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## Judicial Community, Judicial Power, and National Politics

This book tackles an increasingly controversial issue in the politics of many countries around the world. That is, when, why, and how do national courts begin, systematically, to engage heated political issues? Examples abound of both public support and outrage at the increasing role that courts have played in deeply charged political battles. Domestic and even international clashes over the political role of courts have become commonplace in a world more comfortable with idealizing courts as somehow apart from politics. These have included debates over the jurisdiction of the European Court of Justice to review fundamental decisions of national state governments, as in Irish unease about new constitutional citizenship provisions in the face of the EU Human Rights Charter, or French and British concerns about states' rights to restrict Muslim veils in secondary schools. The entire world watched as a single national court intervened in the affairs of a wholly separate state: Spain and Chile in the case of Augusto Pinochet. Firestorms have emerged, too, in response to specific decisions of domestic courts, such as the U.S. Supreme Court's answers to questions of abortion, persistent vegetative states, religious monuments in public spaces, and ethnic or gender representation in university admissions. Equally divisive in some states have been questions about the extrajudicial activities and social associations of justices. U.S. Supreme Court Justice Antonin Scalia received heightened scrutiny at the news of his expense-paid vacations with Vice President Dick Cheney at the very moment the latter was a party in a Supreme Court case. Israeli High Court of Justice President Aharon Barak has been accused by religious critics of tyrannically dominating the Israeli state with the help of like-minded social and legal elites with whom he surrounds himself inside and outside the

courtroom. Some have gone so far as to call for a revolution against the secular judges (see, for example, Eilan 1997).

These few examples should be sufficient to remind those accustomed to considering other sorts of factors in political analyses—markets and economy, electoral institutions, individual political behavior, culture—that courts and justices have, indeed, become significant actors in the daily politics of many states. I argue that the most important determining factor explaining when, why, and the manner in which national courts enter into the world of divisive politics is found in the intellectual or “judicial communities” with whom justices live, work, and think about the law on a daily basis. Judicial communities are organic communities living and working in close physical proximity to one another;<sup>1</sup> they are to be distinguished from epistemic communities or international networks in this regard (Keck and Sikkink 1998; Slaughter 2004). Over the course of decades, judicial communities think and debate about the law through informal as well as formal legal interactions, culminating in new legal norms that may, through court cases, become binding legal principles. Given the right conditions—including, at a minimum, electoral democracy (Schumpeter 1976), basic judicial independence (Russell and O’Brien 2001), and some institutional constraints on courts<sup>2</sup>—courts may use these new legal norms as the basis for a jurisprudence that justifies hearing and allows for creative answers to cases involving major issues of national political contention. When courts hear and answer these cases in favor of substantive rights and against administrative powers of the state, courts increase the political salience of the judiciary and thereby enhance judicial power (Hendley 1996; Shamir 1990). In so doing, courts reinforce the conditions that allow them to become critical political actors.

In the following pages, I outline my theory of judicial communities and their impact on judicial decision making and judicial power. Judicial communities are informal intellectual communities that affect the ability and willingness of national high courts to enter into decision making on matters of national political contention. Courts that choose to answer questions of national political import, and particularly to challenge administrative authority in favor of individual or civil rights, may express a new type of judicial independence. In contributing intellectual resources over time, legal briefs, and petitions that courts may then act on, judicial communities are critical to the questions of judicial power at the center of work on comparative law and society. Courts, religion, and gender intersect in important ways in the case study offered in this book. And, finally, I outline the link between judicial communities, legal norms, and informal processes as they emerge in this study.

## Courts, Communities, and Power

What is a judicial community? Judicial communities may be made up of various judicial, social, and political actors. Judicial communities are first and foremost the intellectual community within which justices live and think and work on the law on a regular, if not daily, basis. Members share similar intellectual backgrounds, education, training, and professionalization. They are most likely to live in the same geographical region or city as justices, even in large countries. They are most likely to share a common educational history with justices, meaning similar training, and, in some cases, having been trained in the identical universities and other educational institutions. As a result, members who eventually make up the judicial community are likely to have known one another by reputation and/or as acquaintances for many years, even since childhood in some cases. And in many cases, they share a similar or the same professionalization process, meaning that they were socialized into their profession through similar or identical institutions and job experience.

However, they do not necessarily share the same class origins. Members are able to overcome class barriers when they are able to access education. This is a community made up of similar education and professionalization processes, and thus class is more easily overcome, relatively speaking, than some other social barriers. Members are not “elites” in the sense of common class or political origins. Drawing on the framework of C. Wright Mills, non-judicial members of the judicial community provide a support community for judicial members of the power elite, but they are not the power elite themselves. Members of the judicial community do, however, make up a relatively small group that may have a large impact on society.

