has been the intrusion of the judiciary into that intended to be the reserve of the legislature: lawmaking. His seminal work on the role of the judiciary in a democracy provides the analytical prism for advancing the claim tentatively made in this essay’s title.³³ This claim—even if not wholly accepted—and the constitutional distinctions highlighted in its making render explicit or implicit reliance on American constitutional jurisprudence by Irish courts largely misplaced.

III. BORKIAN CONSTITUTIONALISM

In *The Tempting of America: The Political Seduction of the Law*, Judge Bork opines that the federal judiciary has fallen victim to a temptation to begin ruling where the legislature should.³⁴ He argues

29. Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2707 (2003).

30. *Id.*

31. *Id.* at 2708.

32. Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1349-51 (1999).

33. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

34. *Id.* at 1.

that this runs contrary to the constitutional framework, especially the separation of powers doctrine which it so prominently enshrines. This has led to a series of unacceptable consequences, including the notion among Americans that the Supreme Court is a political, rather than legal forum. For Bork, the ongoing battle over the divisive and polarizing issue of abortion crystallizes this reality.³⁵ Bork rather neatly synthesizes his philosophy in the Introduction to that *tour de force* of American constitutional jurisprudence. There, he stresses the point that, despite the seemingly incoherent protestations of some legal academics who regard the Constitution as a rather nebulous framework of principles from which legislators and, yes, courts are to make policy, the Constitution is ultimately law and its “principles are known and control judges.”³⁶ Those who would contest this understanding are “ultra liberal activists” who “see the Constitution as a weapon in a class struggle about social and political values.”³⁷ The Supreme Court’s decision in *Roe v. Wade* is the epitome of their aim.³⁸

In support of his own view, however, Bork discusses the genius of the constitutional design, language distinctly enshrining the separation of powers doctrine being its paramount virtue. Because that language is law, Bork argues that judges are bound by it and must be extremely careful not to encroach on that which falls within the ambit of the executive and/or legislative branches. The judges’ “great office” is the preservation of the constitutional design he is so enamored of.³⁹ Bork suggests that the Constitution speaks directly to that reality.

Federal judges, alone among our public officials, are given life tenure precisely so that they will not be held accountable to the people. If it were otherwise, if judges were accountable, the people could, when the mood seized them, alter the separation of powers, do away with representative government, or deny basic freedoms to those out of popular favor. But if judges are, as they must be to perform their vital role, unelected, unaccountable, and unrepresentative, who is to protect us from the power of judges? How are we to be guarded from our guardians? The answer can only be that judges must consider themselves bound by law that is independent of their own views of the desirable. They must not make or apply any policy not fairly to be found in the Constitution or a statute.⁴⁰

It is here where Bork, like most all other observers, seems to overlook the aforementioned reality of the text of Article III. When Bork mentions federal judges, to whom is he referring? In a modern context, it appears

35. *Id.* at 3-4.

36. *Id.* at 2.

37. *Id.* at 8, 10.

38. *Id.*

39. *Id.* at 4.

40. *Id.* at 5.

logical that he means all those men and women who sit on the federal district courts, circuit courts of appeal and Supreme Court. However, Article III references only a Supreme Court, whose appellate jurisdiction is to be determined exclusively by the Congress, and “other [inferior] courts” that Congress may create or eliminate at its discretion. Isn’t that clear subjugation to the will of the legislature the real limitation on the judiciary, not the more abstract notion of a grand design? A “loose” constructionist, who views the Constitution as a set of guiding principles, rather than a binding legal document, can articulate a strong response to that question. But those who, like Bork, believe that the Constitution is law cannot. The express language of Article III makes it manifest that the Framers did not intend for the judiciary to be supreme in any area and that may be the real buttress for the philosophy of judicial restraint and strict fidelity to the separation of powers doctrine that Bork and others advocate. Specifically, in the passage above, Bork argues that the Constitution provides that judges are allowed to discharge the duties of their position without the possibility of being held to account. This ignores the language—the *law*—in Article III that the Congress has plenary regulatory control over the Supreme Court’s appellate jurisdiction, as well as the power to create and, logically, the corollary power to abolish lower federal courts as it sees fit. Doesn’t this reality render the judiciary ultimately accountable to the Congress? If the Congress doesn’t like the way the Supreme Court handles a particular area of law, it is constitutionally permitted to forbid the court from hearing related appeals. If Congress wants to establish federal courts to hear strictly commercial cases, and remove them from the purview of the existing district courts, it is free to do so. If it doesn’t like a particular district court, it can eliminate it tomorrow under the Constitution. Again, a “loose” constructionist can argue against all of this, but someone who regards the Constitution as law cannot. Even allowing for *Marbury* and judicial review, these hypothetical and highly unlikely congressional courses of action are expressly permitted by the law of the Constitution.

