

*Observing an Emergent Judicial System:
Estonian “Reactions” to Problems in American Jurisprudence*

Nancy Maveety

Judicial scholars recognize that judicial legitimacy, independence, and democratic consolidation are objectives for both emerged and emergent judicial institutions and that different constitutional traditions affect judicial institutions' accomplishment of these objectives. One way to highlight the significant effect of constitutional traditions is to examine how an emergent judicial institution reacts to the challenges faced by an emerged judicial institution. An inference that can be drawn from this examination is that the response of a mature judiciary—like that of the United States—to the challenges of articulating the judicial role and maintaining judicial legitimacy is not necessarily a useful lesson for an emergent judiciary—like that of Estonia—in addressing similar challenges.

European reactions to American legal policy making, including those with respect to the recent presidential election case of *Bush v. Gore* (531 U.S. 98, 2000), have not shied from thinly disguised derision for Americans as “victims of law:” citizens whose legal culture is typified by a dysfunctional dependency on courts to manage a broad range of social relations.¹ The “waiting period” of the Bush-Gore election episode—the wait for the Supreme Court to resolve the constitutional debate over the fair counting of ballots in Florida that would determine the election's outcome—was seen as typifying this dependency. The reaction of the Estonian press to the U.S. Supreme Court's involvement in the presidential election dispute, which culminated in the December 12, 2000, ruling ending the Florida recount, conformed to this pattern, in many ways. Yet, a surface overview of the minimal analytical attention the Estonian media paid to the case, and to the questions it raised regarding judicial independence and legitimacy, belies the more interesting inquiry into the relevance of the actions and policy statements of a consolidated judicial institution for a consolidating one.

NANCY MAVEETY is Associate Professor of Political Science at Tulane University. An earlier version of this article was presented at the annual meeting of the Law and Society Association in Budapest, Hungary, in July 2001. That version was prepared at the University of Tartu, Tartu, Estonia, during a Fulbright Lectureship in spring 2001. I would like to thank the law students of my judicial process course in Tartu, Kadri Brugel, Andreas Kangur, and Kristi Polluveer, for their assistance with translation of Estonian press materials and for their contributions to discussion of the topic, and Taavi Annus of the Department of Public Administration at the University of Tartu for his assistance with case materials and for his comments on the matter of *Bush v. Gore* in the Estonian context.

This framework of inquiry is used in this article to examine the following interrelated issues: what sort of coverage did the decision in *Bush v. Gore* receive in the Baltic state of Estonia and what are the implications of that coverage or lack thereof? Are there other indicators of Estonian reaction to American judicial politics and policymaking that help shed light on the articulation of the judicial role and the process of establishing legitimacy of the judicial institution in consolidating democracies like Estonia's? Examination of these interrelated issues, at this point, provides no more than unsystematic observations that form the bases for some general reflections on why emergent judicial systems might attend to the problems of "developed" judicial systems, and *vice versa*.

Who Cares?: Estonia and *Bush v. Gore*

While the *Bush v. Gore* contest and ultimate decision fueled a veritable industry of commentary in the U.S., it is well to ask, as an empirical matter, whether the political nature and implications of the legal controversy inspired similar sustained interest by foreign observers. A sample of such interest is presented by the January 2001 summary issue of *World Press Review*, one which assembled reporting and editorializing of non-American journalists on the case and its political context. This sample included no representatives from the Estonian or the Baltic press, and from media in any EU applicant states. Yet, the reaction of such sources is intriguing to consider because the former Soviet satellites and occupied nations of Eastern Europe constitute an interesting confluence of judicial factors: formerly state-socialist entities in which the judiciary served as an arm of party hegemony and control with little connection to impartial dispute resolution, post-communist states currently struggling with the consolidation of their own independent judiciaries under conditions of rapid and perhaps imperfect democratization and neo-liberal market reform, and eager applicants for accession to the European Union (EU) even as such accession means conformity with European law and accommodation of the increasing judicialization of EU legal policy making (Stone Sweet 2000).²

Estonia, a small and unimportant nation for most of America's punditocracy, represents an interesting example to test the reception market for *Bush v. Gore*. With its breakaway from the Soviet Union and its re-assertion of independence in 1991, Estonia has undergone rapid but incomplete progress toward establishing accountable political institutions and constitutional legitimacy (Ostrow 2000, 195) and toward demonstrating satisfaction of EU accession standards. Its constitution, which provides for a parliamentary system of government, was adopted by popular referendum on June 28,

1992, and its experience with the institutional process of constitutional review dates from 1993. Yet, its judiciary, advanced by some measures in comparison with the judicial institutions of other post-communist states (Herron and Randazzo 2000; Randazzo and Herron 2000), is still in the process of building legitimacy, institutionalizing judicial procedures and a jurisprudential tradition, and training legal personnel. The “crisis” arguably represented by the legal machinations of and Supreme Court policy making in the *Bush v. Gore* litigation would seem to be of moment for such a consolidating democracy and for the role orientation questions of its judges.

