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Joyce M. Mushaben
JURIDICAL PRECEDENCE TURNED LEGISLATIVE PRESCRIPTION: 
THE COURTS AND HIGHER EDUCATION IN THE 
FEDERAL REPUBLIC AND THE UNITED STATES

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Abstract

As institutions of higher learning become all the more dependent upon public financing throughout advanced industrial states, they are steadily being pulled into their central political-legal systems. Decisions bearing on the form and content of higher education have become the domain of state legislatures, the federal bureaucracy and, lately, of the superior courts. This paper attempts to provide a general explanation of how and why the judiciary's efforts to mediate disputes over controversial educational issues has led it to assume the role of policy-maker extraordinaire, with a special focus on developments in the German Federal Republic and the United States. The paper undertakes a summary comparison of six cases related to questions of university admissions, structures of university governance and the selection of academic personnel, pointing to the tensions which exist between the "constitutional rights" accorded to individuals, institutions and the state in matters educational. This work addresses the potential advantages and the inherent disadvantages that the "juridicalization" of educational politics holds for the "separate but equal" status of the judicial branch itself. While the author is more concerned with highlighting the extent to which the German courts have come to dominate the university reform process over the last ten years, she is also anxious to demonstrate that educational policy-makers on this side of the Atlantic are far from immune to the perils of juridicalized politics.
No amount of tampering with democratic theory can conceal the fact that a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems.

--Robert Dahl

Was bleibt aber, stiften die Richter.

--Wolfgang Perschel,
misquoting Hölderlin

For at least a decade, academic institutions have been under fire. But unlike the phoenix, the principle of university autonomy has not emerged unscathed from the ashes of what has been labeled a "revolution in the relationship of law and social policy."1 As institutions of higher learning become all the more dependent upon public financing throughout advanced industrial states, they are steadily being pulled into their respective central political-legal systems. Decisions bearing on the form as well as the on content of higher education have become the domain of state legislatures, the federal bureaucracies and, lately, of the superior courts. The courts have tended to play a particularly active role regarding matters educational in their efforts to clarify -- or to obfuscate -- the constitutional linkages between individual educational opportunities, institutional rights to self-determination and compelling state interests, where other actors have purportedly failed. In fact, as Hans N. Weiler has noted,

it seems that, in both the American and the German case, the courts have a capacity for making legislative institutions do things which they don't seem to be able to do on their own political momentum. 2

Judicial elements have assumed ever greater responsibility for orchestrating the revolution in social policy, for the justices are now functioning as law-makers in a dual sense. They are, in the first instance, obliged to render judgments as to the constitutional acceptability of specific legislative
actions in the field of higher education. In so doing, they inadvertently provide ever more concrete guidelines for future legislation. In the act of becoming political partisans, however, the courts have also been forced to surrender a measure of their own institutional autonomy out on the battlefield.

This paper is an attempt to explore the expanding role of the courts in relation to higher educational policy, with a particular focus on trends in the German Federal Republic and the United States. It begins with a treatment of "creeping juridicalization" (also labeled "politicized legalism"), a process whereby policy-formulation and the statutory enactment of specific educational reforms come to be regarded as a type of "constitutional trench warfare." I attempt to provide a general explanation as to why and how the judiciary's efforts to mediate disputes of a highly political nature has led it to assume the role of policy-maker *extraordinaire*, especially in the Federal Republic. Next, I undertake a summary comparison of six cases handed down by the German Constitutional Court (Bundesverfassungsgericht = BVerfG) and the US Supreme Court (USSC), respectively, impinging on the concept of university autonomy. These cases are intended to illustrate the impact of judicial rulings on procedures for university admissions, the structures of university governance and the selection of academic personnel. Finally, I address the potential advantages and the inherent disadvantages that the spread of politicized legalism is likely to entail for the formerly "separate but equal status" of the judicial branch itself. While the paper is more directly concerned with the critical role which the German courts have carved out for themselves in the university reform process, it also seeks to demonstrate that educational policy-makers on this side of the Atlantic are far from immune to the perils of politicized legalism.

A. COMPLEXITY, THE COURTS AND EDUCATIONAL CHANGE.

With varying degrees of optimism, social theorists as diverse as Mannheim,
Gershenkron and Ellul have tended in the direction of a "convergence theory" which predicts the gradual progression of advanced industrial nations toward a common social structure, a common array of social values, political structures and technological developments. More recently, social scientists have begun to speculate that modern polities might also be heading in the direction of common educational patterns and shared models of educational change. The proposition is a sensible one, given our growing inability to divorce educational policy-making from the political process as a whole, and given our proclivity for borrowing back and forth information on institutional design and educational research.

In a similar vein, the global character of uncertainties generated by the energy crisis, mounting inflation and rising unemployment figures has led a number of post-industrial bedfellows to share "an effective doubt about the appropriateness of existing institutions and about the assumptions on which they are predicated." Checks and balances don't seem to work as they used to, with the result that the very boundaries of politics appear to have shifted. Claus Offe, for instance, has observed a growing threat to the state's "monopoly of politics" in traditional areas, a development that is as much a function of specialization and expertise, as it is an outgrowth of more complex relations among different segments of society. Add to that numerous citizens' demands to be more actively involved in all decisions directly affecting their lives. What might be judged to be an increasing "loss of state" (Entstaatlichung) in politics is nevertheless accompanied by an observable "politicization" of other formerly autonomous or sacrosanct aspects of modern life, i.e. relations between parents, children and teachers, or between professors and their universities.

Uncertain as to what is really political and what is not these days, and no doubt somewhat frustrated that elected officials devote more time to rhetoric
than to problem-solving, citizens are turning with increasing frequency to that branch of government charged first and foremost with the protection of individual (as opposed to group-political) rights. Due to an increasing specialization of government functions, Western nations have witnessed a transfer of state power from the legislative to the executive branch; citizens begin to sense that they have been deprived of direct access to policy-makers as a result. They may derive little comfort from the fact that relations have been far from harmonious between these two branches of government, in spite of an ostensible convergence of many political and administrative functions. Legislators and administrators alike, each branch questions the authority of the other to make and execute decisions in a variety of issue areas. They seek an outside arbitrator.