Importantly, not all people with the same education and professionalization will also be part of the judicial community. Many members will have attended the same law school, but not all people who attend that law school will be members. Thus, attendance at a given law school is not sufficient to claim an intellectual or influential social connection, as some have done in the Israeli case (Hirschl 2004). Membership requires, initially, common normative interests, and it requires a common debating arena. In Israel, that arena came through academic ties, social movement memberships, and the court itself. Members of the judicial community work together professionally; they are not only social acquaintances. Their interactions are marked by diffuse rather than close ties; the legal norms generated through their informal and formal debates are dominated by acquaintances rather than close friendships. Their interactions and debates

with one another over time create a continually changing normative environment that largely determines the confines of how members think about legal issues of the day. That is, members come together initially through common normative interests, and they are changed over time through their interactions with one another.

A judicial community includes high or supreme court justices; possibly, other judges; legal scholars; (left- or right-wing) social movement lawyers; social, political, or economic elites; government attorneys; clerks and interns; or others. These actors come together to think and debate about legal and political questions through formal professional legal work as well as, what is more important, *informal interactions*. It is through the intellectual exchange within this community over time that new legal norms develop and change. Both justices and lawyers come to know one another by reputation; they are aware of current trends of thinking in the community and on the court through their participation in the community; they may use the community as a forum for raising the legal and political issues of greatest interest to them; and they are influenced by the conversations and debates about the most pressing legal issues of the day through their participation in it.

The influence of this intellectual community over judicial thinking is often diffuse rather than direct. It comes through long-term interaction and debate over legal and political issues of the day via legal cases themselves, participation in conferences, activities within civil society, and, sometimes, social events. The diffuse interaction described herein reflects the “weak ties” of Mark Granovetter’s work (1983) on social networks. He argues that individuals are more apt to learn and be influenced by new ideas from acquaintances than from the close friends and family with whom one shares already similar ideas and interests. New ideas may be learned from acquaintances through personal conversations or, more often in the context of judicial communities, through arguments made in a larger forum (such as a conference) by people who one may know only by face or by reputation. A justice or lawyer listening to arguments in such a context is not directly influenced by a friend telling him or her what judgment or legal argument to make. Rather, it is through listening and being party to conversations and debates over long periods of time that new ideas develop and influence the thinking of the individual. In judicial communities, such new ideas may become newly binding legal norms when lawyers petition courts on the basis of a new legal argument and the court accepts the argument.

The model of judicial community that I develop centers on cases in which there is at least a modicum of judicial independence.<sup>3</sup> While existing judicial communities may contribute to a new and expanded form of judicial

independence, in order for a judicial community to come into being, there must be a modicum of judicial independence. For the purposes of this study, judicial independence means that the judiciary is not directly influenced in its decision making by a coercive dependence on economic, social, or other state elites for its continued institutional existence, authority, or for the (literal) lives of judges and justices. A lack of judicial independence may include either physical or lesser types of coercion. That is, at the most personal level, judges and justices who are part of an independent judiciary need not fear for their lives if they make certain decisions. Institutionally, courts need not fear for their continued existence, nor need judges fear for the continuation of their judicial seats, based on voting preferences of executive, legislative, military, or powerful social actors. The central point of my theory is that, in cases with a modicum of judicial independence—by contrast to cases of coercion—legal norms are generated within the context of an intellectual community. In cases of coercion, the process of norms generation is one in which, usually, state actors other than judges determine the norms that the judiciary will follow. By contrast, in the case of basically independent judiciaries, norms are generated within the context of an *intellectual community*. This norms generation occurs in an organic manner over time through a diffuse process of interaction based on conflict and debate.

The account of norms generation in this study shares much in common with the Durkheimian account of law as emerging from community, in which principles and laws regulating the behavior of members develop over time in response to the need or desire of members to define and protect communal boundaries (Douglas 1970). By contrast to Émile Durkheim's own account, the story of judicial communities is one based on conflict rather than consensus; law (as embodied in new legal norms) emerges through an interactive process of debate over pressing issues for which there is no single consensus. Broad legal norms emerge through these debates, are then applied to specific legal questions, and then become principle through judicial decisions. Perhaps most important, these norms continue to change over time through ongoing conversations. We can only imagine, for analytical purposes, a moment in time for which legal norms are fixed. In reality, they are constantly in motion—or under discussion and debate for potential change. This point is in keeping with Peter Fitzpatrick's emphasis on positive law (2001) as claiming to be eternal and unchanging, while at the same time emerging and responding to something ostensibly exogenous to it (2003).

Applying Fitzpatrick's insights to the specific relationship between law and community, the judicial community account suggests that the law is

not actually exogenous to community, as law claims to be, but emerges from community and continues to change through the same process of communal norms generation through which it came into being in the (imagined) first instance. This claim is in keeping with parts of the Durkheimian account, however, it stands in contrast to it in that the community in question is not the larger society; it is a much smaller group of legal specialists. Over time, their debates culminate in new legal norms, generated through informal conversations. And, importantly, the debates among this smaller group of specialists have profound implications for the wider society. The norms they develop become legal principles (albeit continually changing) that define the nature of state and society by determining the relationship between state power and substantive rights, the role of religion, and other questions that define the social boundaries of the nation and its internal, political character.