The Estonian reaction to this American court case proved somewhat thinner than expected for this researcher. Both the Baltic News Service (a wire service) and the Estonian daily *Postimees* attended to the “melodrama” provided by the decision, but they provided little in the way of analytical commentary. Perhaps this is to be expected: the U.S. is far away and the meetings of ministers in Brussels consume more attention in the Baltic press than domestic policy developments in America. But there was some discussion of the decision, and its implications. The Voice of America correspondent based in New York and writing for *Postimees*, Neeme Raud, devoted several pages in the December 14, 2000, issue to the legal and political implications of the recount battle. Nevertheless, this Estonian journalist, as well as other wire service colleagues and daily correspondents, generally devoted less attention to the Court’s part in the drama than to the implications of the close and contested election for American voters’ indifference as to the power of their individual votes or to the light the election shed on America’s national “identity problem.” By this latter phrase, Mart Helme, former Estonian ambassador to the Russian federation and editorial writer for Estonia’s second largest daily newspaper *Eesti Päevaleht*, meant that the politics of the election dispute revealed the deep division between “the two Americas” exemplified by the polarized worldviews of American Democrats and Republicans and their supporters. This same editorial writer—while also consumed by the rather ancillary matter of Bill Clinton’s reaction to the electoral crisis—did offer this prognosis on *Bush v. Gore*: the nature of the U.S. Supreme Court’s involvement in the issue had tainted a “cornerstone of the Anglo-American civilization—an independent judiciary” whose “involve[ment] in the process paradoxically only deteriorate[s] the situation” (*Eesti Päevaleht*, December 13, 2000). Despite such impassioned observations, once the Supreme Court had made its decision, Estonian newspapers concentrated more on the implications of the composition of the new president’s cabinet for U.S. policy toward the Baltic states.

In conversation, silences are as important as what is said; meaning also is given by what is not said. Two observations in this vein are offered on

the Estonian press coverage of *Bush v. Gore*. First, there was an utter lack of parallel drawn between the U.S. situation and an Estonian one. As one Estonian attorney commented, what would happen in a similar instance in an Estonian national election; what would happen to contested ballots in such circumstances?³ That this issue was never raised is telling both of the straightened journalistic protocols of the Estonian media and of the particularistic and somewhat limited way in which the Estonian press reacted to the implications of the American situation. Of course, this silence might simply reflect a very basic and undeniable difference between continental and Anglo-American juridical traditions: in the former, precedent and precedent-based reasoning by courts carry less (or little) weight in terms of jurisprudential significance. Estonia, clearly shaped more by (and identifying with) this continental tradition, would not tend to generate commentaries of comparison between U.S. Supreme Court decisions interpreting electoral law and hypothetically in-common questions of Estonian constitutional law and its construction by Estonian judges. The tendency, then, would be to dismiss the legal policy statements of the American court as utterly beside-the-point for the Estonian case despite the fact that the judicial role in furthering the legitimacy and popular accountability of electoral institutions is an important part of its function in democratic consolidation (Linz and Stepan 1996) and whether that judiciary is working from a civil or common law legal tradition.

Second, and perhaps more interesting from a judicial process perspective, the coverage of the decision and its political context did not serve as an occasion to extrapolate from the seeming ideological nature of American judging in this instance and to fashion a commentary on the political views of high court justices in Estonia. No comparison was drawn between the partisan nature of the U.S. judicial decision and the potential or reality of such partisan or ideological decision making by Estonian jurists despite the fact that Estonian legal academics grumble that this latter matter is one of pertinence that is seldom openly discussed. In sum, judicial legitimacy issues remained buried in the subtext of reporting on the political struggle and the somewhat “shameful phenomenon” on display in the world’s most powerful (and frequently most sanctimonious, though the Estonian journalists were kind enough not to point this out) democracy (e.g., the commentary of Heiki Suurkask, *Postimees*, December 14, 2000).