The one arm of state power whose authority has least been subject to question, whose members indeed continue to bask in an aura of relative infallibility, is the judicial branch. One partial explanation for the enormous respect still accorded the judiciary may rest with the maxim: ignorance is bliss. Until recently, citizens were not privy to information about how the justices made their decisions or were simply so overwhelmed by the complex nature of "the law," that they left it to the experts. Beyond this rather simplistic assessment, however, stands the belief that justices serve as the ultimate protectors of legal procedure, the "watchdogs of due process" and equal protection. If for no other reason, this presumption of final authority permits judicial actors to lend a measure of legitimacy to almost every social policy they deign to approve. Even when compelled to rule on questions of political expediency, the courts' solutions are judged to be "less political" and "more rational" than the compromises proffered by other government officials. Interbranch rivalry has led to a further transfer of state authority from the executive to the judiciary, just as interbranch rivalry will no doubt
discredit the "apolitical" character of judicial pronouncements in the long run.9

Politicized legalism (Verrechtlichung), as it is understood in Germany, is the process whereby "the constitution is repeatedly invoked and its principles elaborated and interpreted in exhaustive detail. Such legalism channels recurrent conflicts among political or ideological factions in many institutions."10 This ongoing invocation of constitutional principles has unleashed the Furies of Politicization and Legalization against the institutions of higher learning over the last ten years, especially in the Federal Republic. The preeminent nature of concerns about the relationship between higher education and the law are perhaps best illustrated by the fact that the fifty-first "synod" of the German legal profession, the Juristentag, made the juridicalization issue a key item on its 1976 agenda.11 The serious allegation that the courts have taken certain liberties in establishing educational policy guidelines rests not only upon a growing number of symposia and an expanding body of literature on the topic, however. We have little difficulty in accruing evidence of a more "scientific" nature with regard to this phenomenon of "creeping" Verrechtlichung. Knut Nevermann, for instance, has contributed to the discussion of "evidence" by identifying four specific indicators of juridicalization in the educational arena. They include:

a) the increase in the number of legal specifications through administrative rules and regulations;
b) the increase in the number of court cases dealing with either the admissibility of certain policies or the legality of concrete decisions and developments in schools;
c) the increased role of parliamentary legislation as a source of educational norms...
d) the growing use of legal arguments by individuals as well as by institutions in the political debate over educational policy.12

While developments in the higher educational field may present us with a most striking case of juridicalization, it is also apparent to students of the policy process that the courts have in no way limited their attention to
litigation of an academic nature. No branch of law is immune, and no justice is spared the fate of a growing workload. FRG statistics reveal that the number of suits filed in the administrative courts grew from 48,297 in 1970 to 172,921 in 1978. Trials for those accused of various "public disturbances" (Ordnungswidrigkeiten, including demonstration arrests) rose from 214,707 in 1971 to 658,463 in 1978. The finance courts saw their caseloads increase from 13,525 suits in 1970 to 44,357 in 1978. The number of case entries per justice brought before the Bundesverfassungsgericht rose from 154.3 in 1976 to 194.4 in 1978. Judges in the US have not fared all that much better. The number of cases filed with the US Supreme Court totaled 4,212 in 1970 and 4,731 in 1978. The Circuit Courts of Appeals disposed of 6,139 cases (out of a total of 11,662 filed) in 1970 and 8,850 (out of 18,918) in 1978. The District Courts commenced with 87,300 civil cases in 1970 and 138,800 in 1978, while criminal cases on the docket numbered 38,100 in 1970 and 46,100 in 1978.

Given the phenomenal workloads facing the justices in traditional litigational arenas, what could possibly compel the courts to devote so much more attention to questions of educational policy and academic affairs, heretofore the province of pedagogical experts and school boards only? It would appear that in both the US and the FRG, one's constitutional right to higher education is largely a derivative one, and that the creation of specific legal norms for academe is equivalent to "legislating in the interstices of the law," in the words of Christopher Wolfe. Wolfe goes so far as to argue that the Constitution has been taken out of Con-Law, insofar as the new contents with which legal vacuums and loopholes have been filled, have given rise to a "judicial necessary and proper clause." Guaranteed access to education, along with the protection of academic freedom, are viewed by members of the bench as penumbral to a catalogue of constitutional rights that have turned into individual liberties: free development of the personality (§2GG); equality (§3GG) and
the free choice of profession (§12/1GG), fostered by the "social state" (§20GG); freedom of speech and association (Amd. I, USC), due process and equal protection (Amd. XIV, USC). But there are also broader justifications being offered for judicial involvement in academic matters, some of which go so far as to stress the state's "compelling interest" in a diversified student body, in compensating for past patterns of discrimination and in ensuring a highly trained, scientifically skilled labor force vital to the nation's economic health and military security. Educational change, in short, is a key to social change; and educational policy, in the long run, can not be divorced from other social policy problems.

Clearly, the courts cannot be expected to find all of the answers. However, before addressing the manner in which German constitutional justices and their American counterparts came to, saw and conquered many of the otherwise irresolvable political conflicts facing educational authorities, we need to attend briefly to the question: under what circumstances or conditions is the juridical solution likely to "stick?"

The judicial remedy is most effective when no other solution seems to exist! This is to say that any solution the court proposes is more likely to be accepted and applied to a pressing social problem if the tribunal of justices need not defer to acts of parliamentary discretion, on the one hand, or where it is not subject to the prior constraints of its own decisions in some other related case. The Bundesverfassungsgericht's 1972 Numerus clausus opinion discussed infra serves as one example; for want of an institutionalized set of university admissions and selection criteria, the justices had little trouble persuading the Länder ministries to accept standards based on individual merit, waiting time and "hardship" status. In this instance, one can reasonably argue that the judiciary does not interpret, it in effect makes the law.
This tendency to create law (Rechtsschöpfung) where none formerly exists is more pronounced in the Federal Republic than in the US, for the main reason that the BVerfG justices are not at liberty to dispose of political questions by simply refusing to consider them. But even in such cases where the thrust of the court opinion has been an exhortation to legislators to invent their own solutions, the judiciary has met with little success in decisively extricating itself from the political process. In short, more legislation means more litigation, as disgruntled interest groups look to members of the bench in Karlsruhe for a more favorable interpretation of the law -- or to the brethren in Washington, D.C., for that matter.

