



# Dædalus

Journal of the American Academy of Arts & Sciences

Fall 2008

on  
judicial  
independence

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EQUAL JUSTICE UNDER LAW



*Inside front cover:* U.S. Supreme Court in Washington, D.C. (1935). See Sandra Day O'Connor on *Fair & independent courts*, pages 8–10: “Judges must be loyal to the law alone. Their duty to the people is to make unpopular decisions when the law demands it. If we fail to communicate this vital message, judicial independence will perish, and with it the assurance that each citizen will enjoy the full protections of our Constitution and the rule of law.”  
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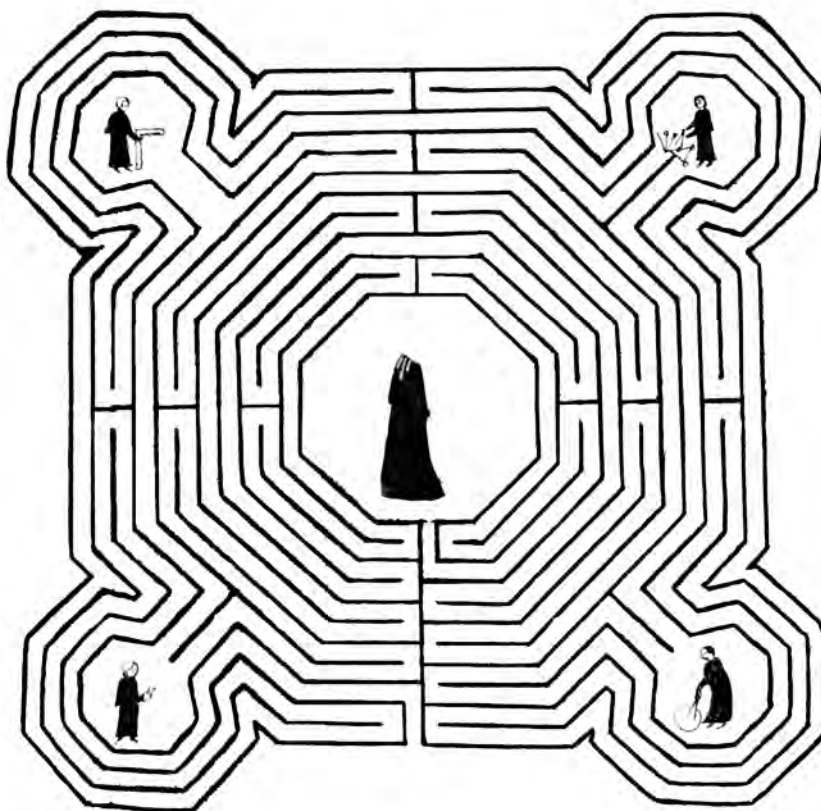
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# Dædalus

Journal of the American Academy of Arts & Sciences



The pavement labyrinth once in the nave of Reims Cathedral (1240), in a drawing, with figures of the architects, by Jacques Cellier (c. 1550 – 1620)

Dædalus was founded in 1955 and established as a quarterly in 1958. The journal's namesake was renowned in ancient Greece as an inventor, scientist, and unriddler of riddles. Its emblem, a maze seen from above, symbolizes the aspiration of its founders to "lift each of us above his cell in the labyrinth of learning in order that he may see the entire structure as if from above, where each separate part loses its comfortable separateness."

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*Interdependent federal judiciaries: puzzling about  
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# Linda Greenhouse

## *Independence: why & from what?*

“Judicial independence” is a concept easier to salute reflexively than to grasp fully. The *why* of judicial independence is simple enough: the rule of law clearly cannot survive alongside the “telephone justice” that Justice Stephen Breyer describes in his essay, justice administered by a party boss instructing a captive judge how to rule. The tens of thousands of Pakistanis who participated last June in what they called “the long march,” demanding the reinstatement of sixty judges dismissed by President Pervez Musharraf, offered powerful testimony to the importance that people around the world attach to the impartial and fearless administration of justice.<sup>1</sup>

But the question of what, exactly, we expect our judges to be independent *from*

is a bit more elusive. Independence from overt political pressure and retaliatory dismissal, of course. But not from any and all constraints: we expect judges to be guided and constrained by precedent, by respect for the roles of the co-equal branches of government, and by the norm of impartiality, the “detachment” that Justice Felix Frankfurter called the “essential quality” of the judicial function.<sup>2</sup> Judicial independence and judicial accountability, as Stephen B. Burbank points out in this issue, are two sides of the same coin.

Nor do we expect judges to be spared public criticism. Judicial independence “is not immunity from criticism,” Chief Justice John G. Roberts, Jr. observed at the first of three Georgetown University Law Center conferences convened by his retired colleague, Justice Sandra Day O’Connor, to examine the current state of the judiciary.<sup>3</sup> As Viet D. Dinh notes in his essay in this issue, more than one

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1 Candace Rondeaux and Shaiq Hussain, “Pakistanis March for Restoration of Judges,” *The Washington Post*, June 14, 2008.

2 *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J. concurring).