Perhaps they were moved more by rhetoric than by argument but Estonian law students responded much more sympathetically to the dissenting opinions—particularly to Stevens’ cautionary words regarding judicial legitimacy—than to the *per curiam* opinion or the concurrence in the *Bush v. Gore* decision. (They were echoed in this outlook by the coverage of the

case by the Finnish *Helsingin Sanomat* of December 12, 2000.) This was the case notwithstanding the fact that the majority and the concurring justices strove to ground their statements in precedential reasoning and close, textual analysis of relevant statutory law—interpretive approaches generally consonant with Estonian jurisprudential traditions (such as they are, to date) and legal training. The implications of the decision for Estonian constitutional law and judicial politics that were *not* discussed in the press were issues which some in the Estonian legal community found pertinent, important, and thought-provoking.

Nevertheless, in the end, *Bush v. Gore* created but a tiny ripple in Estonian media, failing to provide the opportunity for serious commentary on the parallels between American and Estonian judicial legitimacy. This is hardly too surprising because the wrenching and polarizing debate over the case and controversy in the American media initially did little to further an intelligent discussion of the ways in which courts can confer legitimacy on their decisions or the multiple ways in which they can sabotage that legitimacy.⁴ How the U.S. Supreme Court's subsequent actions may (or may not) restore (or reshore) that legitimacy represents an occasion whereby consolidating judiciaries, beset by their own legitimization concerns, might well observe the old adage, “do as I say, not as I do.”

The Judicial Role in Democratic Society: Enno Tammer Meets Larry Flynt

American jurisprudential traditions and American judicial history provide many lessons as to what to do—and what not to do—in establishing judicial legitimacy and articulating the jurist's role in interpreting legal and constitutional language (see Schwartz 2000, 4-5). While political scientists are accused (at times, by each other) of undermining these lessons through their insistence on the importance of attitudes and other political variables in shaping judicial decisions, the political science of law and courts has performed the essential service of turning a critical eye to legal formalism and to the cult of the robe. This same accomplishment is only imperfectly absorbed in legal cultures still struggling to enshrine basic fundamentals such as judicial independence and the importance of reasoned argument in grounding the former value. If the Estonian (non)reaction to *Bush v. Gore* provides a cautionary proverb about a road-not-taken-towards-comparative-assessment-of-judicial-legitimacy-concerns, Estonian jurists' consideration of problems familiar in American constitutional law provide an interesting avenue for reflection on what the U.S. Supreme Court in fact *has* to teach consolidating judicial institutions about the judicial role in a democracy.

This raises the more general question of the extent to which constitutional solutions can be “borrowed” from one system to another (Jackson and Tushnet 1999, 169).

Hustler Magazine v. Falwell

Most American court scholars are familiar with the 1988 decision by the Rehnquist Court in the case of *Hustler Magazine v. Falwell* (485 U.S. 46, 1988). Indeed, for many court commentators who now vilify the court’s conservative wing for their (alleged) naked political opportunism in *Bush v. Gore*, the *Hustler* case represents the right-of-center justices’ finest hour as political libertarians. *Hustler Magazine v. Falwell* pitted two cultural icons, pornographic “journalist” Larry Flynt and moral majoritarian the Reverend Jerry Falwell, in a cosmic struggle of somewhat burlesque proportions over First Amendment freedoms of speech and press. Flynt’s press outlet, *Hustler Magazine*, had engaged in the fairly tasteless satire of Falwell’s moral piety using the frame of a then-familiar liquor commercial print-ad. The broad parody of the satire included unflattering reference to Falwell’s fictional but purportedly wistful remembrance of drunken sexual congress with his mother in an outhouse while both were under the influence of the liquor whose celebrity “first times” spots were being parodied by Flynt’s magazine.

Despite the fact that Flynt’s ad parody included the explicit statement that it was fiction and not to be taken seriously, his magazine’s action sparked outrage and a libel suit from Reverend Falwell. As a public figure, Falwell’s requirement to prove malicious intent in the presentation of a falsehood as truth (or with “reckless disregard of whether it was false or not”—the “actual malice” standard of *New York Times v. Sullivan*, 376 U.S. 254, 1964) hindered his libel claim in lower federal court, but the jury awarded him monetary damages in his suit for intentional infliction of emotional distress. The constitutional question before the Supreme Court was whether the First Amendment places limitations on a state’s ability to protect its citizens from intentional infliction of emotional distress resulting from such public utterances as those in *Hustler Magazine*.