Individuals may—and likely do—bring their own agendas to the table in these debates. And the individual members of the judicial community may have greater or lesser stature within the community. However, the norms that emerge over time are not the product of one person's interests or ideological preferences. Rather, through debate, the questions raised within the community take on a normative life of their own, culminating in broad new legal norms. The broad contours of these legal norms, and their specific application to a given context, may or may not please those individuals involved in initiating the discussions that led to their adoption by the community. Or, the debates may change the views of the initiators so that they have markedly different positions at the end of a decade-long debate than they had at the beginning.<sup>4</sup> For, just as the members of the community are changed through their interaction with one another (including changes in their individual ideological positions on a given issue) (Migdal 2001), and as law and political institutions take on a life of their own once established (Durkheim 1997, 43),<sup>5</sup> legal norms take on a life of their own within the debates of the judicial community over time.

Through the diffuse ties of the judicial community, members may actively seek to join the community, to solicit certain groups to join it, and to encourage the development of innovative legal thinking along certain lines. Thus, justices, social actors, and other members of the community (such as government lawyers, who are part of the state) may be active agents in the development of new membership in the community, as well as the development of new legal norms. Justices may use the judicial community as an intellectual resource for new and innovative legal reasoning on issues facing them in court, or on issues they wish to see in court. Lawyers may use the

judicial community as a staging ground for the development of new legal norms as well, encouraging debate on certain issues, for example, of rights in order to test the prevailing normative trends in the community and on the court (see Barclay and Woods 2002). Justices and lawyers enter into a mutually beneficial relationship when lawyers bring new arguments to the court, developed in the context of debates in the judicial community, and the justices in turn use those new arguments to support legal reasoning in a direction already of interest to themselves. In this *indirect* manner, marked by *informal* interactions rather than formal legal processes, justices may draw on the judicial community as a resource.

If justices are changed by exposure to argument and debate on legal issues of the day in the informal context of the judicial community, then who is part of the community over time will influence the direction of court decisions on political and other issues. Whether the judicial community includes social, economic, and political elites, on the one hand, or left-wing social movements in favor of rights revolutions, on the other hand, will have an important impact on the direction of legal norms prevailing in the highest court. No matter the political direction that court decisions take, if the highest court is being asked to answer and does answer contentious political questions dominating the national agenda, the court will experience increased political salience.

The judicial community revolves around the highest court(s) in a state, although the processes through which justices make decisions in the context of this community will often be mirrored at lower court jurisdictions as well. What distinguishes this community from narrower legal communities around specific jurisdictions, or the wider legal community of the entire bar in a country, is that their debates and conversations consistently culminate in new legal norms that are then used by lawyers petitioning the highest court(s) and by justices themselves in answering those petitions. Thus, by contrast to these other legal communities, the informal conversations and arguments held within the judicial community have a strong impact on decision making at the highest judicial level.

### Judicial Power and Judicial Independence

It has become well-accepted in work on comparative judicial politics and power that there is a link between judicial intervention on questions of national political contention, on the one hand, and increasing judicial power, on the other hand (Hendley 1996; Russell and O'Brien 2001; Tate

and Vallinder 1995). I suggest that when courts challenge other state institutions, and particularly when they challenge administrative power in favor of individual rights, they may experience the most dramatic gains in judicial power. When courts increase judicial power in this way, they may be demonstrating a substantively new type of judicial independence associated with high degrees of judicial power. Judicial independence has typically been associated with independence of the judiciary from administrative agencies, legislative influence, and wider corruption. Thus, judicial independence has sometimes been defined in terms of its opposites: “political direction of judicial decision making, bribery, corruption, and absence of economic security for their judges” (Russell 2001, 1). It has often been identified according to institutional factors contributing to independent decision making on the part of individual judges: rationalized appointment, compensation, and firing procedures; rationalized job security; separation of judicial offices from political branches, and so forth. These institutional factors reflect concern that the judicial branch benefit from the general principles of rationalized bureaucratization outlined by Max Weber (1978) and others (for example, Mann 1993, 445–446). Peter Russell (2001, 13) suggests that judicial independence should be measured not only in terms of the relative independence of judicial personnel, but also in terms of the independence of the judiciary from other state institutions that may change political and institutional arrangements affecting the judiciary; administration, or management within courts; and direct forms of influence peddling.

The type of judicial independence identified in this study is of a different sort. It assumes the layers of judicial independence I have mentioned. But in this case, the judiciary moves significantly beyond this foundational judicial independence to a new and concerted willingness to challenge administrative authorities on a regular basis. In checking administrative power, the judiciary increases its political salience, often catapulting itself into public prominence, as expected by the work of Kathryn Hendley (1996) and others (Ginsburg 2003; Hirschl 2004). At the same time, while it chooses not to restrain itself out of fear of institutional reprimand (such as removal of judicial powers or legislation “overturning” a new precedent through law), in checking administrative authority the judiciary remains well within the balance of power framework (Rubin and Feeley 1998). Review of administrative power has long been a function of the judiciary in both civil and common law contexts (Merryman 1985; Provine 1996; Shapiro 1981). And yet, the expanded willingness in the past fifty years of national courts around the world to intervene in executive acts and decisions, parliamentary lawmaking processes,

and broader exercises of administrative power (military, religious, and so on) has been well established (Guarnieri and Pederzoli 2002; Russell and O'Brien 2001; Tate and Vallinder 1995). I am suggesting that this new level of intervention, particularly the dramatically expanded willingness to weigh in on the appropriate balance between administrative power and individual liberties and rights, reflects a new type of judicial independence. Thus, judicial communities may only function in the context of basic judicial independence; however, if they function to support judicial interventions as just described, they may contribute to dramatic increases in judicial power, and a substantively new type of judicial independence associated with these high levels of judicial power.