3 Remarks of Chief Justice Roberts, September 28, 2006; at [www.law.georgetown.edu](http://www.law.georgetown.edu)

million Americans signed petitions calling for the impeachment of Chief Justice Earl Warren, yet the Supreme Court and the country survived. And some of the more stinging critiques of the performance of the Supreme Court today, after all, come from within the Court itself, from the pens of dissenting justices.<sup>4</sup>

Nonetheless, the line between informed criticism and verbal assault is a fine one. Justice O'Connor asserts in her essay that the line is being crossed more often today than in the past, with worrisome consequences. While federal judges are protected by life tenure, several contributors to this issue point to the acute problems posed at the state level by unrestrained election campaigns and their "judicial ad wars," described here by Bert Brandenburg and Roy A. Schotland.<sup>5</sup>

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.edu/news/documents/CoJo92906-roberts.pdf.

4 For example, Justice Scalia's dissenting opinion in *Boumediene v. Bush*, decided June 12, 2008. Justice Scalia warned that the majority opinion, granting habeas corpus rights to the Guantánamo detainees, would have "disastrous consequences." He added, "It will almost certainly cause more Americans to be killed." 553 U.S. \_\_\_\_ (slip op., Scalia dissent at 2).

5 It is difficult to overstate the challenges facing state-court judges who must raise money and run in ideologically charged retention campaigns simply to keep their seats. Chief Justice Ronald M. George of California is considered likely to face a difficult retention campaign when his term expires in 2010 due to his authorship of the 2008 California Supreme Court decision recognizing same-sex marriage. See Paul Elias, "Top California Judge Faces Backlash Over Gay Marriage," Associated Press, August 12, 2008.

The president of the American Bar Association, H. Thomas Wells, Jr., announced upon

People can and do differ over the sources and nature of threats to judicial independence. In his second "Year-End Report on the Federal Judiciary," delivered on January 1, 2007, Chief Justice Roberts described the stagnation in judicial pay as a "constitutional crisis that threatens to undermine the strength and independence of the federal judiciary,"<sup>6</sup> a statement that drew considerable attention but has so far failed to achieve the desired effect of a substantial pay raise for federal judges. In her essay in this issue, Judith Resnik describes the disparity of views on the impact of vigorous questioning of judicial nominees at Senate confirmation hearings. Are the probing questions themselves a potential threat to judicial independence, or do they serve instead to illuminate the current range of accepted and contested legal principles?

Despite these disagreements, most people would probably agree with Justice Ruth Bader Ginsburg, who told a Canadian audience in 2007, "Judicial independence is vulnerable to assault; it can be shattered if the society law exists to serve does not take care to as-

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taking office in August 2008 that safeguarding the independence of the state judiciary would be a priority for the 413,000-member organization during the coming year. The bar association is convening a summit on "fair and impartial state courts" in Charlotte, North Carolina, in May 2009, which Justice O'Connor will chair. See "Contentious Federal Judicial Nominations, State Court Elections Focus of Next ABA President," archived press release dated August 11, 2008, [www.abanet.org/media/](http://www.abanet.org/media/).

6 John G. Roberts, Jr., "2006 Year-End Report on the Federal Judiciary" (2007); at [www.supremecourtus.gov/publicinfo/year-end/2006-year-endreport.pdf](http://www.supremecourtus.gov/publicinfo/year-end/2006-year-endreport.pdf).



sure its preservation.”<sup>7</sup> Judicial independence, in other words, is neither an end in itself nor an abstraction to be taken for granted.

This issue of *Dædalus* draws from two complementary and ongoing efforts to examine judicial independence today, to define it in its historic context, assess its current function, and address the perception that it is currently under attack. The American Academy of Arts and Sciences, under the auspices of its project on The Independence of the Judiciary, has held several meetings that have brought together scholars, public officials, and state and federal judges. Essays in this issue by Senator Charles Schumer, Judge J. Harvie Wilkinson III, Chief Justices Ronald M. George and Margaret H. Marshall, and Professors Judith Resnik and Robert C. Post are drawn from those sessions.

The Sandra Day O’Connor Project on the State of the Judiciary at Georgetown University Law Center held conferences in 2006, 2007, and 2008 that drew the attendance of six sitting Supreme Court justices and hundreds of scholars, business and political leaders, and representatives of the nonprofit sector. The essays by Justices O’Connor and Breyer are drawn from the first two of those conferences, as are those by Chief Justice Ruth V. McGregor; Professor Kathleen Hall Jamieson and Bruce W. Hardy; and Professors Dinh, Burbank, Brandenburg, Schotland, Vicki C. Jackson, and Charles Gardner Geyh.

The result is a collection of diverse perspectives from those who study the question of judicial independence as scholars and those who live it as judges,

a contribution to a conversation as old as the republic and as current as today’s news.

The novel collaboration that resulted in this issue of *Dædalus* was the joint idea of Leslie Berlowitz, Chief Executive Officer of the American Academy of Arts and Sciences, and Dean T. Alexander Aleinikoff of the Georgetown University Law Center. At Georgetown, the work of editing the essays was performed by Meryl Justin Chertoff, director of the Sandra Day O’Connor Project on the State of the Judiciary, and two members of her staff, Abigail B. Taylor, the 2007–2008 Sandra Day O’Connor Project Fellow, and Samantha Yarbrough, the Lefkowitz Independent Judiciary Fellow. At the Academy, the editors were Phyllis S. Bendell, managing editor of *Dædalus* and director of publications, and Micah J. Buis, assistant editor.

*Independence: why & from what?*

7 Ruth Bader Ginsburg, “Remarks on Judicial Independence,” U.S.-Canadian Conference on Judicial Excellence, September 27, 2007.