At any rate, whether or not one concurs with the seemingly radical idea mooted in the foregoing discussion of American constitutionalism, it must be recognized that the intellectual coherence of Bork’s crusade against “judicial activism” is derived directly from the constitutional framework in which he operates. Contesting the proposition that the United States Constitution allocates a limited role to the judiciary is extremely difficult. And that’s why the argument for restraint and against

activism has merit in an American context. It is to a consideration of the currency of this school of thought in the Irish constitutional framework that this essay now turns.

IV. IRISH CONSTITUTIONALISM AND THE JUDICIAL ROLE

While there are undeniable similarities in many respects between the American and Irish constitutions, there are fundamental differences as well.⁴¹ The distinctions are perhaps most pronounced in those sections of the Irish Constitution dealing with the judiciary. The powers delineated therein are concrete, detailed and comprise 1,132 words of text, as opposed to the 295 allocated to the judiciary in Article III of the United States Constitution. Article 34 provides, *inter alia*, that there shall be a “Court of Final Appeal” (i.e., Supreme Court), “Courts of First Instance,” including “Courts of local and limited jurisdiction,” and, tellingly, a “High Court,” whose jurisdiction “shall extend to the question of the validity of any law having regard to the provisions of the Constitution.”⁴² While that article, similar to its corollary in the United States Constitution, then states that the Supreme Court’s appellate jurisdiction may be subject to regulation, it follows with the proviso that “no law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.”⁴³ Article 35 states that “all judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.”⁴⁴ And Article 37 contains the principle that nothing in the Irish Constitution “shall operate to invalidate the exercise of limited functions and powers of a judicial

41. T.D. v. Minister for Education, [2001] 4 I.R. at 310-312 (Denham, J., *dissenting*) (noting that the drafters of the 1937 Irish Constitution took a “similar” approach to the Framers of the American Constitution, but also posits that “the Constitution established the special duty of the courts to protect fundamental rights and the Constitution.” No such duty is found in Article III of the United States Constitution.). See also Gerard Casey, *Are There Unenumerated Rights in the Irish Constitution?*, 23 I.L.T. 123, 126 (2005) describing the United States Constitution’s “role for much that is found in Bunreacht na hÉireann”). A further difference not alluded to directly in this essay is the process by which the two documents are amended. A mere majority vote in a popular referendum is sufficient to amend the Irish Constitution. See Gerry Whyte, *Natural Law and the Constitution*, 14 I.L.T. 8, 9 (1996) noting that “decisions of the Supreme Court on the interpretation of the Constitution could, with relative ease, be amended by way of referendum”). In the United States, however, amending the Constitution is a Herculean task. A proposed constitutional amendment must be approved by a 2/3 majority in both houses and then ratified by majority vote in 3/4 of the 50 state legislatures.

42. IR. CONST., 1937, art. 34.

43. IR. CONST., 1937, arts. 34.4.3, 34.4.4.

44. IR. CONST., 1937, art. 35.2.

nature.”⁴⁵ The myriad differences between these Articles and Article III of the United States Constitution—all indicative of the significantly higher degree of power expressly allocated the Irish judiciary from the bottom up by the language of *Bunreacht na hEireann* (the Irish language title of the Constitution of Ireland)—have dramatic implications for the judicial role and vitiate against the “Borkian” arguments for restraint presently espoused by a majority of the Irish Supreme Court.

The argument for restraint features prominently in Supreme Court Justice Adrian Hardiman’s opinion in *T.D.*⁴⁶ Near the outset of his opinion, Hardiman asks and answers a rhetorical question:

If a judge considers that there has been a “failure of the legislature and executive” (to use a phrase of the learned trial judge in this case) in some particular area of constitutionally significant policy, can he or she on that account “attempt to fill the vacuum” by ordering either of those bodies to implement a particular policy? If this is possible, it may gratify those who agree with the judge that there has been a failure, and who find the solution which he or she imposes acceptable. But it would represent an enormous increase in the power of an unelected judiciary at the expense of the politically accountable branches of government.⁴⁷

And later in *T.D.*, before citing with approval a passage from United States Supreme Court Justice Byron White’s majority opinion in *Bowers v. Hardwick*,⁴⁸ Hardiman states “[i]n my view, the courts in their own interest and for the protection of their legitimacy in the discharge of their proper role, should be reluctant even to appear to trespass on the spheres of the political organs of government.”⁴⁹ Given the constitutional authority accorded to Irish courts, what is the legal basis for and how legitimate is this reluctance that Judge Bork and Justice Scalia would praise? In addition to a philosophical reverence for Montesquieu’s doctrine that features in both *Sinnott* and *T.D.*, much of the legal authority for Hardiman’s view seems to come from across the Atlantic.