A judicial remedy will prove much less effective when the court as a body finds itself politically or philosophically out of step with the current lawmaking majority. Given what we know about the socialization of judges, we may presume that they are not habitually radical reformers, relatively speaking. Hence, the bench is less inclined to act -- to have its "ultimate" authority questioned or jeopardized, as it were -- when it is unable to set the bounds for officials and state governments; where it needs to defer to agency or parliamentary discretion (Gesetzesvorbehalt); if it is unable to resolve an issue by a preventative injunction; or where it cannot render a decision that is otherwise easily monitored. The court will not openly challenge political elements when its own autonomy might appear to swing in the balance. In reference to the US Supreme Court, Robert Dahl has determined, except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant alliance. As an element on the political leadership of the dominant alliance, the Court of course supports the major policies of the alliance. By itself, the Court is almost powerless to affect the course of national policy (my emphasis).

The same can be said of the German Constitutional Court: Juridicalization is a "covert" political activity, through which the Court must necessarily seek to
enhance its own political status within the leadership coalition.

Perhaps the 1970's witnessed an end to such a period of disintegrating alliances, a thesis which would help us to explain why indeed the courts have been very powerful with respect to influencing policy in the educational sector. During the period under investigation, the justices in Karlsruhe had neither been appointed by, nor were they exactly partial to members of the new SPD government which assumed office at the end of the 1960's. Nor does one find evidence of much political affinity between the members of Warren court and the Nixon administration. In both instances, the philosophical orientation and composition of the two courts predated the new governments by at least a decade, a factor which (common sense tells us) must have enhanced the legitimacy of the courts' pronouncements. By the late 1970's the equilibrium between the executive and the judiciary was reestablished, one can conceivably argue, given the SPD's rejection of its own more radical reform goals in the FRG and a number of revisions undertaken by the Burger Court as part of a larger political consensus in the US. But even though the balance may have since been restored at the leadership level, one continues to observe in the aftermath that "ordinary" citizens turn with increasing frequency to the courts on a variety of important issues, in the United States as well as in the Federal Republic. My grounds for generalizing about the process of juridicalization in two societies characterized by very different legal traditions rest with a number of striking parallels that can be drawn between the Numerus Clausus and Bakke cases, between the Group University and Yeshiva decisions, and to a lesser extent, between the Radical Ordinance and the Keyishian cases, explored below (official citations infra).

B. INDIVIDUAL, INSTITUTIONAL AND STATE RIGHTS: PREVAILING LEGAL TRADITIONS

Before discussing case specifics, I think a brief comparison of the German and American legal traditions is in order. Historically, the German system of
jurisprudence has been more concerned with adhering to the letter of the Basic Law, than with expounding upon its spirit. The judiciary's role has been an inherently conservative one; it defines its main function as that of testing current, legislatively mandated practices against the dictates of the provisional constitution. In recent years, however, the Justices have set out on a course of greater activism, spurred on, ironically, by that other stronghold of German conservatism, the CDU/CSU. Prior to the 1972 Numerus clausus decision, the "guardians" of Karlsruhe "on the whole declined the invitation to define the content of open or opaque constitutional clauses further than was necessary to rule out the clearly unconstitutional." 

The Court's efforts to preserve ambiguity and, with that, flexibility have nonetheless been limited by four features peculiar to the German legal system, the so-called Rechtsstaat. 1) The BVerfG, unlike the American Supreme Court, has no doctrine of "political questions" at its disposal. As a result, it is required to pass judgment on any issue that is construed to fall within close range of a constitutional norm. In the absence of parliamentary self-restraint, or in view of a parliamentary failure to act, the Court is virtually compelled to enter the political arena. It is nonetheless a highly specialized court of constitutional affairs; administrative regulations, social security claims, labor disputes, questions of civil and criminal justice or finance are reviewed by other equally specialized court branches. 2) Elected by the two houses of Parliament for non-renewable twelve year terms, the members of the court are divided into two chambers, called Senates. In contrast to the adversary rule which governs case selection in the US, the Bundesverfassungsgericht bears responsibility for cases involving both individual "constitutional complaints" (the domain of the First Senate) and those involving the comprehensive "control of abstract legal norms" (delegated to the Second Senate). The closest American equivalent to "abstract control" is the principle of
judicial review. In norm-control proceedings, however, initiators are not required to have a direct, material, practical or substantial interest in the case before them. In short, it is much easier for a political party, wearing the cloak of a Bundestag caucus or (more frequently) a Land government of a particular ideological complexion to turn a controversial political issue into a subject for judicial review. 3) Rather than extolling the virtues of "precedent," the training of German jurists emphasizes the precepts of Roman Law, viz. reliance on the deductability of the "one right answer" from a well-elaborated system of legal norms. In fact, the dissenting opinion did not become part of the Court's legal apparatus until 1970, and the immediate result was that the justices found it impossible to close the lid, once they opened this Pandora's box to the political opponents of various rulings. 32 4) Finally, in light of the atrocities of the Nazi regime, the Constitutional Court is particularly sensitive to all questions pertaining to the German "Bill of Rights." The Basic Law is responsible for the special tension which has developed between the guarantee of individual liberties, on the one hand, and the obligation of the "social state" to provide for the common good, on the other. In fact, individual constitutional grievances are reported to account for about 96 percent of all cases submitted and for 55 percent of all published opinions. 33 The notion of "equal protection" requires the state to take affirmative measures to ensure both. As to this last point, the Court has realized that the costs of its orders to the state are likely to become prohibitive, as proved to be the case with the 1972 Numerus clausus decision. Yet the Court can do no other. 34

The combined effect of the first three features is a high degree of irreversibility in the establishment of legal norms. The Constitutional Court operates along the lines of "what I have written, I have written." On the other hand, it is impossible to assess the extent to which this tendency also
tempers its decisions. The meliorating or aggravating circumstances produced by the interjection of the fourth factor renders a decision more difficult, but does nothing to alleviate the inflexibility aspect of the judgment process generally.\textsuperscript{35}