# Sandra Day O'Connor

## *Fair & independent courts*

More than one hundred years ago Roscoe Pound delivered an important address to the American Bar Association called “The Causes of Popular Dissatisfaction with the Administration of Justice.”<sup>1</sup> In that address, Pound, who would later become dean of the Harvard Law School, warned his audience, “[W]e must not be deceived . . . into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for the law, which exists in the United States today.”<sup>2</sup> I believe that Pound’s words apply with at least equal force today as they did in 1906.

The United States has promoted the notion of the rule of law as a means for helping to ensure peace and democracy around the world. In our work with emerging nations and with the breakup

of the Soviet Union, we have continually advocated the importance of the rule of law. One necessary component to achieving the rule of law, of course, is a fair, impartial, and independent judiciary. The United States’s federal judiciary has been the envy of the world for many years, as other nations have attempted to emulate our federal court system. Given the intense criticism that is consistently leveled at so-called activist judges who supposedly legislate from the bench, however, I fear that some of that admiration for our judicial system could end up eroding.

Although this point need not be dwelled upon at length, it is important to point out that the rule of law is not a novel concept. Indeed, the notion stretches back many centuries. Judith Shklar has noted that Aristotle believed the Rule of Law to be “nothing less than the rule of reason,” balanced by considerations of equity so that just results may

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*Sandra Day O'Connor, a Fellow of the American Academy since 2007, served as an Associate Justice of the U.S. Supreme Court from 1981 until her retirement in 2006. The first woman to serve on the Court, she is the author of “The Majesty of the Law: Reflections of a Supreme Court Justice” (with Craig Joyce, 2003) and “Lazy B: Growing Up on a Cattle Ranch in the American Southwest” (with H. Alan Day, 2002).*

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1 This essay is taken from remarks given at Fair and Independent Courts: A Conference on the State of the Judiciary, convened by the Georgetown University Law Center in September 2006.

2 Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice,” *American Bar Association Reporter* 29 (1906): 395.

be achieved in particular cases.<sup>3</sup> More recently, our late Chief Justice Rehnquist indicated that “the creation of an independent constitutional court, with the authority to declare unconstitutional laws passed by the state or federal legislatures is probably the most significant single contribution the United States has made to the art of government.”<sup>4</sup>

Like the rule of law, directing anger toward judges has, regrettably, also enjoyed a long tradition in our nation. President Thomas Jefferson was a spirited antagonist of judges appointed by the Federalists. And, more recently, President Franklin Roosevelt took issue with the decisions of the Supreme Court when it invalidated some of his New Deal legislation. And I well remember as a youngster driving around the highways near the Lazy B Ranch and seeing signs calling for the impeachment of Earl Warren. So, while scorn for some judges is not an altogether new phenomenon, I do think that the breadth of the dissatisfaction currently being expressed – not only by public officials, but also in public opinion polls – indicates that the level of anger directed toward judges today exceeds that of the past.

On the federal level, Congress has engaged in recent efforts to police the judiciary. Seeking to constrain the legal sources that are available to judges, some members of Congress have advocated measures that would forbid judges from citing foreign law when they are interpreting the Constitution. The House of Representatives passed legislation in

2006 that would prohibit the Supreme Court from considering whether the Pledge of Allegiance’s inclusion of the words “under God” violates the First Amendment. And there have been troubling calls during the nomination and confirmation processes to require a nominee to state how he would rule on particular cases.

On the state level, there has historically been far less political controversy in the selection of judges due, in part, to a perception that state judges do not often make decisions on politically controversial issues. This perception is changing, however, and powerful interest groups have begun to pour money – and politics – into the state judicial selection process to influence decisions on issues ranging from gay rights to medical malpractice. These efforts are particularly troubling in states that elect their judges through partisan judicial elections, where candidates for judge have become highly dependent on funding from politically motivated special interest groups to get elected. In 2007, the final four candidates running for open seats on the Supreme Court of Pennsylvania raised more than \$5.4 million combined, shattering fund-raising records in Pennsylvania judicial elections. Since 2006, high-court campaigns in Georgia, Kentucky, Oregon, and Washington also set fund-raising records. Since 2004, nine other states broke records for high-court election spending.

There is seemingly no ceiling for fund-raising in state judicial races, as campaign spending by advocates on one side of any sensitive cultural or economic debate spurs increases in spending by the other. The weapons in this judicial “arms race” are campaign advertisements bankrolled by these groups. Advertisements in judicial races too often send an unmistakable message to our

3 Judith N. Shklar, *Political Thought and Political Thinkers* (Chicago: University of Chicago Press, 1998), 21 – 23.

4 William H. Rehnquist, Symposium on Judicial Independence, University of Richmond T. C. Williams School of Law, March 21, 2003.

citizens that a judicial candidate should be elected *because* she will rule based on her biases, instead of suggesting voters should trust her to be impartial enough to set those biases aside.

As a result, voters in states that elect judges are more cynical about the courts, more likely to believe that judges are “legislating from the bench,” and less likely to believe that judges are fair and impartial. This distrust has the perverse effect of making voters more inclined to elect their judges through partisan processes. If you do not believe that judges are or can be fair and impartial, you will want to select judges by a process that you believe will be most likely to result in a judge who is partial to you and unfair in your favor.