This checking of administrative power is closely related to societal demand that judiciaries, as the final "impartial" arbiter, determine the proper relationship between administrative (or executive branch) power and individual liberties. Some have suggested that judicial review of legislative powers is most important; indeed, there is widespread attention to legislative review in work on judicial power (Ginsburg 2003; Hirschl 2004). Others have suggested increased attention to the role of courts in reviewing administrative power (Shapiro 1968). Review of administrative power has been central to the development of constitutionalism, particularly in the civil law world (Blankenburg 1996; Merryman 1985; Provine 1996). Indeed, the checking of administrative power vis-à-vis individual liberties is a critical component of many constitutional questions. For, even in the case of judicial review of legislation, it is the question of the powers granted to the administrative authorities charged with executing legislation that is the common underlying constitutional issue. The legislature or parliament's right to pass legislation is rarely in question. The centrality of administrative power in constitutional questions, particularly relating to rights and liberties, suggests that judicial review of administrative functions is at least as important, if not more significant, for analyses of judicial power than is judicial review of legislation.

The salience of the administrative-substantive rights continuum may explain why constitutional development in so many civil law countries has centered on separate administrative courts designed to hear constitutional cases (Blankenburg 1996; Guarini 2001; Merryman 1985; Provine 1996). In Israel, which incorporates aspects of both civil and common law systems, constitutional questions have been addressed in purely administrative terms as well. The Israel High Court of Justice has drawn regularly on the long-standing principle of administrative legality, by which state institutions are limited by the law in their treatment of citizens. While common

law systems exercise this principle as well, it has been used in civil law countries as the foundation of constitutional development in many cases. Israel's use of the principle as a way to answer constitutional-type questions in the absence of a constitution well reflects the manner in which civil law countries have used administrative tribunals in the development of constitutions and the protection of constitutional principles.

Most recent work in comparative judicial politics has focused on either the supply-side (Ginsburg 2003) or demand-side (Epp 1998) of judicial power. In the case of the supply-side, both Ginsburg (2003) and Hirschl (2004) suggest that the supply of new judicial tools and powers, such as judicial review, emerges primarily from (elected) political elites. Demand-side arguments have tended to center on increased societal demand in the form of a marked increase in the number of cases brought to the judiciary (Hendley 1996). In turn, this increased demand has been analyzed in the context of social movement legal mobilization, and domestic or international funding for litigation (Epp 1998). My study makes the new suggestion that the judiciary may be able to dominate *both* the supply-side and the demand-side of judicial power. A judiciary may be said to dominate both sides of judicial power when it is able both to cultivate social demand for cases and to itself provide judicial decisions and other forms of judicial power (such as judicial review and/or access to the court itself). Thus, the "supply"-side of judicial power should be understood not only in terms of executive and legislative supply of judicial powers, as in most recent work (Ginsburg 2003; Hirschl 2004). It should also be understood to include aspects of *judicial* supply of judicial powers. Since increasing judicial power has often been associated with the expanded willingness of courts to engage especially administrative powers, I would argue that the supply-side of judicial power should also be understood to include judicial supply of critical legal decisions. That is, through precedent, courts may reinforce or augment (supply) aspects of their own power.

The implications of a judiciary that dominates or strongly influences both the supply-side and the demand-side of judicial power is interesting for questions of state power. When the judiciary is able to dominate both sides of judicial power, it may be more willing to challenge administrative powers than under other conditions. This point reflects a recognition that increasing in judicial power is not only an expansion of the power of "the state" in general. Many critical legal scholars have pointed out that when courts appear to challenge state authorities, uphold rights, or otherwise make "landmark" decisions, what courts are really doing usually is upholding the power and legitimacy of the state (Shamir 1990). Courts may do

this by upholding the legal system (Shapiro 1981), upholding the notion that the state is subject to the law (Thompson 1975), and upholding a “myth of rights” (Scheingold 1974), all making the law appear more salient and omnipresent in the public eye. I agree that courts may reinforce the legitimacy of the state through enforcing the law, and they may do so in the manners suggested by critical legal scholars. What I am suggesting is that something else is happening in this equation that is important: courts may increase judicial power to the greatest extent precisely by *challenging* parts of the state (particularly administrative authorities). Courts, then, like other competing state institutions, should not be seen as part of a singular state entity that exerts its power coherently (Migdal 2001). Rather, courts may experience great increases in judicial power precisely through contests with other state institutions. And increases in judicial power may have a substantively different impact on individuals than, for example, increases in administrative power. Increasing power in various parts of the state should not be viewed in monolithic terms.