The US Supreme Court has moved "from the byways onto the highways of policymaking" under a different set of litigational conditions. Briefly, 1) adjudication is focused; rather than mulling over possible alternatives in search of the "one best way," justices consider which "remedies" can be appropriately applied to redress specific "wrongs" done to identifiable individuals who possess "rights." 2) American adjudication is piecemeal in nature; while precedents may be established, a courtroom victory often centers on statutory details or circumstantial factors. 3) In contrast to the practice of abstract norm control, Supreme Court judges must wait for litigants to call. They cannot initiate adjudicative action, which consequently "makes the sequence of judicially ordered change dependent upon the capricious timing of litigants," rather than upon strategic planning by state agencies or Congressional caucuses.\textsuperscript{36} 4) The unrepresentative character of the litigants who come calling in Washington means that the judicial process does not provide established mechanisms for policy review, nor can the USSC justices adjure members of Congress to take legislative action as forcefully as the BVerfG judges do under the principle of "statutory reserve" (Gesetzesvorbehalt).\textsuperscript{37} A final difference between decisions rendered by the bench in Karlsruhe and Washington lies in their overall legal-philosophical approaches to constitutional rights. Whereas the German Court pushes a substantive-constitutional approach, equipped as it is to render principles in the abstract and to delegate authority for entire policy areas to specific organs of government, the Supreme Court presumes a degree of special "procedural insight," couching its arguments in terms of due process and equal protection, that is, across-the-board application of
whatever rules are at hand. In the latter, the problem is to find the right rule rather than to establish the right social alternative. 38

The "university crisis" of the late sixties neither recognized the existence of national political boundaries, nor respected the limits of particular academic disciplines. Their litigational and philosophical differences notwithstanding, superior courts in the FRG and the US were forced to the center of the political stage to mediate conflicts produced by problems common to both. In a manner illustrative of convergence-theory-at-work, universities in both national settings fell prey to the pressures of: a) the rapid expansion of the student body, followed by dramatic increases among the ranks of the academic teaching staff; b) the "knowledge explosion," resulting from technological specialization and the exponential growth of science in society at large; c) an emphasis on egalitarianism and the push for extended educational opportunities; d) quantitative as well as qualitative changes in labor market demand; e) rising institutional and research costs and constraints imposed by finite fiscal resources; and f) conflicts generated by the politicization of academe. 39 I now turn to six cases which attest to the commonality of these pressures, in order to examine similarities and differences among the juridical outcomes produced by contrasting legal traditions.

C. ADMISSIONS AND EQUAL OPPORTUNITY: Numerus clausus and Bakke*

Article 12/1 of the Basic Law guarantees all Germans the right to choose freely their vocations, educational facilities and places of work, as do respective articles in the Länder constitutions. German institutions of higher learning found it impossible to meet the constitutionally-based demand, when the Federal Education Ministry's enrollment projections of 280,000 for 1978 and 560,000 for 1980 were surpassed in 1960 (291,000) and 1971 (587,000),

respectively. 40

University rectors, in conjunction with Länder educational ministers, devised a system for imposing numerical limitations on admissions. In 1972, administrative courts in Hamburg and Munich lodged an appeal on behalf of several medical school applicants denied entry. In a landmark decision of July 18, the Bundesverfassungsgericht found that the Numerus clausus system, devised to meliorate the overcrowding of especially popular disciplines, i.e. the medical sciences, violated the precepts of Article 12/1GG. 41 Its application was permissible if and only if the university in question could prove that its departmental capacities were in fact completely exhausted, and until such time as legislators succeeded in establishing specific, nondiscriminatory admissions criteria or, alternatively, introduced a "lottery" system. The justices upheld the use of academic "achievement" (Abitur scores and Gymnasium grade point averages) as the primary determinant, "waiting time" and "hardship status" as secondary criteria. The Constitutional Court, in essence, challenged federal law-makers to develop "objective and universally applicable norms" for admissions decisions, a prerogative that had been exercised solely by the university in former times. As literally thousands of individuals continued to file claims against specific institutions, the superior administrative courts deemed it their role in subsequent decisions on "university capacities" to expedite the flow of students by actually subjecting to systematic, external controls the content of courses and the scope of academic programs. 42 The Numerus clausus system remained in force.

In 1973 and again in 1974, a white male named Allan Bakke was denied entry to the Medical School of the University of California at Davis, in spite of the fact that his grade point average, MCAT and "bench mark" scores were significantly higher than a number of other individuals admitted to the program. In a case that reached the Supreme Court in 1977, Bakke charged the Davis
Medical School with violation of the Equal Protection Clause of the Fourteenth Amendment as well as Title VI of the Civil Rights Act of 1964. The plaintiff argued that Davis' special selection program reserving a set number of admissions slots for minority applicants constituted reverse discrimination on the basis of race. In a decision characterized as "a remarkable act of judicial statecraft," the Supreme Court struck down the specific admissions formula used at Davis, thus ordering Bakke's entry into the program, while simultaneously affirming the principle of special procedures for minorities to counterbalance the effects of past discrimination. Brennan's opinion for the majority resorted to standards of "intermediate scrutiny," while dissenting Justice Powell was the only one to adhere unfailingly to "equal protection" arguments. The overarching verdict nonetheless advanced the notion that "the right to procedural due process" has intrinsic as well as instrumental constitutional value," and that its value in this instance was absolute. 43

The main difference between the Numerus clausus and the Bakke rulings can be summarized thus: the German Constitutional Court has sought to put pressure on as many parties as possible -- legislators, educational administrative agencies and individual institutions of higher learning -- to ensure that university places are made available to as many potential registrants as necessary, as soon as possible, in light of a clear-cut constitutional mandate. The US Supreme Court has applied pressure primarily to the institution in question to devise procedures (for allocating whatever places exist) that ensure equal consideration and protection to individuals in their competition for those limited open slots. A search for parallels between the two cases reveals that in accepting "waiting time" and "hardship" criteria, the German judiciary recognizes the need to compensate for past patterns of discrimination, as does the American Court's attention to female and minority qualifications. In both cases, the justices realize there is a need for a societal commitment to the
principle of "equal opportunity," and they speak further of the state's interests, as ranging from special to substantial to compelling, in the institutions' ability to apply fair standards. In neither case do the justices go so far as to oblige the state to provide unlimited opportunities to individual applicants; but while both courts begin their deliberations by focusing on equal opportunity, the German case ends with admissions stipulations that are more or less meritocratic in nature, while the American ruling ends with requirements of the procedural sort.