Alexander Hamilton once observed that “a steady, upright, and impartial administration of the laws is essential, because no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today.”<sup>5</sup> Hamilton’s point is a profound one because he understood that judicial independence was not designed only – or even principally – for the benefit of judges. Rather, judicial independence is for the benefit of all of society, protecting the exalted and the humble alike. Preserving an independent judiciary is the work of an educated citizenry, and we must be ever-vigilant against those who would strong-arm judges into adopting their preferred policies. Judges must be loyal to the law alone. Their duty to the people is to make unpopular decisions when the law demands it. If we fail to communicate this vital message,

judicial independence will perish, and with it the assurance that each citizen will enjoy the full protections of our Constitution and the rule of law.

5 Alexander Hamilton, The Federalist No. 78, in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York: New American Library, 1961), 470.



# Kathleen Hall Jamieson & Bruce W. Hardy

## *Will ignorance & partisan election of judges undermine public trust in the judiciary?*

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations

of particular rights or privileges would amount to nothing.

– Alexander Hamilton, *The Federalist* No. 78

The judicial branch enjoys higher levels of public trust than the other branches of the U.S. government. “[The Supreme] Court is an especially well regarded institution, and over and over again, polls show that Americans have more confidence in the Court than either the president or the Congress,” write political scientists Gregory A. Caldeira and Kevin T. McGuire. “In evaluating the Court’s authority, most Americans think that it is exercising about the right amount of political power, and more often than not they believe that the Court is doing a good job.”<sup>1</sup> Consistent with this notion, an August 2007 survey by the Annenberg Public Policy Center of the University of Pennsylvania<sup>2</sup> found that 66 percent of Americans trust the Supreme Court a

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*Bruce W. Hardy is a senior research analyst at the Annenberg Public Policy Center and a doctoral student at the Annenberg School for Communication at the University of Pennsylvania.*

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1 Gregory A. Caldeira and Kevin T. McGuire, “What Americans Know About The Courts and Why It Matters,” in *The Judicial Branch*, ed. Kermit L. Hall and Kevin T. McGuire (New York: Oxford University Press, 2005), 264.

2 The 2007 Annenberg Public Policy Center Judicial Survey was prepared by Princeton Survey Research Associates International for the An-

“great deal” or “fair amount” to operate in the best interests of the American people. Sixty percent of Americans trust the courts in their own state a “great deal” or “fair amount,” while only 41 percent of Americans polled trust the president a “great deal” or “fair amount” to operate in the best interests of the American people – the same level of confidence that Americans have in Congress (41 percent).

However, lurking in the data from the same survey are two factors with the capacity to undermine confidence in the judiciary and, with it, public willingness to protect the prerogatives of judges and the courts. Ignorance about the role and function of judges and the courts and partisan campaigning for judicial office each independently threaten public trust in the judiciary. As trust declines, willingness to constrain the judiciary rises.

A first predictor of diminished trust in courts is ignorance about the judiciary. In August 2007, one out of three (32 percent) in a national random sample of the adult population of the United States believes U.S. Supreme Court rulings can be appealed, and under a third (31 percent) knows that the rulings are final. Fewer than one in two (45 percent) believes that a 5 – 4 decision by the Supreme Court produces the same outcome as a 9 – 0 ruling. When the Court divides so closely, 14 percent believes the decision is referred to Congress for reconsideration, 7 percent thinks it is

sent back to the federal court of appeals, and a third (34 percent) doesn’t know. Forty percent thinks the Constitution permits the president to ignore a Supreme Court ruling if he believes that doing so will protect the country from harm. A little less than half of Americans (48 percent) knows Supreme Court justices usually give written reasons behind their rulings, 9 percent said justices did not give written rulings, and 44 percent did not know. In 2007, only 15 percent of Americans could correctly name John Roberts as chief justice of the United States. The survey did find that a majority of Americans knew something about some judges: two-thirds of Americans (66 percent) could name at least one of the judges on the Fox television show *American Idol*.

With ignorance about the judiciary comes an increased disposition to believe that judges are biased and a reduced tendency to hold that the courts act in the public interest. Those who adopt these views are more willing to allow Congress or state legislatures to impeach judges who make unpopular rulings; they are more likely to believe that when Congress disagrees with the Supreme Court’s decisions, Congress should pass legislation saying the Supreme Court can no longer rule on that issue or topic; and they are more likely to believe that if the Supreme Court “started making a lot of rulings that most Americans disagreed with it might be better to do away with the Court altogether.” This finding is consistent with a conclusion drawn by Jamieson and Michael Hennessy from the 2006 Annenberg Judicial Survey. Using structural equation modeling, they found:

[I]ncreases in respondents’ knowledge decrease[d] their belief that judges are motivated by self-interest, that they fa-

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nenberg Foundation Trust at Sunnylands. A total of 1,514 adults 18 and older were surveyed by phone from August 8, 2007, to September 2, 2007. The survey has a margin of error =  $\pm 3\%$  for results based on full sample. Additional data from this and other surveys can be found at [www.annenbergpublicpolicycenter.org](http://www.annenbergpublicpolicycenter.org).

vor the more affluent members of society, that courts have too much power, and that judges are too affected by the political process. These four types of perceived judicial bias – self-interest, economic bias, power imbalance, political influence – ... are all *negatively* associated with trust in courts. ... [A] drop in trust and an increase in the four judicial biases predict the beliefs that the president *can ignore Supreme Court decisions* and that judges *should be impeached* on the basis of unpopular rulings.<sup>3</sup>

A second factor predicting reduced trust and willingness to circumscribe judicial prerogatives is living in a state that elects judges through a partisan process.<sup>4</sup> By one estimate, 89 percent of state judges are selected by some form of election.<sup>5</sup> In some of these in-

3 Kathleen Hall Jamieson and Michael Hennessey, “Public Understanding of and Support for the Courts: Survey Results,” *The Georgetown Law Journal* 95 (2007): 902; original emphases.