What causes courts to engage political questions that they used to avoid, or that they previously left to the devices of the elected (or majoritarian) branches? Are courts and justices primarily out to increase their power and aggrandize their institutional standing (Epstein and Knight 1998), perhaps necessitating that they support existing power holders in the executive (Shamir 1990; Shapiro 1981)? Are they in cahoots with political, social, or economic elites who see increasing judicial powers as serving their own interests (Hirschl 2004; Ginsburg 2003)? Are judges more apt to follow changes in national, regional, professional, or court-level legal cultures (Abel and Lewis 1989; Glendon 1991; Hattam 1993) and organizational interests (Blumberg 1967; Nardulli 1986)? Are they filling in gaps where effective electoral institutions used to make decisions (Guarnieri and Pederzoli 2002; Hirschl 2004)? Or are they responding to social pressures from below in the form of interest groups or social movements (Epp 1998; Krishnan 2002; McCann 1994)?

#### Enabling Factors: Creating a Fertile Landscape for Judicial Intervention

I argue that several factors are important in allowing courts to enter the quagmire of controversial political cases. The first factor is *social mobilization*, meaning an increasing set of demands on the state from an increasing range of groups in civil society. An enabling factor related to social mobilization is

*institutional inefficiency*, particularly in the parliament or legislature. Parliamentary inefficiency often emerges directly from social mobilization; it also becomes important to courts as a result of social mobilization. That is, an increasingly active and diverse civil society may lead to an increasingly polarized society, which in turn elects a fractured parliament or a polarized legislature. Both have difficulty making decisions, particularly on controversial questions. This has led to both politicians and individual citizens turning to the courts for answers to their questions or in pursuit of their agendas (Barzilai 1998; Dotan and Hofnung 2005; Guarnieri and Pederzoli 2002; Kretzmer 2002). However, institutional inefficiency is not likely to be important to courts in the absence of social mobilization. If social actors are not accustomed to making demands on the government, a decrease in the parliamentary efficacy will not lead those social actors to seek redress elsewhere. If, on the other hand, social actors become accustomed to achieving some level of success through engaging with the state, and particularly the parliament or political parties, parliamentary breakdown will, indeed, lead those social actors to seek other venues in pursuing their agendas. In democracies with judicial independence, that other venue will often be courts.

Another factor that can play a role in allowing courts to move into the center of politics is *new judicial powers or legal tools* (such as judicial review). The role of this factor is complicated, as new judicial powers may come before, during, and/or as a result of the judiciary's move into national contentious politics. In the absence of judicial review, it would be difficult for courts to challenge other state institutions in a way that enhances judicial power. However, it is also the case that new judicial tools may increase throughout the process of change from a nonadversarial court (*vis-à-vis* other state institutions) to one willing to behave in an adversarial manner toward administrative power. New legal tools may be the result of parliamentary compensation for inefficacy or uncertainty. And they may be the result of judicial precedents that create new legal powers themselves. For example, it has been demonstrated that elected politicians facing either an inefficient parliament or uncertainty regarding future coalitions will often grant significant new powers to the judiciary in an effort to stabilize or fix existing rules of the game, which they expect courts to enforce. These new powers include, especially, judicial review (Ginsburg 2003; Hirschl 2004) and new rules of standing that expand access to the courts (Lawrence 1990). Judiciaries may create some of these powers for themselves, without the assistance of new legislation, as in judicial review in the United States (based on *Marbury v. Madison* 5 U.S. 137 [1803]) and Israel (based on *Bergman v. The Minister of Treasury* 1969).

The aforementioned factors create a fertile landscape within which courts may choose to engage heated political questions, at times turning the court into an important political actor in its own right. However, none of these factors alone, or even all three combined, is enough to drive courts into the political fray. In the absence of direct corruption—court decisions for sale—social mobilization cannot in itself drive courts to certain decisions. Institutional inefficacy opens an opportunity, but it does not alone make courts act. Even in the case of expanded judicial powers, courts may choose not to use judicial review or expanded social access to courts to challenge administrative powers. It is not a given that, once established, judicial review will either be used extensively (as it was not for a long period in the U.S. case), or will be used in the service of one “particular ambit of virtue” (Fitzpatrick 2005). Neither is it a given that judicial review, once in use, will always culminate in decisions against the state. This point has been highlighted extensively in the case of Israeli treatment of Palestinian non-citizens (Kretz-mer 2002; Shamir 1990; Sharfman 1993; see also Dotan 1999, who argues that the HCJ has supported Palestinian rights through the nonpublic course of legal settlements). What courts choose to *do* with judicial review, whether it is established through judicial decision or primary legislation, is a question left hanging by a focus on the supply of judicial review to the courts (Ginsburg 2004). Expanded judicial powers cannot themselves explain a judiciary’s choice to *use* those powers, nor to use them in a specific manner. The combination of factors provides fertile ground for a judiciary that does decide to take on political battles and thereby increase its political power. But how can we know when a judiciary will make that fateful decision?