Both cases have had the effect of "throwing the universities to the wolves;" they are damned if they do, damned if they don't. The judges admit that "the freedom of a university to make its own judgments as to education includes the selection of its student body." Universities are nevertheless obliged to appear before the courts time and time again to defend their procedures for estimating the numbers, as well as the mechanisms for distributing the slots. The most striking aspect of the juridicalized treatment of admissions questions is that it has lent itself to an institutionalization of do's and don't's (e.g. the USSC's support for the "Harvard model, the BVerfG's three selection criteria) for what were expected to be temporary, emergency procedures.

D. UNIVERSITY GOVERNANCE: The Group University and the Yeshiva Decisions**

Unable to implement directly their own strategy for higher educational reform in the German Bundestag after 1969, conservative CDU/CSU elements joined forces outside parliament; their purpose was to block the "democratization" of the university foreseen by the SPD's 1971 draft Federal Framework Law for Higher Education (Hochschulrahmengesetz). The SPD hoped to

**Cases are officially listed as Bundesverfassungsgericht, 1 BvR 424/71, 1 BvR 325/72, verkündet am 29. Mai 1973 and National Labor Relations Board v. Yeshiva University, 100 S.Ct. 856 (1980).
build on a parity model introduced earlier in Berlin, which provided for an equal number of faculty, student and non-academic staff representatives in university decision-making organs. On May 29, 1973, the Constitutional Court handed down a verdict in favor of 398 professors and associates, who opposed the inclusion of the parity model in the Higher Educational "Preliminary Law" (Vorschaltgesetz) in Lower Saxony. The Karlsruhe majority ruled that three-way parity in university decision-making organs violated the constitutional rights of the senior academic staff members, as posited by Art. 5/3GG (cited infra). Moreover, the court held that these full professors were to be guaranteed at least one half of the seats (massgebender Einfluss) in any body regulating teaching and examinations, and assured a clear majority (50 percent plus one, ausschlaggebender Einfluss) in matters of academic hiring, firing and research. (The decision took no note of the fact that tenured full professors in most institutions were outnumbered at least two or three to one by associate and assistant level faculty charged with primary academic functions).

In the final analysis, the Constitutional Court recognized in principle the need for the representation of all groups directly affected by academic decisions in central university organs, at the same time it limited proportionately the amount of influence that each of these groups could bring to bear on final decisions, according to the participants' level of "qualification."

These proportional limitations were subsequently incorporated into the 1976 Federal Framework Law.

Judicial influence on university governance structures in the US does not find expression in a particular educational statute. According to the provisions of the National Labor Relations Act, however, supervisors and managerial personnel are to be excluded from the categories of employees entitled to the benefits of collective bargaining. In 1974, the Yeshiva University Faculty Association petitioned the NLRB for certification as the union.
bargaining agent for full time faculty at 10 of Yeshiva's 13 graduate and undergraduate schools. The university's central administration opposed this action on the grounds that faculty members exercised supervisory and managerial authority, and hence did not fall within the categories eligible for bargaining status under the Act. The NLRB granted the petition, and certified the faculty union after its successful election. The university refused to bargain with this unit and the board refused to reconsider the "exclusion" issue. On February 20, 1980, the Supreme Court affirmed an Appeals Court decision holding that faculty were "in effect, substantially and pervasively operating the enterprise" and they enjoyed a "managerial status" sufficient to disqualify them from the coverage of the Act. Left unresolved was question of their "supervisory status;" while latter type implies that academic professionals use independent judgment, overseeing an institution in the interest of the employer, the former status designation indicates a more general, cooperative involvement of faculty in "developing and enforcing employer policy." The dispute appears to have been narrowly defined in terms of the particular degree of "alignment with management" observed to exist between the Yeshiva Faculty and the Central Administration.

In concentrating on the "managerial status" aspect, the Supreme Court carefully skirted the issue of statutory interpretation, viz. the need to adapt the National Labor Relation Act's broad provisions to different types of workplaces. This act of judicial restraint, in conjunction with Yeshiva's standing as a private university, produced no clearcut rule with respect to professional academics and collective bargaining rights. While Yeshiva findings are expected to lend themselves to a case by case review, the effect of the Group University decision was immediate and universal.

The Group University case focuses on a constitutional grievance involving full professors' rights to self-determination vis-à-vis other institutional
groups in matters of teaching and research; the Yeshiva suit was technically appellate in nature, entailing no specific constitutional complaint (although the latter might be construed to cover the freedom of association). On the surface, the two cases demonstrate no significant overlaps with respect to substance. In fact, a debate over the collective bargaining rights of German professors is unlikely ever to arise, since they are legally designated public servants, whose employment and salary terms are regulated by Federal and State Civil Service Codes. But the two rulings do raise similar questions of principle. In both instances, there is a recognition that faculty responsibilities and functions are distinct from those of other segments of the university community, a distinction which rests with the level of professional qualification. Both courts have implicitly recognized the institution's right to provide for, indeed to require, faculty involvement in university governance, insofar as "professional expertise is indispensable to the formulation and implementation of academic policy."49

A critical question addressed in both cases is whether the faculty's right to participate is equivalent to the faculty's right to decide. The German and American Courts approached this question from very different angles, as did the respective litigants. To protect themselves from challenges "from below," the German professors filing suit in 1973 tried to claim for themselves the same measure of discretion and absolute authority over academic decisions, that the Yeshiva faculty argued they did not have, in order to ensure bargaining power vis à vis administrators "from above." The Supreme Court begins with the assumption that faculty "authority in academic matters is absolute;"50 the Constitutional Court concludes with the idea that the faculty must have final say in certain areas, but its power is "substantial" and "controlling," not absolute. The German judiciary finds a "middle solution," to which it attaches a numerical formula that becomes legally binding on all institutions of higher
learning. For the present, the American judiciary holds a more "extreme" position which lends itself to application in institutions whose circumstances will have to resemble closely those at Yeshiva.

E. ACADEMIC FREEDOM: The Radical Ordinance and the Keyishian Rulings

The German experience under Hitler led the authors of the Basic Law to incorporate academic freedom into the catalogue of fundamental rights in 1949. Article 5/3GG asserts,

Art and Science, research and teaching shall be free. Freedom of teaching shall not absolve from loyalty to the Constitution.