In finding in favor of the speech and press liberties of the magazine and its publisher by an 8-0 vote (Kennedy did not participate), the Court addressed the importance of furthering robust public debate on political affairs. While it is a dubious matter whether *Hustler* is generally a significant part of such debate (as the majority opinion noted rather wryly), the Court observed that despite the caustic nature of political caricature and satire, its presence plays a prominent and salient role in public debate and criticism of

the actions of public officials. The Court demurred from attempting to define satire so “outrageous” that it exceeded the boundaries of productive and valuable social and political discourse, commenting that “the art of the cartoonist is often not reasoned and even-handed, but slashing and one-sided. . . . [I]t is a weapon of attack, of scorn and ridicule” (485 U.S. at 51). With respect to Falwell’s urging the justices to devise a definition of satiric expression that was beyond the pale, the Court offered this: “‘Outrageousness’ in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression” (485 U.S. at 52).

In spite of any lingering distaste for standing on the battlements with the likes of Larry Flynt, most commentators on the *Hustler* decision lauded it as a vital statement on behalf of individual freedom of expression and judicial protection of constitutional liberties. That the parameters of First Amendment liberty and of judicial solicitude for it were generally unquestioned by court scholars provides an interesting vehicle through which to compare the marketplace-of-ideas principle espoused in *Hustler Magazine v. Falwell* with that articulated about similar issues in the 1997 decision by the Criminal Chamber of the Estonian Supreme Court, *In the Matter of Enno Tammer* (August 26, 1997, #3-1-1-80-97).

In the Matter of Enno Tammer

The *Tammer* case concerned a situation superficially but still remarkably similar to that presented by the *Hustler* case: a public figure objected to a journalist’s scurrilous characterization of her using certain colorful metaphorical expressions which, while factually accurate in describing her behavior, are nonetheless considered degrading and insulting in Estonian.⁵ While the politician-public figure in question was not the target of a fictionalized ad parody, she complained that her honor had been degraded and her dignity besmirched by the colorfully figurative nature of the words used to describe her. Article 130 of the Estonian Criminal Code provides for criminal liability if the honor and dignity of another person is degraded in an indecent manner; there is no exception for statements made about public figures under Estonian law, and the truth of even insulting words is not considered a defense under the statute. Tammer’s appeal raised the question of whether his conviction under Article 130 was in conflict with the principle of freedom of speech and press in section 45 of the Estonian Constitution and Article 10 of the European Convention of Human Rights. The appeal was heard by the Criminal Chamber of the Estonian Supreme Court,

upon reference to it by the lower court, the Criminal Board of the District Court of Tallinn.⁶

Unlike Larry Flynt, Enno Tammer was not successful in convincing the high court as to the importance of robust and spirited debate over the actions of public figures. Instead, the Estonian justices voiced the view that “there is a general view in the theory of law as to [sic] there may be no absolute and unrestricted fundamental rights.” Noting that section 11 of the Estonian Constitution limits the restriction of any rights and freedom only as pursuant to the Constitution itself and as necessary in a democratic society,⁷ the three-judge panel⁸ argued that “the public has the right to expect that the press describes the life of public figures more thoroughly than the life of ordinary people, but the public has no right to expect that the honor of public figures be degraded, *especially in the press and in an indecent manner*” [emphasis added]. In direct contrast to the reaction of the U.S. Supreme Court to Falwell’s “outrageousness” exception to the First Amendment protection of satire, the Estonian court considered the problem of offense sympathetically. “Indecent manner as a legal category in the meaning of sec. 130,” the opinion declared, “does not include only the use of vulgar or indecent words, but also the use of negative and defamatory figurative expressions. *Indecent manner can also be nonlinguistic—e.g. a caricature*” [emphasis added]. It was the value of human dignity—words the opinion used again and again⁹—which the Estonian Supreme Court elevated over the value of press or expressive freedom in this instance. And in clear contradistinction to *Hustler*, it singled out (albeit in *dicta*) pictorial caricature as just the type of offensive expression beyond the pale of constitutionally protected speech.