4 Sixteen states elect at least some judges in an environment in which there are strong partisan cues, including, in some states, party identification on the ballot. They are Alabama, Illinois, Indiana, Kansas, Louisiana, Maryland\*, Michigan, Missouri, New Mexico, New York, North Carolina\*\*, Ohio\*\*\*, Pennsylvania, Tennessee, Texas, and West Virginia.

\*Maryland trial judges run in contestable non-partisan general elections but are nominated in party primaries. A candidate in Maryland can cross-file in both the Democratic and Republican primaries.

\*\*Although North Carolina moved away from an explicitly partisan ballot in 2002 some partisan campaigning has continued.

\*\*\*In Ohio, candidates appear on the ballot without party affiliation, but their selection and campaigns are otherwise partisan.

5 Roy A. Schotland, “New Challenges to States’ Judicial Selection,” *The Georgetown Law Journal* 95 (2007): 1092.

stances, judicial campaigns have become high-stakes contests, bringing in large sums of money and attack-driven advertising campaigns. In 2006, a record \$16 million was spent on advertising in state supreme court races in ten states.<sup>6</sup> Professor Anthony Champagne’s study of judicial advertisements found that ads commonly attacked opponents, portraying them as “corrupted by campaign contributions, the tools of special interests, and soft on crime.”<sup>7</sup>

In recent years, the number of judicial candidates airing attack ads has increased. “In Alabama, Georgia, and Nevada candidates hurled insults and accusations that would have been unbecoming even in congressional campaigns, much less in campaigns by individuals whose judicial temperament is an important qualification for office.”<sup>8</sup> A report by Justice at Stake found that in 2004 nine out of ten negative judicial ads were sponsored by political parties and special interest groups. By 2006 the candidates were sponsoring 60 percent of negative advertisements.<sup>9</sup>

While the level of attack could be a cause for concern in its own right, the existence of serious distortions in these ads is troubling as well. In a 2006 report by the Annenberg Public Policy Center’s FactCheck.org, Deputy Director Viveca Novak provided illustrations of such distortions:

6 James Sample, Lauren Jones, and Rachel Weiss, *The New Politics of Judicial Elections 2006* (Washington, D.C.: Justice at Stake, 2007); www.justiceatstake.org.

7 Anthony Champagne, “Television Ads in Judicial Campaigns,” *Indiana Law Review* 35 (2001–2002): 670.

8 Sample, Jones, and Weiss, *The New Politics of Judicial Elections 2006*, 8.

9 Ibid.

*Will ignorance & partisan election of judges undermine public trust in the judiciary?*

One ad, for example, falsely implied that a candidate for the Kentucky Supreme Court paroled a rapist who 12 hours later raped a 14-year-old and forced her mother to watch. Another portrayed a Georgia candidate as soft on crime, even though independent reviews found that she usually sided with the prosecutor and was tough on defendants in death penalty cases. And a third invited viewers to believe, wrongly, that an Alabama candidate got nearly \$1 million from oil companies to run negative ads against his opponent.<sup>10</sup>

The public finds some of the practices associated with judicial elections worrisome. Even though a solid majority (64 percent) endorses judicial election, the 2007 Annenberg survey found that 69 percent thinks that raising money for campaigns affects a judge's rulings to a moderate or great extent. These results mirror what Charles Gardner Geyh, professor of law and director of the American Judicature Society's Center for Judicial Independence, calls the *Axioms of 80*:

Eighty percent of the public favors electing their judges; eighty percent of the electorate does not vote in judicial races; eighty percent is unable to identify the candidates for judicial office; and eighty percent believes that when judges are elected, they are subject to influence from the campaign contributors who made the judges' election possible.<sup>11</sup>

10 Viveca Novak, "Judicial Campaigns: Beginning to Look a Lot Like Congress: Would-be judges employ big bucks, TV ads and questionable attacks," November 20, 2006; available at [http://www.factcheck.org/judicial-campaigns/judicial\\_campaigns\\_beginning\\_to\\_look\\_a\\_lot.html](http://www.factcheck.org/judicial-campaigns/judicial_campaigns_beginning_to_look_a_lot.html).

11 Charles Gardner Geyh, "Why Judicial Elections Stink," *The Ohio State Law Journal* 64 (2003): 47–79.

The Annenberg survey also revealed that the public does not clearly distinguish the role of judge from that of legislator. Seventy-seven percent holds that, to a great or moderate extent, state judges should represent the views of the people of their state. Ninety-four percent believes that this is a responsibility of the state legislators. Three-fourths (75 percent) reports that representing the views of the people of their state applies to both state judges and state legislators. When asked whose job it is to interpret the laws of the state and the state constitution, 91 percent said state judges, while 87 percent reported that, to a great or moderate extent, it is the state legislators' responsibility. Fifty-six percent of Americans believe that expressing their views on controversial issues is a responsibility that applies to judges, while 75 percent see this as a responsibility of state legislators.