Nevertheless, on February 18, 1972, Chancellor Willi Brandt joined the heads of the Länder governments in formulating guidelines to regulate the public employment of right and left wing radicals (Extremistenbeschluss). This "Radical Ordinance" was intended to subject civil service candidates of questionable political background to "constitutional loyalty" checks, prior to granting them tenure. Academics were included in light of their civil service classification. Instead of checking personal political histories only in those cases where "evidence" was already known to exist, the exception quickly became the rule.

After 1973, Land-level "constitutional protection offices," tied to a monolithic, computerized apparatus at the national level, carried out routine investigations on persons applying for public service jobs, as well as on those up for tenure.

On May 22, 1975, the justices in Karlsruhe announced that even those working for the state on a temporary or trial basis had to submit to a test of their loyalty (including legal and medical interns). The BVerfG decreed:

The political loyalty obligation requires more than just a formally correct, but otherwise disinterested, cool, internally-distant posture toward the state and the

*** These cases are officially cited as Bundesverfassungsgericht, 2 BvL 13/73, vom 22. Mai 1975, and Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967).
Constitution; it demands of the civil servant in particular that he clearly distance himself from groups and endeavors which attack, oppose and defame this state, its constitutionally created organs and the valid constitutional order. (my emphasis). 52

With this particular verdict, the Constitutional Court has gone far to forge new ties between the exercise of one's duties and prerogatives within the academic community and the exercise of professional "voice" and choice of career outside the university. Instead of reading into Art. 5/3 a set of double safeguards for the individual with respect to academic freedom and free political expression, the court has reinterpreted Art. 5/3 in favor of the state's "compelling interest" in its own survival and good name. This variation on the "guarantee" theme means that the proverbially neutral civil servant is to be replaced with a prospective public servant who not only evinces a willingness to support the principles of the Constitution; s/he must demonstrate further an ability "to defend actively" and unquestionably the state itself against its real and potential enemies. In fact, individuals have been barred from public service (Berufsverbot) not because of "unconstitutional" behavior (verfassungswidrig), but on the grounds that their political statements and affiliations have been "inimical to the constitution" (verfassungsfeindlich), an argument which in many cases has stood in violation of Art. 21/2 (free choice of political parties) and Art. 33 (free and equal access to civil service employment). The judiciary has provided no concrete standard for distinguishing between academic discourse on alternative political ideologies, personally cool and distant expressions regarding the existing German state, or an active call to political insurrection.

Free speech and academic freedom were dominant constitutional concerns in the American case of an English instructor, Keyishian, and three of his colleagues; the four refused to sign a certificate declaring they were non-communists when their original employer, the privately owned University of Buffalo
merged in 1962 with the State University of New York system. The SUNY Board of Regents sought to draw up a list of "subversive" organizations for the expressed purpose of using membership in such organizations as prima facie evidence for disqualifying or dismissing individuals from service in the state's public schools. Disqualification would ensue on the basis of membership inquiries addressed by the appointing authority to an applicant's former employers or associates, according to a 1939 law. Keyishian's one-year-term contract was not renewed on the basis of his refusal to sign the Communist disavowal certificate.

The Supreme Court did not question the Board's legitimate interest in protecting the educational system from subversion, but it rejected the disqualification mechanisms which it warned were "susceptible of sweeping and improper application," since they lacked "terms susceptible of objective measurement." The Court declared portions of New York's Education Law and its Civil Service Law unconstitutional, but did not limit itself to a rejection of inappropriately vague statutory provisions. The judiciary went a step further in linking safeguards of academic freedom to a defense of the larger socio-political "market place of ideas." Moreover, the justices appeared sensitive to an individual's and their own inability to draw fine lines between academic discourse and subversive expression:

The teacher cannot know the extent, if any, to which a "seditious" utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. 55

In an earlier related decision, Wieman v. Updegraff (involving a loyalty oath at the Oklahoma Agricultural and Mechanical College in 1952), the Court had similarly held that "membership" alone could not disqualify from public educational appointment. The "free speech" dimension of academic appointment was substantiated further when Justice Frankfurter, concurring in the 1957
decision of Sweezy v. New Hampshire, refused to stand the individual's guarantee of political expression on its head:

For society's good - if understanding be an essential need of society - inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling. 56

Herein lies the critical differences between the German and American judicial responses to the concept of academic freedom. Whereas the freedom of teaching and research is explicitly designated as an individual right in the Basic Law (listed fifth in the "Bill of Rights" section), academic freedom, in fact, takes a back seat to the state's presumed "compelling interest" in an actively loyal corps of civil servants. While the defense of academic freedom in the US Constitution appears to be of a more penumbral character, the individual's rights definitely take precedence over those of the state in questions of political loyalty and expression.

The Radical Ordinance and Keyishian suits have at least two items in common (buried in the fine print of the opinions). The first is the unwillingness on the part of both the Constitutional and the Supreme Courts to accept membership in a "subversive" organization as a necessary and sufficient condition for disqualification from professional public service. The second point in common is that both cases involve, but do not directly address, an institutional right to the determination of university personnel. It is rather obvious that university hiring, firing and promotion rights are ultimately connected with the protection and pursuit of research and teaching objectives, "since institutional success in these areas depends substantially on the personal capacities of individual faculty members."57 Government regulations meant to induce academic institutions to alter otherwise nondiscriminatory hiring practices infringe
upon the university's and its members' rights to freedom of association, at the same time they interfere with scholarship.