Judicial Role in Constitutional Democracy

It is this aforementioned point of contrast between the two court decisions that is most intriguing to consider with respect to the judicial role in constitutional democracy. Civility of public debate—and of civil society generally—is perhaps the price of a ruling like *Hustler*, but censorship and a chilling effect on public debate is arguably the cost paid for a policy decision like *Tammer*. Yet, there is a footnote to the *Tammer* litigation: the Estonian Supreme Court’s ruling was appealed to the European Court of Human Rights (ECHR) in Strasbourg. The European court, in its opinion of February 6, 2001, upheld the Estonian decision, noting “that it is primarily the task of national authorities to apply and interpret domestic law” (#41205/98, p. 9). Like the Estonian judges, the European judges found that the insulting expressions the journalist chose to formulate his criticism of the political figure’s actions were not justified “by considerations of public

concern [nor] bore on a matter of general importance” or “of value to the general public” (p. 15). The ECHR concluded that the Estonian court had not failed to properly balance the various interests in the case, and that the interference with the right to freedom of expression in the situation could reasonably be considered necessary in a democratic society for the protection of the reputation or right of others under EU law (pp. 15-16).

Given this endorsement from the only constitutional court that ultimately matters in the Estonian context,¹⁰ one might well ask of what relevance is a parallel, but conflicting, ruling by the U.S. Supreme Court? The Estonian press’s lack of attention to the tribulations of the U.S. Supreme Court in and as a result of *Bush v. Gore* is mirrored by the Estonian Supreme Court’s lack of regard for how certain issues that come to it are dealt with in American constitutional law and jurisprudence. America’s consolidated judiciary and its practices, it would seem, are not automatically of import for this consolidating one and its democratic social context. Not only is the U.S. Supreme Court’s legal and jurisprudential context radically different from the Estonian court’s, but the political context of the American court—particularly the specific separation-of-powers context of the Court in the recent election dispute—raised questions of *maintaining* an already-established judicial independence and political insularity for judges. For Estonia, and for the Estonian Supreme Court, the more relevant question is still one of institutional vision: the degree to which the Estonian constitution makers intended to *design the potential* for a powerful and independent judiciary (Smithey and Ishiyama 2000, 165-167). The contexts, and problems within them, are distinct, one which reminds us of the distance between institutional design and institutional reality. One explanation for the creation of powerful constitutional courts in post-communist constitutional structures was their suggestion and support by foreign constitutional consultants (Smithey and Ishiyama 2000, 180; Holmes 1993). One assumes that both the givers and the recipients of such advice understand the different stages and respective challenges in designing, establishing, and maintaining independent judicial power. These stages and challenges are interrelated—a familiar message exported to the newly-reconstituted Eastern European states but one that also is suitable for domestic consumption.

There is thus a point of commonality to note with respect to recent episodes of decision making by the American and Estonian courts. As Stone Sweet comments at the conclusion of *Governing With Judges: Constitutional Politics in Europe*, “context conditions the judges’ work in powerful ways, all the more so if the judges hope to fashion a *compelling judgment that both resolves the case at hand and provides normative guidance for the future*” (Stone Sweet 2000, 203 [emphasis added]). The Estonian Supreme

Court, arguably, absorbed this lesson with its holding in *Tammer*, interpreting the Estonian constitution to mean that a journalistic feeding-frenzy was not conducive to the creation and maintenance of a civil society; the U.S. Supreme Court in its decision in *Bush v. Gore*, on the other hand, may have forgotten this same lesson or, worse, willfully disregarded it.

Leaving aside the morality play that the *Bush v. Gore* litigation presents, a less inflammatory interpretation of the disparity between the legal policies endorsed by the two courts in the free speech cases of *Hustler* and *Tammer* would simply be this: specific constitutional norms may play out quite differently, depending on the cultural assumptions that qualify a norm's interpretation (Jackson and Tushnet 1999, 170). If one of the virtues of the comparative perspective on constitutional law is to provide critical standards for reviewing the work of the U.S. Supreme Court,¹¹ then viewing the Court's behavior in the 2000 presidential election controversy and the issue it decided in *Hustler* through Estonian eyes may offer a useful, and refreshing, critical position.