I argue that the intellectual communities with whom judges live and work and think about the law on a daily basis provide the most important determining factor to explain when, why, and in what manner courts choose to intercede in political battles. These communities, which I call “judicial communities,” provide both intellectual resources and the normative environment within which judges think and act on—that is, interpret—the law. In addition to justices, judicial communities can be made up of almost any segment of society or the political sphere. However, to summarize the definitional traits, members are most likely to share several characteristics with justices: (1) They are most likely to live in the same geographical region or city as justices. (2) They are most likely to share a common educational history with justices, meaning similar training, and in some cases, having been trained in the identical universities and other educational institutions. As a

result, (3) members who eventually make up the judicial community are likely to have known one another by reputation and/or as acquaintances for many years, even since childhood in some cases. And in many cases, they share (4) a similar or the same professionalization process, meaning that they were socialized into their profession through similar or identical institutions and job experiences. Importantly, members of the judicial community do not necessarily share the same class status, although in some country cases they may. As discussed in regard to several other country cases in chapter 7, what they do share is a similar intellectual background, history of education together, professionalization process, and certain common normative interests that bring them together initially. Their interactions and debates with one another over time create a continually changing normative environment that largely determines the confines of how members think about legal issues of the day. That is to say, members come together initially through common normative interests, and they are changed over time through their interactions with one another.

It is important to note that a far larger set of people also share these aspects of intellectual background, training, and professionalization who are not members of the judicial community. So mere attendance at the same university law school, for example, does not suggest the intellectual ties that become so salient within the judicial community. All members will share these traits in common, but all people who share these traits in common are not members. Thus, in order to determine who is part of the judicial community, one must look for signs of regular engagement in intellectual debates over legal issues of the day both inside and outside the courtroom, as well as specific interactions (formal and informal) that signal an ongoing mutual influence within the community. It is not enough that a justice or lawyer engages in dinner-table conversation on a question of rights. Members of the judicial community are those people who make up the salient intellectual community of the justices of the highest court informing their thinking on legal issues and, in many ways, setting the very parameters of debate for those issues.

Both informal and formal legal deliberations within judicial communities constitute an ongoing debate regarding which legal norms should be binding. Despite the ongoing, ever-challenging nature of the debate, over time a general consensus emerges in one of two directions: support of administrative authorities or support of substantive rights. The answers that courts give to this question will have a profound impact on judicial power. Depending on which general trend comes to be the norm in the judicial community, courts will lean toward a use of legal tools that either allow

courts greater freedoms to challenge administrative authorities (in favor of rights) or that disallow that intervention into the activities of other state institutions (effectively supporting administrative authorities). The particular tools that courts choose to use and the manner in which they use them will be determined in largest part by the legal norms being developed in the intellectual/normative context of the judicial community. If courts choose to take advantage of the opportunity to answer questions of political significance, and particularly if a court chooses to challenge administrative power, the political salience and visibility of the court will increase dramatically. This increased salience has a feedback effect, leading to greater-still demand on courts for decisions on political issues.

### Judicial Politics and Judicial Power

The book builds on existing work on the role of the judicialization of politics on increasing judicial power worldwide, as well as a smaller body of work on communities around courts. It adds an entirely new emphasis to this literature in its focus on the role of intellectual communities and legal norms generation in the intervention of courts into political questions, and in detailing the informal interactions within these communities that may contribute to increasing judicial power over time.

Many important works have emphasized the increasing role of courts in political decision making—or judicialization of politics—since the end of World War II (Russell and O'Brien 2001; Tate and Vallinder 1995). These works have noted that the increasing intervention of courts in political questions has increased the political salience, or political power, of judiciaries in many contexts. Kathryn Hendley (1996) has argued, in the Soviet case, that when social or political actors bring politically charged questions before the court, it has the effect of increasing the salience and power of the court vis-à-vis other state institutions. This phenomenon is precisely what is seen in the Israeli case. Social movement cause lawyers, in addition to members of Parliament, political parties, individuals, and others, increasingly brought political questions before the High Court of Justice after the parliament became highly fractured and relatively ineffective with the 1977 elections. Societal demand for court decisions on political questions has been extremely strong in the Israeli case (on social demand in other contexts, see Epp 1998; Sarat and Scheingold 2005). Moreover, the Israel High Court has been recognized by supporters and critics alike as increasing the power of the judiciary over the last three decades or so.<sup>6</sup>

Some works have emphasized the role of political elites in the change to court intervention on political questions (Ginsburg 2003; Hirschl 2004). Tom Ginsburg has argued that the demand-side theories of judicial activism, previously mentioned, do not account for the role of politicians in the onset of judicial review. Judicial review is a legal tool that enables courts to review the decisions of government institutions, allowing courts to make decisions in some highly politicized cases. While Ginsburg is correct that in many contexts judicial review was established by parliaments and legislatures—most likely through the strategic interests of the political elites, as he suggests—it is not true of Israel. Like the United States, judicial review was established in Israel through a court decision (*Bergman* 1969) and was increasingly drawn on by the High Court thereafter to justify its jurisdiction. *Moreover, the judicial communities theory accounts for both the demand-side and the supply-side of increased judicial activism by emphasizing the roles of social actors as well as High Court justices, in interaction, in the increasing role of courts in Israeli politics.*