Multivariate statistical analyses of the 2007 Annenberg survey show that Americans who live in states that hold partisan judicial elections are more distrustful of the courts than Americans who live in states that do not hold such elections.<sup>12</sup> Specifically, after controlling for gender, age, race, education, political party identification, and news media use, living in a state that holds partisan elections<sup>13</sup> is negatively related to trusting the courts in that state to operate in the best interest of the American people. Participants living in a state that holds partisan elections are also more likely to believe that courts "legislate from the

12 For a detailed description of the multivariate analyses, see the Annenberg Public Policy Center report "Partisan Judicial Elections Foster Cynicism and Distrust"; available at <http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=241>.

13 See Geyh, "Why Judicial Elections Stink."



bench” and less likely to believe that the courts are “fair and impartial” in their rulings and “interpret the law.” Finally, those living in a state that holds partisan elections were more likely to agree that “judges are just politicians in robes.” All of these results are statistically significant and hold in the presence of control variables. Taken together they suggest that partisan judicial elections have the capacity to erode public trust in the judicial branch.

This erosion of trust is significantly related to support for punitive policy decisions. Controlling for gender, age, race, education, news media use, and knowledge about the courts, analyses of the 2007 Annenberg survey show that a lack of trust in the courts is significantly related to willingness to: (1) allow Congress or state legislatures to impeach judges; (2) afford Congress the ability to pass legislation saying the Supreme Court can no longer rule on an issue or topic if Congress disagrees with the Court’s rulings; and (3) believe that it might be better to do away with the Supreme Court altogether if it “started making a lot of unpopular rulings.”

Responding to concerns such as these, retired associate justice of the U.S. Supreme Court, Sandra Day O’Connor, recommends<sup>14</sup> that states do away with judicial elections and adopt a merit-selection process in which an independent committee of citizens recommends qualified candidates for appointment by the governor. States that currently elect judges are unlikely to forgo that practice, however. The August 2007 Annenberg survey found nearly two-thirds (64 percent) favor the direct election of judges, while a merit-selection process is fa-

vored by less than one-third (31 percent).

Justice O’Connor’s second suggestion focuses on implementing civic education programs about the judiciary, a recommendation consistent with our findings that knowledge about the courts increases trust in this branch of government. Analyses of the 2007 survey suggest that civic education can increase knowledge about the courts. Fifty-three percent of those surveyed reported taking a class in civics or a course that focused on the U.S. Constitution or the judicial system. Controlling for gender, age, race, education, and news media use, these individuals were significantly more knowledgeable about the courts than those who had never taken such a class. As our analysis predicts, increased knowledge predicted increased trust in the judiciary. And, as outlined above, with increased trust comes a heightened disposition to protect judges from impeachment for unpopular rulings and the judiciary from stripped jurisdiction. Trust also increased the belief that the Supreme Court should be retained in the face of unpopular rulings.

*Will ignorance & partisan election of judges undermine public trust in the judiciary?*

14 Sandra Day O’Connor, “Justice for Sale,” *Wall Street Journal*, November 15, 2007.

# Stephen B. Burbank

## *Judicial independence, judicial accountability & interbranch relations*

Recent years have witnessed attacks on the courts, federal and state, that have been notable for both their frequency and their stridency.<sup>1</sup> Many of these attacks have been part of strategies calculated to create and sustain an impression of judges that makes courts fodder for electoral politics. The strategies reflect a theory of judicial agency, the idea that judges are a means to an end, and that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit to them in advance. The architects of these strategies seek to create the impression not only that courts are part of the political system, but also that courts and the judges who sit on the bench are part of ordinary politics.

At the federal level, pursuit of these strategies prompts politicians to curry favor by promising to hold courts and judges accountable: staffing courts (or ensuring that they are staffed) with reliable judges, monitoring them through “oversight,” and, when they stray, reining them in through the instruments of

politics – ordinary or extraordinary (impeachment). At both the federal and state levels, these strategies enable interest groups to wield influence by framing judicial selection in terms of the supposed causal influence of a vote in favor of or against a judicial nominee or candidate on results in high salience cases, such as those involving the death penalty or abortion.

What is the precise nature and extent of the threat to judicial independence? How, in the conduct of interbranch relations, should the judiciary respond to the impulses and incentives, both legitimate and illegitimate, that have brought us to this unhappy point in interbranch relations? Successful interbranch relations require the institutional judiciary to avoid the attitudes and techniques of contemporary politics, but not to avoid politics altogether.<sup>2</sup> In essence, judicial accountability, properly conceived, plays

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1 A modified version of this essay first appeared in *The Georgetown Law Journal* 95 (4) (2007). Arlin Adams, Barry Friedman, Charles Geyh, Robert Katzmann, and Carolyn King provided helpful comments on a draft.

2 This essay draws on (without frequent citation to) my interdisciplinary work exploring judicial independence and judicial accountability and the implications for the future of theo-

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a critical role in judicial independence, and politics of a certain sort must play a role in the work of courts and the judiciary if they are to continue to serve as the guardians of our fundamental rights and liberties.