F. COMMON THEMES, UNCOMMON POTENTIAL FOR INFLUENCE

What tentative conclusions can be drawn about judicial influence in the field of higher education, with respect to the Federal Republic and the United States? I begin by pointing out that the operational definitions of scholarship iterated by judges in Karlsruhe and in Washington do not substantially differ. The German definition, which the BVerfG borrowed from Humboldt in its 1973 opinion, charges academics to consider Wissenschaft "as something still not completely found and to treat it as never completely to be discovered and yet persistently to be pursued." 58 The American version asserts that scholarship merits constitutional protection because "no field of education is so thoroughly comprehended by man (sic) that new discoveries cannot yet be made." 59

Academic freedom, a composite of individual and institutional rights, becomes the core issue in all of the cases reviewed here. Supreme Court Justice Frankfurter outlined the "four essential freedoms of the university" in his concurring Sweezy opinion: 1) the right of the institution to set its own academic standards for faculty selection; 2) the right to determine what will be taught; 3) the right to determine how it will be taught; 4) the right to decide who may be admitted to study. 60 In each of these four areas, the German institutions of higher learning are subject to many more limitations as a direct result of judicial involvement than is true for the United States. Yet in all of the cases discussed supra, there persists a tension between the rights of the individual, those of the institution and the interests of the state in matters educational. In an effort to clarify which set of rights seem to prevail in each case, I have devised a classificatory scheme of sorts, which I hope to develop at a later date.
Individual rights find their basis of strength in the constitutional documents themselves. I would like to suggest that they are therefore open to broader interpretation. Institutional rights are the product of tradition; owing to a lack of documentary evidence as to their constitutional status, I would expect the judiciary to be more cautious, viz. narrow, in the protection it directly affords the universities. The power of the state is grounded in its constitutionally mandated responsibility to protect its citizens' rights and liberties; its powers are limited through enumeration, its powers expanded by the growing fiscal dependency of educational institutions. I suspect that the broad definition of state's rights depends on the possible consequences of individually exercised freedoms.

For the present, I will simply note that the question of institutional rights has ostensibly received the least amount of attention from the courts. But to the extent that both the tenure processes and participation in university governance can be construed as devices for protecting and promoting individual academic freedom, one cannot ignore the institutional context in which they operate. Public institutions of higher learning may be compelled

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 Prevailing Set of Rights

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"COMPELLING INTEREST"


to stand up for their rights vis à vis the state legislatures as they struggle to secure their financial futures. To say that the superior courts have not acted on the matter of institutional rights in the past does not preclude them from doing so a few years down the road. In conclusion, what impact has this litigational foray into the field of higher education had on the judicial institutions themselves?

G. AUTHORITY GAINED, AUTONOMY LOST

The courts have paid a heavy price for their involvement in the policymaking process. Critics in the Federal Republic have gone so far as to label the judiciary in a disparaging fashion "a secret superministry of education." The judiciary's attempt to forge a workable political consensus where none exists is inextricably rooted in the status quo. Laws build upon laws. To the extent that the courts cannot or will not excuse themselves in response to questions of political expediency, they are able to engrave their own higher educational prescriptions on legislative tablets. The irony is that even if conflicting social groups are able to smash those tablets in a fit of anger, they are inevitably forced to return for a new set.

Within limits, the contribution of the German and American courts to the policy process in their respective systems is a function of their ability to go beyond the established "legal" criteria rooted in statute, precedent and constitution -- which is what usually occurs when justices attempt to rule on the basis of "legislative intent." The tools they employ may be strictly "legal" ones, but the setting of any case brought to the courts for the purposes of relegating social conflict is undeniably "political." As Robert Dahl argues,

"If the Court were assumed to be a "political" institution, no particular problems would arise, for it would be taken for granted that members of the Court would resolve questions of fact and value by introducing assumptions derived from their own predispo-
positions or those of influential clients and constituents. But since much of the legitimacy of the Court's decisions rests upon the fiction that it is not a political institution but exclusively a legal one, to accept the Court as a political institution would solve one set of problems at the price of creating another. 62

One problem does lead to another, as demonstrated by the effects of the BVerfG Numerus clausus and "capacity" verdicts in particular. Moreover, the tendency toward a more open "politicization of justice" in Germany, with its parallels in the US, has caused a few cracks in the twin façades of judicial infallibility and unquestionable authority:

it is worth considering whether overindulgence in appeals to the Bundesverfassungsgericht to make fundamentally political decisions in favor of one or the other policy is not bound to reduce respect for it as a source of resolution of disputes which is endowed with a higher rationality and authority than the political actors possess. 63

Conflicting values (and personality differences) within the courts dispel the notion that the judicious treatment of "law" will always provide a single, authoritative, "right" answer; otherwise there would be little need for the instrument of the dissenting opinion in Germany, and less need for an array of concurring and dissenting opinions in the US in the wake of very close votes.

It is the purpose of law to promote a just social order within the framework of basic rights. In other words, law has a dual function, that of preserving order and that of protecting citizens against potential abuses of state power. It is dangerous to stress one at the expense of the other. This duality also makes certain contradictions inevitable, since Western constitutions are markedly deficient in concrete criteria for establishing at what point individual well-being must defer to the common good, under what circumstances social order takes precedence over civil liberty (at the crux of the Berufsverbot issue) -- not that we would want to expect them to be so explicit.

The advent of politicized legalism produces other tensions and snags in
the fiber of societies which characterize themselves as democratic. Many of the changes thrust upon the higher educational systems, in particular, stem from a demand for greater "social accountability and responsibility." The institutions of higher learning have been called upon to respect the constitutional rights of individuals in determining who may or may not enter them. Democratic systems have accepted the premise that education is a civil right, whether it has been explicitly stated (Art. 12/1 GE) or implicitly contained (First and Fourteenth Amendments, USC) in their respective constitutions.

The courts are therefore constitutionally obliged to protect the rights of individuals and minorities against the collectivity or the majority, and individual rights have often been secured at the expense of quality education and freedom for the whole. It may be a plus for democratic systems that citizens have learned to make more effective use of the mechanisms of government available to them for the protection of their rights. But it certainly complicates our understanding of conventional forms of participation in the policy-making process.

Juridicalization is here to stay, certainly in the Federal Republic and probably in the United States. Despite the somewhat different thrusts of judicial involvement in educational policy (a "litigational" approach in the latter, in contrast to a "constitutional" orientation in the former), the courts in both countries have shown that they do have an important, positive role to play, in my judgment. Given the highly complex nature of societal interactions, the tasks of the judiciary now come to include the clarification and specification of the duties, rights and responsibilities that various elements of the academic task environment have with respect to each other and in relation to society as a whole. I hold this development to be an acceptable one only to the extent that all societal institutions are guaranteed "equal protection before the law." In light of my own political values, I am opposed to the
process of politicized legalism if it means that some institutions have only duties (universities), some have responsibilities (welfare agencies) and others have only ipso facto rights (corporations).