Conclusion: Courts and the Transition to Constitutional Democracy

One hears much in casual conversation in the Baltics, in reports circulated by the English-language weekly *The Baltic Times*, and in papers at regional academic conferences,¹² of the creeping and possibly pernicious influence of "Americanization." By this is meant not simply a McDonald's-on-every-block or even aggressive neo-liberal economic policies, but it means the attitude as to how life should be lived and whether rampant individualism is the appropriate goal for every free society. *Hustler* and *Tammer* balance freedoms and interests in different ways, and *Bush v. Gore* illustrates that free and democratic electoral procedures can look (or be) very unfree and undemocratic in a certain light and under certain circumstances. The Court which to many Americans distinguished itself in *Hustler* did not seem so laudable an institution in the context of the 2000 presidential election dispute (but see Kritzer (2001) for a discussion of the impact of the election decision on public attitudes toward the Court). This former jurisprudential triumph has not been emulated in Estonian (and European) law. Rather, it seems to have been studiously avoided. Likewise, the U.S. Supreme Court's alleged debacle in *Bush v. Gore* did not occasion outrage or even much thoughtful commentary in the press of one prospective EU member state—even while its judiciary is currently challenged to implement basic and fundamental forms of fair procedure.¹³ Perhaps bewilderment over the U.S. Supreme Court's self-assumed plight clouded the analytical lens of Estonian journalists, or perhaps the geographic separation of the Estonian

Supreme Court from the rest of the government (the national judiciary is housed in Tartu while the offices of the presidency and parliament are located in the capital of Tallinn) creates a symbolic and factual distance from daily political affairs and partisan wrangling for the Estonian judicial branch (see Schwartz 2000, 239), one that makes the political situation of the two court systems seem utterly unparallel from the Estonian perspective.

What the above observations may tell us is only what we knew all along: judicial legitimacy, independence, and consolidation as part of a democratic system is a work in progress for emerged and emergent judicial institutions. What role courts should play in their democratic societies is very much a matter of what constitutional traditions permit, foster, and forgive.

NOTES

¹Certain European correspondents saved their most pointed invective in coverage of the election controversy for the U.S. “penal state[s]” “inflict[ion of] lifetime disenfranchisement on former convicts.” Such commentary occurred in both *The Times* of London and *Le Monde* from November 14, 2000. It is interesting that this dismissive attitude toward the judicialization of American life coexists with the post-World War II “ascendancy of the judiciary,” in Europe, as well as in Asia, Africa, Latin America, and the United States (see Schwartz 2000, 247-248).

²And accommodation to the supremacy of EU law and governing institutions. Indeed, a topic of recent debate (January 12, 2000) in the Estonian Riigikogu’s [parliamentary] Constitutional Commission was whether the constitution’s first article regarding state sovereignty would retain its meaning once Estonia enters the EU. The chair of the Commission raised the question of amending the constitution, citing a number of countries that have included an explicit constitutional delegation of some state authority to the EU (CW 2000, 16). Article 123 of the Estonian Constitution does say that in cases where national legislation conflicts with international treaties duly ratified by parliament, the provisions of the international treaty shall apply; however, the Constitutional Review Chamber of the Estonian Supreme Court arguably overlooked this article recently, in deciding a 1998 case which privileged the constitution’s Estonian language requirements as applied to candidacy for public office. Subsequent amendments to Estonia’s Language Law have since been made subsequent to further EU pressure. See Grosskopf and Maveety (2001).

³Estonia’s president, a largely ceremonial office (though one whose powers, particularly those relating to national defense, are a current subject of debate, (CW 2000, 16)), is elected by the parliament (Riigikogu) by a 2/3 majority. However, if it fails in three attempts, the decision is handed to an expanded electoral body which includes representatives from Estonia’s 247 city and town councils (CW 1999, 20). Close elections have occurred, such as the 1996 election of President Lennart Meri, which required the convening of an electoral college. The issue of contested ballots in Estonian elections

has received minimal attention, with local councils and officials left to interpret what is a validly cast vote.

⁴There have been exceptions to this dearth in intelligent discussion; time has modulated the tone of more recent reflections. A well-chosen collection of editorial commentary contemporaneous with the Court's decision is found in Dionne and Kristol (2001). A systematic study of on-going public reaction to the election crisis is Caldeira, Gibson, and Spence's legitimacy survey of public opinion, "The Legitimacy of Legal and Political Institutions in a Divided Polity: A Longitudinal Analysis of the Consequences of the U.S. Presidential Election, 2001-2005" (<http://artsci.wustl.edu/~legit/index.html>). The first major theoretical musings on the political significance of the case are two books (Sunstein and Epstein 2001; Gillman 2001) published by the University of Chicago Press.