Others have used the Israeli case to argue that constitutional change, and the increasing judicial power that usually comes with it, is the result of an alliance of neoliberal political, judicial, and economic elites seeking to preserve their existing interests (“hegemonic preservation”) (Hirschl 2004, cited above). Due to the timing of the onset of neoliberal economic arguments and policies in Israel, which began at the earliest in the late 1980s but began in earnest in the 1990s (Peled and Shafir 2002), it is unlikely that the High Court’s move toward a rights-oriented jurisprudence in the early 1970s was influenced by such thinking to any great extent. Indeed, despite some limited areas of privatization, political economists emphasize the rather extensive role of the state in the Israeli economy (Levi-Faur and Jordana 2005), and some continue to call Israel a welfare state (Shalev 1992, reaffirmed in papers as recent as 2003). Perhaps more importantly, in presenting the neoliberal thesis of constitutional change and judicial power, scholars like Ran Hirschl have cited two new Basic Laws in 1992 as marking the onset of a constitutional jurisprudence and of judicial review in particular. These new Basic Laws established a wide range of fundamental rights in legislation in the absence of a constitution. However, again, the timing does not support the “1992” hypothesis, as the court began using judicial review according to most Israeli scholars (including most critical scholars) in 1969 with *Bergman*. Far from depending on the parliament, judicial review powers were established and expanded through court precedent.

If the timing does not support the neoliberal thesis, then what explains the increasing rights jurisprudence of the court through the 1970s and 1980s

(for one example, see Kretzmer 2002), and the court's fateful decision to take on state religious authorities? This study provides compelling evidence through political ethnographic study of just who it is that Israeli justices discuss legal issues with on a daily basis. The evidence points conclusively to legal scholars, left-wing social movement cause lawyers, and government lawyers as the most salient legal-intellectual community of the justices, their "judicial community." Based on jurisprudence, extrajudicial writings, and academic conference and social movement proceedings, the ideological leaning of this community in Israel seems to have been dominated by a deep commitment to a liberal political rights regime, an expansive notion of the rule of law, and a strong judiciary to protect both. By developing norms that allowed the High Court to answer political questions, such as the powers of religious authorities, the judicial community contributed to increasing the court's political salience. It is through increasing its political salience, as Hendley's work would predict, that the Israel High Court was able markedly to increase judicial power.

Just who makes up the salient legal-intellectual community of justices—the judicial community—matters a great deal, then, to the decisions of the court in specific cases as well as the larger questions of when and in what manner to engage heated issues of national contention. Judicial communities are fundamentally informal intellectual communities engaged in the generation of new legal norms. It is the role of the generation of new legal norms and practices that is a critical defining factor of judicial communities. Both elites and nonelites within a judicial community engage in conversation and debate over time that literally create and re-create not only the rules of the game for daily work within the judicial world, but the legal norms that become the foundations of jurisprudence at the national level.

The Israeli case thus teaches us that courts can themselves drive processes of increasing judicial power by choosing to engage issues of national political import, and particularly by choosing to challenge administrative powers and uphold substantive rights. However, courts can do this most effectively when they are able to draw on the intellectual resources, both informal and formal, of a wider community. Given, at a minimum, electoral democracy and judicial independence, it is judicial communities that will have the greatest impact on the legal norms that become entrenched in jurisprudence and on the larger decisions of whether to enter into controversial national political issues. That is, judicial communities will largely determine whether courts take on the lightning-rod issues of the day, and the legal means available to do so. These choices will determine the relative power of the judiciary in the political system.

## Courts, Religion, and Gender

This book draws on the specific issue area of religious-secular conflict as a case study of judicial decisions to take on major political issues and thereby increase judicial power. In the area of religious-secular conflict, the Israeli case is also far from alone. This case study sheds important substantive light on the link between religious-secular conflict and tensions over gender equality. Indeed, in Israel, as in many countries in the Middle East, battles between religious authorities and secular authorities have often pivoted on gender issues. For example, in Israel, Egypt, Morocco, Tunisia, and Pakistan, women's groups have been key challengers of religious authorities with varying degrees of success (Badran 1991; Jalal 1991; Woods 2005; Ziai 1997). In all of these countries, women's groups have had at least some impact on religious personal status law within the state. On the other hand, in Turkey, Iran, and Iraq, early- and mid-twentieth-century secular leaders used liberalization of women's rights as a means of undermining religious institutions (Joseph 1991; Kandiyoti 1991; Najmabadi 1998; Sullivan 1998). Both religious authorities and secular movements and leaders have often focused on issues of gender norms and gendered practices in their battles with one another. Why would gender, an area that is ostensibly not important to the "high" politics of states and national policy, be so important in conflicts between religious and secular leaders and movements in so many places?