Judicial independence is merely the other side of the coin from judicial accountability. The two are not at war with each other but rather are complements; neither is an end in itself but rather a means to an end (or variety of ends); the relevant ends relate not primarily to individual judicial performance but rather to the performance of courts and court systems; and there is no one ideal mix of independence and accountability, but rather the right mix depends upon the goals of those responsible for institutional architecture with respect to a particular court or court system.<sup>3</sup>

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retical and empirical research concerning interest groups and public knowledge of and attitudes toward courts. For a more comprehensive presentation of some of my arguments, see Stephen B. Burbank and Barry Friedman, eds., *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks, Calif.: Sage Publications, 2002); Stephen B. Burbank, "Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices," *University of Pennsylvania Law Review* 154 (2006): 1511; Stephen B. Burbank, "The Architecture of Judicial Independence," *Southern California Law Review* 72 (1999): 315; Stephen B. Burbank, "What Do We Mean by 'Judicial Independence'?" *Ohio State Law Journal* 64 (2003): 323. I also draw on work in which I have explored the writings and career of a distinguished federal judge. See Stephen B. Burbank, "Judicial Accountability to the Past, Present, and Future: Precedent, Politics, and Power," *University of Arkansas at Little Rock Law Review* 28 (2005): 19.

3 Burbank and Friedman, "Reconsidering Judicial Independence," in *Judicial Independence at the Crossroads*, ed. Burbank and Friedman,

From these premises I derive several additional propositions that are helpful in considering the role of interbranch relations in maintaining a desired balance between judicial accountability and judicial independence. First, judicial accountability has as many roles to play as does judicial independence. Judicial accountability should serve to moderate what would otherwise be unacceptable decisional independence, that is, decisions unchecked by law as generally understood or, in the case of inferior courts, by the prospect or reality of appellate review. In addition, judicial accountability should moderate other judicial behavior that is hostile to or inconsistent with the ability of courts to achieve the role or roles envisioned for them in the particular polity, including, for example (in the case of federal judges), "conduct prejudicial to the effective and expeditious administration of the business of the courts."<sup>4</sup>

Second, just as independence must be conceived in relation to other actors – independence from whom or what? – so must accountability: accountability to whom or what? Judicial accountability should run to the public, including litigants whose disputes courts resolve, and who therefore have a legitimate interest in court proceedings that are open to the public and in judicial decisions that are accessible. Judicial accountability should also run to the people's representatives, who appropriate the funds for the judiciary and whose laws the courts interpret and apply, and who therefore have a legitimate interest in ensuring that the judiciary has been

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9; Burbank, "What Do We Mean by 'Judicial Independence'?"

4 See 28 U.S.C., section 351(a) (Supp. III 2003).

responsible in spending the allotted funds and that, as interpreted and applied by the courts, public laws are functioning as intended. Finally, judicial accountability should run to courts and the judiciary as an institution, both because individual judicial independence exists primarily for the benefit of institutional independence and because appropriate intrabranch accountability is essential if potentially inappropriate interbranch accountability is to be avoided. In each instance, proper regard for the other side of the coin – judicial independence – requires that accountability not entail influence that is deemed to be undue.

Recent scholarship has brought sharply into focus the fact that formal protections of federal judicial independence pale in comparison with formal powers that might be deployed to control the federal courts and make them “accountable.” This scholarship, in particular the work of Charles Geyh,<sup>5</sup> has thus made it clear that the traditional equilibrium between the federal judiciary and the other branches owes its existence primarily to informal norms and customs. One such norm or custom is to eschew use of the impeachment process in response to judicial decisions that are unpopular. Another is to eschew court-packing as a means of ensuring decisions in accord with the preferences of the dominant coalition.

We know, however, that customs, norms, and traditions can change. Neither the fact that periods of friction between the judiciary and the other branches have recurred throughout our history, nor the fact that they have

been succeeded by a return to normalcy, is adequate grounds for confidence that the pattern will hold. The dynamics leading to our current malaise suggest that there is reason to fear a tipping point, a point of no return to the traditional equilibrium in interbranch relations affecting the judiciary.

The current poisonous condition of interbranch relations affecting the judiciary is remarkably dangerous because of the debased notion of judicial accountability implicit in a view of judges as policy agents: if judges are policy agents, they should be “accountable” for their decisions in individual cases, or at least those involving issues of high salience. If those on the front lines of the current war on courts (that is, some interest groups, politicians, and journalists) succeeded in persuading the public to view judges as policy agents and courts as part of ordinary politics, it might be impossible to return to the status quo ante. For the informal norms and customs enabling the equilibrium we have enjoyed were forged and maintained in the shadow of the public’s support of the courts, support that was offered even in the face of unpopular decisions.

Richard Arnold was a distinguished appellate judge and master of federal judicial administration in part because he was also a thoughtful student of politics in general and of judicial politics. Judge Arnold did not often write about judicial independence, but his extrajudicial writings are filled with expressions of concern about judicial accountability. That is not because he thought that everyone understands and accepts judicial independence, defined as a judge might like to define it. He knew that if the federal judiciary is in fact, or is perceived to be, insufficiently accountable it will lose the independence necessary for

5 See Charles Gardner Geyh, *When Courts & Congress Collide: The Struggle for Control of America’s Judicial System* (Ann Arbor: University of Michigan Press, 2006).



it to accomplish, if not what the architects of our system intended, what developing American constitutionalism requires.