⁵Tammer, the journalist in question, had written an Estonian daily *Postimees* piece which recounted the contents of an interview he had conducted with another journalist, Ulo Russak, in which Russak discussed and commented on the actions of a former Minister of the Interior assistant who remained politically active in the Center Party. This assistant, Vilja Laanaru Savisaar, had had an extra-marital affair with and subsequently married (after his divorce) Estonian politician and later Interior Minister Edgar Savisaar. After giving birth to Savisaar's child, she continued to work for him, and she subsequently entrusted the child to her parents' care. Savisaar was later forced to resign in the wake of a secret taping scandal in the Ministry; Laanaru Savisaar issued a statement claiming full responsibility for the secret recordings made of office conversations with the Minister.

For her Fanny Fox-mixed-with-Rosemary-Woods past, Russak branded her in the interview with Tammer as "*abielulohkuja*" and "*rongaema*"—literally translated (since no one-word equivalents exist in English) as "one who breaks up another's marriage" and "an unfit and careless mother who deserts her children" (a *rongaema* is actually a type of blackbird). It was the metaphoric language of these unbecoming characterizations—not their factual applicability to her actions—to which Ms. Laanaru Savisaar objected.

⁶Estonian judicial procedures include a process by which the Supreme Court sits in separate subject-matter panels, including a constitutional review panel (not convened here), and it only rarely hears cases *en banc*. Cases are referred to the Court through three channels of judicial appeal: the president, the legal chancellor, and the lower courts. No provision for direct appeal by individual applicants currently exists although this reform to the appeals process was included in the 1998 draft law, and it has been a topic of study by a governmental commission charged with considering possible amendments to the constitution.

Interestingly, though the president and the legal chancellor—an independent officer charged with monitoring all legal acts for their conformity with the constitution (Article 139)—initially took the lead in submitting constitutional cases to the Supreme Court, the lower courts began to be more active in using their review prerogatives in 1995, and they moved ahead of the other two institutions by 1997 (Pettai 2000, 13).

⁷The court also noted that section 10(2) of the European Convention on Human Rights allows that the freedom of speech be restricted "with a view to protecting the morale, reputation and rights of other people."

⁸Because the partisan affiliations of Estonian judges are not a matter of public record and because decisions of the court's panels are unsigned (though the panel

membership is known, and dissents are individually-filed), there is no way to project whether an attitudinal model of judicial decision-making (or partisan-level analysis) might explain the judicial vote supporting Centrist Laanaru Savisaar in *Tammer*.

⁹Without noting the source of the value of human dignity. But the Estonian court's view is clearly grounded in European jurisprudence: compare its statement with this declaration by the Federal Constitutional Court of Germany in 1958:

[The Basic Law] on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights. This value system, *which centers on the dignity of the human personality* developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law. (Jackson and Tushnet 1999, 1405 [emphasis added])

Coincidentally, the “sphere of law” with which the German court was concerned was defamation and the protection of free expression.

¹⁰As a signatory to the European Convention on Human Rights, Estonia voluntarily binds itself to the decisions of the European Court of Human Rights. Unless and until Estonia gains accession to the European Union, the directives of the other major European “constitutional” court, the European Court of Justice, are more signals than commands. But see Grosskopf and Maveety (2001).

Interestingly, the Estonian Supreme Court's interpretation of EU law in the *Tammer* case departs from judicial behavior another observer characterizes as “overlook[ing] the relevance of certain international covenants binding on Estonia and instead privileg[ing] narrow domestic political imperatives” (Pettau 2000, 37). While the context of his observation is rather different—the Constitutional Review Chamber's disregard for individual rights protections in Article 25 of the International Covenant on Civil and Political Rights (ratified by Estonia in 1991) in favor of promotion of the Estonian Constitution's official-national-language requirements—it remains the case that Article 123 of the Estonian Constitution states that in cases where national legislation conflicts with international treaties duly ratified by parliament, the provisions of the national treaty shall apply. Of course, there was no such conflict in *Tammer*.

¹¹Scheppele (2001) also finds election 2000 a time “when Americans can learn something from looking abroad” (p. 1368). She applies this maxim to contrast the emergence of an explicitly substantive rule of law constitutional principle in the majority of “post-horror” constitutions and jurisprudential practices with the violation of the rule of law in the legal processes surrounding the election 2000 controversy.

¹²Two examples will suffice, from the program of the Fifth International Tartu Conference on North American Studies, held at the University of Tartu, May 7-9, 2001, Krista Vogelberg's “How Much Convergence? American Impact on Estonia and Why We Don't Talk About It,” and Janis Taurens' “Perception of the U.S. in Latvia, 1981-2001.”