The cited passage from *Bowers* notes that the “[c]ourt is most vulnerable and comes nearest to illegitimacy when it deals with judge-

45. IR. CONST., 1937, art. 37.

46. *T.D. v. Minister for Education*, [2001] 4 I.R. 259, 338 (Ir.).

47. *Id.* at 339. See also *Sinnott v. Minister for Education*, [2001] 2 I.R. 545, 710-12 (Ir.) (featuring a similar discussion of the separation of powers doctrine that reads just like one of Justice Scalia’s thunderous dissents).

48. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of an anti-sodomy statute). The Court has since overruled itself, striking down a similar statute as unconstitutional in *Lawrence v. Texas*, 539 U.S. 558 (2003).

49. *T.D.*, 4 I.R. at 361-62.

made constitutional law having little or no cognizable roots in the language or design of the Constitution” and that the judiciary must avoid assuming “further authority to govern the country without express constitutional authority.”⁵⁰ In an article published subsequent to the Court’s decisions in *T.D.* and *Sinnott*, Hardiman argues that the last point in Justice White’s opinion is the perfect antidote to much American 20th century constitutional jurisprudence which, unlike Ireland’s, is comprised of numerous political decisions.⁵¹ He further opines that judges must respect their judicial role and that, to the extent they decline to do so, they step beyond their designated, non-political duty. In articulating his position at a macro-level, Hardiman again looks to the United States and defines an opinion by Supreme Court Justice Oliver Wendell Holmes as the “most famous judicial dissent against politically encroaching decision making.”⁵²

It is not argued here, nor could it plausibly be, that Hardiman’s (or like-minded members of the Irish judiciary) arguments are wholly without merit. No rational observer would claim that a judge should give into temptation and “rule where a legislator should”⁵³ or that the political process should be preserved as nothing more than “an inferior organ of government.”⁵⁴ In constitutional democracies, like Ireland and the United States, democratically accountable representatives of the people, not a largely unrepresentative and unaccountable judiciary, should be in the business of lawmaking. What is argued is that the respect for “the separation of powers and the restraint that doctrine imposes on each organ of Government”⁵⁵ is far more deeply entrenched and much more unequivocally pronounced in the United States Constitution than in *Bunreacht na hÉireann*. Consequently, and in light of the aforementioned language of Article III of the former document, the passages cited approvingly by Hardiman from *Bowers* and *Lochner* can’t be looked at in a vacuum and their import in an Irish context can be quite easily misperceived. To concretize this point again, one of the *real politik* factors lurking in the background of the Court’s decision in *Bowers* (and in many others) is that a conservative United States Congress, angered by a decision to strike down a statute outlawing sodomy, could the very next day have voted to remove all related cases from the Court’s

50. *Bowers*, 478 U.S. at 194-95.

51. Adrian Hardiman, *The Role of the Supreme Court in Our Democracy*, in *POLITICAL CHOICE AND DEMOCRATIC FREEDOM IN IRELAND* 39, 39-40 (Joe Mulholland ed., 2004).

52. *Id.* at 41 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

53. BORK, *supra* note 33, at 1.

54. Hardiman, *supra* note 50, at 42.

55. *Id.* at 41.

appellate jurisdiction. Although this reality doesn't illuminate much of the debate between "activists" and "strict constructionists," the seeming—if not readily apparent—thrust of Article III's language is to limit the workings of the federal judiciary. The aforementioned relevant provisions of Bunreacht na hÉireann provide for a great deal more judicial independence than this. The constitutional remit of the Irish judiciary is broader. Accordingly, their attempted reliance on American constitutional jurisprudence for a theory that espouses hyper-fidelity to the separation of powers doctrine and urges judicial restraint is misplaced. After all, in any constitutional democracy, the functions of the three branches of government "are themselves of constitutional origin and constitutionally defined."⁵⁶ The weaknesses of this school of thought now prevalent in the Irish judiciary, however, have been alluded to in a purely domestic context as well.