On the side of religious constituencies, a great deal of work has suggested an important link between religious extremism, on the one hand, and strict concerns with gender norms on the other hand. Martin Marty and Scott Appleby (1994) list heightened concern for traditional gender divisions in either religious practice or social boundaries as one of the important traits in defining "fundamentalism." Others have suggested that concern over strict gender norms is one of the universal traits of extremist religion (see, for example, Hawley 1994). Many of the religious authorities around the Middle East, including Israel, would not fall under the category of "fundamentalist" for other reasons—for example, lack of appeal to violence, and somewhat looser group boundaries. And yet, one of the critical areas in which they are least willing to allow the encroachment of modern, liberal legal principles is in highly gendered marriage and divorce laws. In both Judaism and Islam, marriage and divorce laws regulate gendered practices within society and within the marital couple, and most importantly, they regulate religiously sanctified reproduction and the religious identity of offspring. Because these highly gendered regulations ultimately decide who is in the community and who is not, whether the community is physi-

cally reproduced in accordance with what they see as God's will, gender practices have come to hold a heightened significance for many religious constituencies both within the context of marriage and more generally in the context of religious practice. For some religious leaders and constituents, the concern for proper gender roles as a proxy for acting within the framework of God's will extends to social relations far more broadly. (Thus, in the case of Israel, Yair Sheleg [2000] has argued that concern for gender norms is one of two critical variables distinguishing among ultra-Orthodox and several other types of Orthodox Jews in Israel).

Secular leaders, as well, have demonstrated a high level of concern for gender norms. Their concerns have often been related to nationalist movements in which women's roles are seen as critical to the development of the new nation. Women's roles, whether new or a rehashing of traditional roles, and gender norms have been critical in nationalist movements around the globe. Women have been treated as symbols of the nation; as socializers of the nation's new generation; as physical reproducers of the nation; as needing to educate themselves to provide support for their new, modern nationalist husbands; and more rarely, as needing to contribute their own human capital to the nation. In the case of Israel, for example, first Prime Minister David Ben-Gurion asserted that it was a woman's nationalist duty to have at least four children (Hazleton 1977, 63), and he provided a national award for "heroine mothers" who had ten or more children (Portugese 1998). In Egypt and Iran, women were variously treated as symbols, reproducers, socializers, and, for example, in Ali Shariati's writings, as human capital (Badran 1991; Fahmi 1998; Najmabadi 1991, 1998; Sullivan 1998). New education reforms were enacted to allow women to be doctors and teachers in order to contribute their human capital and to demonstrate to the world the extent to which the new nation had become "modern" (see, for example, Abu-Lughod 1998). Thus, for secular nationalist leaders in the Middle East and elsewhere, notions of how to be a modern state were melded with traditional gender roles and gender norms to produce a strong concern with gender in national policy. (For other examples, see Jayawardena 1986; Stetson and Mazur 1995; Stevens 1999.)

These concerns among secular leaders have led to severe underlying tensions in states attempting to function under general law (often with some aspects of liberal law) as well as to accommodate religious personal status law. Such states include most of the Middle Eastern states, many states with a large Muslim population in Asia and Africa, and some cases in North and South America in which communal or customary law is granted autonomy for specific communities. Given the proxy role that gender

norms play for both secular and religious leaders—in one case symbolizing the modern nation, in the other case representing divine will—it makes sense that conflicts between secular and religious leaders and social forces would be at their most intractable over gender issues. Indeed, it is the most intractable issues that find their way to courts, often after all other venues have been fruitless. Both the empirical observation that gender issues have been at the center of religious-secular conflict in Israel, and the analysis of the relationship between gender and religious-secular conflict are important contributions of the book.

### Judicial Community and Legal Norms

While the theory of judicial communities is novel, much work has been conducted on certain aspects of legal communities, particularly in the case of the United States. These have centered on either the legal profession (norms of the profession as a whole, the bar in various contexts, and so forth) or on specific court communities. Much of the excellent work on the legal profession has focused on communities as formal institutions or organizations; that is, an extensive literature exists on the nature of the bar: membership, demographics, types of legal work conducted by members, and the like (Abel and Lewis 1989; Nelson 1988). Some have shown that specific groups of lawyers may make up a community, as seen in work on the bar of the U.S. Supreme Court (McGuire 1993). However, until recently, that work, too, has tended to focus on the characteristics of a community of lawyers—“shared geography, common ties or bond, and collegial interaction” (McGuire 1991)—rather than the diffuse, norms-generating processes of interaction seen in the judicial community model. More recently, Mather, McEwen, and Maiman (2001) have shown the extent to which communities of legal practice make up the predominant referent for matters of daily practice and legal ethics. These communities both inform and are informed by the values of their members, and, thus, form a smaller legal community (of lawyers) that is very much a corollary to the judicial community of my study. However, they, too, have generally focused on communities of lawyers rather than the wider, norms-generating ties between lawyers and judges at the heart of the judicial community model.

Work in criminology, on the other hand, has long been concerned with the role of broader court communities, which include both lawyers and judges, in the meting out of criminal justice (Fleming et al. 1992; Nardulli 1986). Much of this work has centered on courts as organizations with