¹³As Schwartz (2000, 232) observes, “a little noticed but vitally important series of decisions to which virtually all [Eastern European] courts have contributed are those insisting on various forms of fair procedure—the right to be heard, to present one's position, to fight an adverse decision by some government body. . . .” In doing so, courts—in Poland, Hungary, and Bulgaria, for example—have relied on fundamental notions of fairness drawn from unwritten rule-of-law principles or nonspecific references in their constitutions.

The Estonian court is no exception in its attention to such questions; however, a recent ruling on due process questions was somewhat parsimonious in its view of citizen complaint procedures to fine-claims issued by administrative authorities. This February 2001 decision by the Supreme Court's constitutional chamber, which concerned the right to a fair and impartial hearing over the matter of parking tickets issued by the city of Tallinn, rejected the complaint's constitutional challenges "bearing in mind the specific character and large number of the offenses" and "the public interest to effectively conduct a large number of proceedings concerning [such frequent] offenses" (#3-4-1-4-01). While guarantees of procedural nicety for alleged violators of parking regulations is hardly a human rights issue of major proportion, the expediency-laced message of the court's ruling is troubling from the perspective of judicial protection for due process, generally. It also seems to deviate from the general trend in post-communist judicial policy making noted by Schwartz.

REFERENCES

- CW. 2000. Constitution Watch: Estonia. *East European Constitutional Review* 9:1-2:16-17.
- CW. 1999. Constitution Watch: Estonia. *East European Constitutional Review* 8:4:19-20.
- Dionne, E.J., Jr., and William Kristol. 2001. *Bush v. Gore: The Court Cases and the Commentary*. Washington, DC: The Brookings Institution.
- Gillman, Howard. 2001. *The Votes that Counted*. Chicago: University of Chicago Press.
- Grosskopf, Anke, and Nancy Maveety. 2001. International Pressure and Adaptation: The Evolution of an Estonian Jurisprudence of Minority Rights. Paper presented at the Annual meeting of the American Political Science Association, San Francisco, August.
- Herron, Erik S., and Kirk A. Randazzo. 2000. Judicial Activism in Post-Communist States: Evidence from Estonia, Lithuania and Russia. Paper presented at the Annual meeting of the Midwest Political Science Association, Chicago, April.
- Holmes, Steven. 1993. Back to the Drawing Board: An Argument for Constitutional Postponement in Eastern Europe. *East European Constitutional Review* 2:21.
- Jackson, Vicki C., and Tushnet, Mark, eds. 1999. *Comparative Constitutional Law*. New York: Foundation Press.
- Kritzer, Herbert M. 2001. Into the Electoral Waters: the Impact of *Bush v. Gore* on Public Perceptions and Knowledge of the Supreme Court. Paper presented at the Annual meeting of the Law and Society Association, Budapest, Hungary, July 5-8.
- Linz, Juan J., and Alfred Stepan. 1996. *Problems of Democratic Transition and Consolidation*. Baltimore: The Johns Hopkins University Press.
- Ostrow, Joel M. 2000. *Comparing Post-Soviet Legislatures*. Columbus: The Ohio State University Press.
- Pettai, Vello. 2000. Estonia's Constitutional Review Mechanisms: A Guarantor of Democratic Consolidation? Working Papers, Robert Schuman Center, European University Institute (RSC 2000/59).
- Randazzo, Kirk A., and Erik S. Herron. 2000. Judicial Independence in Eastern Europe and the Former Soviet Union. Paper presented at the annual meeting of the Southern Political Science Association, Atlanta, November.

- Scheppele, Kim Lane. 2001. When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law. *University of Pennsylvania Law Review* 2001:1361-1437.
- Schwartz, Herman. 2000. *The Struggle for Constitutional Justice in Post-Communist Europe*. Chicago: University of Chicago Press.
- Smithey, Shannon, and John Ishiyama. 2000. Judicial Choices: Designing Courts in Post-Communist Politics. *Communist and Post-Communist Studies* 33:163-182.
- Stone Sweet, Alec. 2000. *Governing With Judges: Constitutional Politics in Europe*. New York: Oxford University Press.
- Sunstein, Cass, and Richard Epstein. 2001. *The Vote: Bush, Gore and the Supreme Court*. Chicago: University of Chicago Press.