For instance, Prof. Gerry Whyte writes that this school of thought seems at odds with one key feature of the Irish Constitution that relates more to its overarching spirit, as opposed to the letter of the language employed to describe the judicial function. As he points out, "it is important to note that the Irish Constitution, unlike its US counterpart, is not simply concerned with establishing a system of government."⁵⁷ Whyte persuasively argues that the hallmark of Bunreacht na hÉireann—embodied in its Preamble, which cites the virtues of "Prudence, Justice and Charity," the "dignity and freedom of the individual" and the goal of "true social order;" its commitment to protecting implied rights in Article 40.3; its provision for the right to free education in Article 42.4; and its mandate in Article 42.5 that the State care for abandoned children—is a ringing endorsement of social inclusion as a central value in the foundation of the State.⁵⁸ This aspiration for ensuring social inclusion in Ireland is far more ideological than anything contained in the United States Constitution, which is notable for being far more concerned with the "process of government, not a governing ideology."⁵⁹ The lofty principles contained in the Preamble to the Constitution and the firm commitments spelled out in its body properly undermine an

56. *Sinnott v. Minister for Education*, [2001] 2 I.R. 545, 707 (Ir.). The two documents define the functions of the respective judiciaries quite differently.

57. Gerry Whyte, *Addendum*, in *SOCIAL INCLUSION AND THE LEGAL SYSTEM: PUBLIC INTEREST LAW IN IRELAND* 361 (Dublin 2002).

58. *Id.* at 361 n.74. See also IR. CONST., 1937, pmbl., arts. 40.3, 42.4 and 42.5.

59. JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 100 (Cambridge 1980).

argument that it is almost always inappropriate for the judiciary to intervene when action or inaction by the other two branches proves an obstacle to, and not a conduit of, social inclusion.

Moreover, in her dissent in *T.D.*, Justice Susan Denham, while paying due respect to those provisions of the Constitution that delineate the various duties of the three branches of government⁶⁰ and vest sole lawmaking authority in the Oireachtas,⁶¹ makes the following prescient observation that likewise militates against Hardiman *et al*'s philosophy:

Fundamental powers of government are distributed between these three great organs [i.e., the executive, legislative and judicial] of State. A separation of powers is described although it is not a strict division or distribution of power. It is not a doctrine applied rigidly in the Constitution. A framework for government is established which includes a functional separation of powers to independent organs of State. It is the separation and independence of the institutions which is important. However, checks and balances are created between the three organs of State, for example the power given to the superior courts to review legislation, and the power given to the Government to appoint judges and to Dail Eireann and Seanad Eireann to remove a judge.⁶²

Stressing the import of checks and balances, Denham later observes that where the government acts in contravention of its powers and duties under the Constitution, the Court has a duty to intervene because of its "power and obligation to protect constitutional rights."⁶³ Again, this duty, unlike the duty *assumed* by the United States Supreme Court, is found within the express language of the text of Bunreacht na hÉireann.⁶⁴ It is perhaps the judiciary's manner of intervention which has caused the most consternation for Hardiman and others. Ordinarily, where the Court finds that another branch has acted unconstitutionally, it will issue a declaratory order to that effect.⁶⁵ However, in "truly exceptional" cases, similar to a writ of mandamus, the Court may issue mandatory orders ordering another branch to take action and/or expend moneys to rectify a constitutional wrong.⁶⁶

Clearly, cogent arguments can be made that the judiciary, by involving itself to this extent in the functioning of the other branches, violates the separation of powers doctrine and transgresses its constitutional mandate.

60. IR. CONST., 1937, art. 6.1.

61. IR. CONST., 1937, art. 15.2.1. The Oireachtas is the collective term for the two houses of the Irish Parliament, the Dail and the Seanad.

62. *T.D. v. Minister for Education*, [2001] 4 I.R. 259, 289-99 (Ir.).

63. *Id.* at 301.

64. Genevieve Coonan, *The Role of Judicial Research Assistants in Supporting the Decision-Making Role of the Irish Judiciary*, 6(1) JUD. STUD. INST. J. 171, 190 (2006) (noting that judicial review has been invoked in American constitutional jurisprudence since *Marbury*, but that, in Ireland, "the courts' jurisdiction to engage in this striking practice is found in the Constitution itself").

65. *Id.* at 303.