I fear, however, that the disadvantages of juridicalization may far outweigh the advantages in dealing with political - constitutional conflicts. The contradiction between society's need to respond flexibly to constantly changing socio-economic conditions and the generally irreversible nature of judicial pronouncements is an "antagonistic" one. The carved-in-stone character of Constitutional Court verdicts, especially, assuages the uncertainties of decision-makers engaged in one social conflict, at the same time it generates new ones. Even if US Supreme Court justices do not exhibit quite the same predilection for irreversible decisions as their German counterparts, they are far from enthusiastic about overturning prior rulings should the opportunity arise. Policy-makers, on the other hand, may not be entirely satisfied with the results of litigation, yet they are nonetheless glad to be relieved of many a difficult political decision in this manner. A bad compromise is often better than no compromise at all for politicians and administrators whose attentions must quickly be diverted to other pressing social problems.

While legal judgments ensure conflicting parties a degree of consensus (contrived though it may be) in the short run, they impair the universities' ability to manage their own interdependencies more creatively in the long run. Each court ruling presents university administrators, legislators and bureaucrats with a clear outline of constraints, but blocks off categories of alternatives which might be utilized later on to handle institutional contingencies. Justices are by definition legal experts. Their lack of substantive expertise promises to become a serious impediment in developing their capacity for proposing remedies that are as educationally effective as they are legally rational. 64 The deus ex judicia, upon whose counsel citizens' and institutions'
futures now more heavily depend, occasionally bears a rather suspicious family resemblance to the Wizard of Oz.

Naturally some supreme courts are more likely to speak ex cathedra regarding educational matters than are others. I am arguing that the juridicalization of academic reform issues is a function of a lack of political consensus, and that educational systems in other Western nations may be able to rely on alternative vehicles for conflict resolution. The approaches based on constitutional rights in the United States and the Federal Republic are the product of very diverse legal traditions; the tendency of the courts to involve themselves in specific educational conflicts at all levels of schooling evinces a growing number of parallels nonetheless. (Lately the judicial branches in the US and the FRG have fielded questions of sex education and have even seen fit to define the concept of a "disabled learner," entitling children to participate in state compensatory programs). The juridicalization of university reform in the German Federal Republic may be special insofar as it is among the first system to have been so thoroughly infused with formal legal values. It will certainly not be the last.

Jesse Choper has set forth four proposals delegating and delimiting the jurisdictional powers of the US Supreme Court, which in effect would lead to greater specialization in constitutional matters along German lines. He emphasizes that

the federal judiciary's ability to persuade the populace and public leaders that it is right and they are wrong is determined by the number and frequency of its attempts to do so, the felt importance of the policies it disapproves, and the perceived substantive correctness of its decisions.

Theodore Lowi pursues a similar argument, maintaining that "juridical democracy" should be used to reimpose the basic "separation of powers"
doctrine by putting a halt to the delegation of discretionary powers from the legislature to the administrative agencies of the Positive State. 66

I agree with the basic prognosis that the persuasive powers of the judicial branch are finite and that the justices must be very careful not to exhaust their "capital" which derives from the "politically neutral" character of their pronouncements in earlier times. I am much less optimistic, however, about the judiciary's prospects for extracting itself from the complex web of intergovernmental relations which it has helped to spin, and which in turn precludes its ability to reestablish the separation of powers among legislative, political and administrative actors. It is indeed the responsibility of the federal judiciary to monitor the performance of the other branches. As the scope of state activity expands, the courts witness an increase in the number and range of social institutions which fall under their purview, including universities. Along with David Horowitz, I can offer a caveat, but no way out of the juridicalization dilemma:

Over the long run, augmenting judicial capacity may erode the distinctive contribution the courts make to the social order. The danger is that courts, in developing a capacity to improve on the work of other institutions, may become altogether too much like them. 67
Footnotes


8. A recent exposé of the Supreme Court has laid to rest many of the myths of "judicial neutrality." See Bob Woodward and Scott Armstrong, The Brethren - Inside the Supreme Court; New York: Simon and Schuster, 1979.


16. Ibid., p. 192.

17. Ibid., p. 192.


19. Ibid., p. 16.


27. Dahl, ibid., pp. 63-64.


34. For a specialized treatment of the German legal system, see Donald P. Kommers, Judicial Politics in West Germany, Beverly Hills: Sage Publications, 1975.


43. Lawrence H. Tribe, "Perspectives on Bakke: Equal Protection, Procedural
Fairness, or Structural Justice?" Harvard Law Review, Vol. 92, No. 4,

44. Regents of the University of California v. Bakke, 98 S.Ct. 2733 (1978),
reported in Harry T. Edwards and Virginia Davis Nordin, Higher Education
and the Law, Cambridge, MA: Institute for Educational Management, Harvard,
1979, pp. 496, 498, 501.

45. Ibid., p. 498.

46. A June 25, 1979 article in the Chronicle of Higher Education reported that
726 institutions of higher learning have already conducted elections in
order to designate a bargaining agent for university faculties. The
American Association of University Professors successfully campaigned at
59 institutions; the American Federation of Teachers represents 222, the
National Education Association negotiates for 294 institutions. AAUP-AFT
coalitions bargain at 14, AAUP-NEA at 10 facilities and independent agents
were elected at 50 other schools. At the time, 77 institutions had rejected
collective bargaining altogether. Edwards and Nordin, Higher Education and
the Law, 1980 Cumulative Supplement, ibid., p. 33.

47. Ibid., p. 36.
48. Ibid., p. 37.
49. Ibid., p. 40.
50. Ibid., p. 39.

51. Between 1973 and 1975, the state-level "constitutional protection office"
in Berlin, for example, had received requests for 24,000 "inquiries" and
was able to provide "evidence" in 1,800 cases, 93 of which actually resulted
in individuals being barred from public employment. Peter Frisch,

52. Cited in Horst Säcker, Das Bundesverfassungsgericht. Oberster Hüter der
Verfassung. Sonderauflage für die Landeszentrale für politische

53. Keishian v. Board of Regents of the University of the State of New York,

54. Ibid., p. 185.
55. Ibid., p. 184.


57. "Academic Freedom and Federal Regulation of University Hiring," Harvard Law


64. The Supreme Court practice of ruling on the basis of "legislative intent" seemed to offer too many loopholes, so justices have in fact begun to require empirical and scientific evidence, on topics as diverse as truck widths and "mudflap" specifications. Where they decide to recruit their experts will, in all probability have an effect on the findings.