66. *Id.*

Indeed, the former Chief Justice has argued that a judiciary's doing so would precipitate problems in virtually all liberal democracies, and to an even greater extent in an Irish context, given his strong view that the Constitution was designed so that socio-economic rights are to be enforced by the legislature, not by the judiciary.⁶⁷ Furthermore, he notes that:

[W]here a declaration [has been] made that the legislature or [the] executive have failed to uphold a particular constitutional right of the citizen, the courts are entitled to assume that their decision to that effect will be treated with the appropriate degree of respect by the other organs of [the] State. It is quite another matter, however, for the court to assume the roles specifically assigned under the constitution to the legislature and the executive.⁶⁸

Summing up this argument, he endorses Hardiman's emphatic statement in *Sinnott* to the effect that the judiciary must not involve itself in the business of the other branches.⁶⁹ But on the other hand, if the judiciary declines to issue mandatory orders in truly exceptional cases, does it become something of a "toothless tiger?"⁷⁰ These responses to and defense of Hardiman's philosophy are raised for illustrative purposes only. Resolution of the debate as to the propriety of issuing mandatory orders lies beyond the scope of this essay. Yet provided their issuance is confined to this category of "truly exceptional" cases, a phrase which has been quite narrowly construed, it would seem that the Irish judiciary has the constitutional authority, though perhaps not a constitutional mandate, to do so.⁷¹

67. Ronan Keane, *Judges as Lawmakers: The Irish Experience*, 4(2) JUD. STUD. INST. J. 1, 15-16 (2004) (discussing the Directive Principles of Social Policy in Article 45).

68. *Id.* at 16-17.

69. *Id.* at 17 (quoting *Sinnott v. Minister for Education*, [2001] 2 I.R. 545, 711 (Ir.)).

70. Fergus W. Ryan, *Disability and the Right to Education: Defining the Constitutional 'Child'*, 24 DUBLIN U. L. J. 96, 105 (2002) (positing that there are exceptional cases that demand "more than an assertion of the State's wrongdoings). See also Shivaun Quinlivan & Mary Keys, *Official Indifference and Persistent Procrastination: An Analysis of Sinnott*, 2(2) JUD. STUD. INST. J. 163, 183(2002) (arguing that the judiciary's reluctance to grant mandatory orders is strongest when asked to enforce socio-economic rights).

71. *T.D. v. Minister for Education*, [2001] 4 I.R. 259, 337 (Ir.). Justice Murray, now Chief Justice, argues that it first must be established that there has been "a conscious and deliberate decision by the organ of the state to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness" and that "the absence of good faith or the reckless disregard of rights would impinge on the

V. CONCLUSION

This essay has doubtless provoked more constitutional questions than it ever endeavored to answer. What, it is hoped, is clear is that the Irish judiciary's reliance, whether explicit or implicit, on the constitutional jurisprudence of the United States for a judicial philosophy that emphasizes restraint and unquestioning loyalty to the separation of powers doctrine is inappropriate. To a large extent, the myriad differences between Article III of the United States Constitution and the relevant provisions of Bunreacht na hEireann render this a case of "apples and oranges." In the interest of clarity, judicial adherents to this philosophy in Ireland should ground their arguments elsewhere, either in domestic law (Article 45⁷² is one potential source) or in the constitutional jurisprudence of another jurisdiction whose judiciary is similarly empowered. There is much fertile territory outside of Washington, DC on which to base a conservative judicial philosophy. Regardless, because its adherents are unlikely to change their minds in the foreseeable future, those now seeking to vindicate socio-economic rights through the judicial process are likely to be told that their remedy lies not in the Four Courts, but in Leinster House.⁷³

And perhaps that is the way it should be. Perhaps the best way to proceed is for individuals to lobby, cajole, and convince legislators into making laws that will better their condition. One criticism of this proposition, however, is that it rests on the premise "that individuals are on equal footing and can fend for themselves without the assistance of government."⁷⁴ This criticism is particularly valid in that today, "the most marginalized in Irish society . . . believe they have no real say, distrust the State and politicians, and are skeptical about how much the process contributes."⁷⁵ This is far from an ideal world. The success of those now aggrieved in the rough and tumble world of electoral politics, therefore, would seem dependent upon a cultural, social and attitudinal metamorphosis on the Emerald Isle the likes of which are heretofore unseen.

observance by the State party concerned of any declaratory order made by the court" before a mandatory order can justly be issued by the judiciary. *Id.*

72. IR. CONST., 1937, art. 45 (providing, *inter alia*, that "principles of social policy . . . intended for the general guidance of the Oireachtas . . . shall be the care of the Oireachtas exclusively . . . and shall not be cognisable by any Court under any of the provisions of this Constitution").

73. *O'Reilly v. Limerick Corporation*, [1989] I.L.R.M. 181, 195 (H. Ct.) (Ir.).

74. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2316 (1990).

75. Peadar Kirby, *The Most Marginalised Still Believe They Have No Say*, IRISH TIMES, May 25, 2004.