Judge Arnold often stated that the judiciary must have the “continuing consent of the governed”<sup>6</sup> in order to do its job. He also believed that, once a court has observed all jurisdictional limitations on its power, it must render and accept responsibility for a decision, however unpopular, that the law requires. From this perspective, his repeated expressions of concern about judicial accountability represented underlying anxiety about the prospects of judicial independence – namely, the continuing willingness or ability of the courts not, as he put it, to “pull [their] punches”<sup>7</sup> when the law requires an unpopular decision.

We know that public support for the Supreme Court as an institution, irrespective of the decisions it was rendering in the 1930s – what political scientists call “diffuse support” and what Judge Arnold gets at in referring to the “continuing consent of the governed” – was consequential in the failure of President Roosevelt’s court-packing plan.<sup>8</sup> There is reason to believe, however, that this deep well of diffuse support, which federal courts have traditionally been able to draw upon when making unpopular decisions, might not

survive the excrescences of contemporary politics regarding the judiciary, were they to persist.

Research suggests that diffuse support is linked to legitimizing messages about the courts, such as those that highlight the role of precedent and the rule-of-law ideal,<sup>9</sup> and that it is adversely affected by delegitimizing messages, such as those that frame court decisions simply in terms of results – the message that *Bush v. Gore* decided the 2000 election, for example.<sup>10</sup> Another body of research indicates that interest groups are here to stay in the politics of judicial selection, federal and state; that they thrive on conflict as a means to energize both their patrons and their members; and that they employ a variety of tactics to convey their messages, from lobbying to direct communications with their members to indirect communications through the mass media.<sup>11</sup> Although some groups pitch their messages concerning judicial selection in terms of factors not directly related to results in cases (such as partisan-

6 See, for example, Richard S. Arnold, “Judges and the Public,” *Litigation* (Summer 1983): 5.

7 *Ibid.*, 59.

8 See Barry Cushman, “Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s,” *Buffalo Law Review* 50 (2002): 67–74; Barry Friedman, “Mediated Popular Constitutionalism,” *Michigan Law Review* 101 (2003): 2611. On diffuse support, see David Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965), 273.

9 See James L. Gibson et al., “On the Legitimacy of National High Courts,” *American Political Science Review* 92 (1998): 343; see also James L. Gibson et al., “The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?” *British Journal of Political Science* 33 (2003): 553–556, which discusses the framing effect whereby unpopular decisions are cushioned by general views about the Court and the rule of law.

10 See Stephen P. Nicholson and Robert M. Howard, “Framing Support for the Supreme Court in the Aftermath of *Bush v. Gore*,” *Journal of Politics* 65 (2003): 676.

11 See generally Jack L. Walker, Jr., *Mobilizing Interest Groups in America: Patrons, Professions, and Social Movements* (Ann Arbor: University of Michigan Press, 1991); Gregory A. Caldeira et al., “The Lobbying Activities of Organized Interests in Federal Judicial Nominations,” *Journal of Politics* 62 (2000): 51–52.

ship or general ideology), others frame choices precisely in terms of the supposed effect of individual selection decisions on precedent concerning highly salient issues – the assertion that voting for this nominee will lead to the overruling of *Roe v. Wade*, for example.<sup>12</sup>

Given what we know about public attitudes toward courts and about the incentives and tactics of the interest groups that are involved in judicial selection, there is reason to fear that the distinction between support for courts irrespective of the decisions they make (“diffuse support”) and support depending on those decisions (“specific support”) will disappear. If that were to occur, the people would ask of the judiciary not “What does the law require?” but, rather, “What have you done for me lately?” Law itself would be seen as nothing more than ordinary politics, and it would become increasingly difficult to appoint (or elect or retain) people with the qualities necessary for judicial independence because the actors involved would be preoccupied with a degraded notion of judicial accountability.<sup>13</sup> At the end of the day, judicial independence would become a junior

partner to judicial accountability, or the partnership would be dissolved. The imminence of the threat is suggested by a 2005 editorial in *The Washington Post*:

The war [over Justice O’Connor’s successor] is about money and fundraising as much as it is about jurisprudence and the judicial function. It elevates partisanship and political rhetoric over any serious discussion of law. In the long run, the war over the courts – which teaches both judges and the public at large to view the courts simply as political institutions – threatens judicial independence and the integrity of American justice.<sup>14</sup>

The problem of interbranch relations concerning the federal judiciary is hardly virgin territory. Robert Katzmann and Charles Geyh have asked and provided thoughtful answers to most of the pertinent general questions concerning the nature, extent, and timing of communications that should occur between the federal judiciary and Congress.<sup>15</sup> Their work, together with that of Judith Resnik,<sup>16</sup> well sets the abiding dilemma confronting the federal judiciary of participating in a political system without becoming the victim of politics. That di-

12 See Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (Oxford and New York: Oxford University Press, 2005), 103; Anthony Champagne, “Interest Groups and Judicial Elections,” *Loyola of Los Angeles Law Review* 34 (2001): 1402.

13 See Susan S. Silbey, “The Dream of a Social Science: Supreme Court Forecasting, Legal Culture, and the Public Sphere,” *Perspectives on Politics* 2 (2004): 789: “Rather than better and worse craft, justices will be assessed only by those who are for or against some position. If the decisions become understood only as wins and losses, we feed the politicization and gaming of judicial appointments that have become ever more systematic in an effort to predict, and control, the decisions of appointees.”

14 Editorial, “Not a Campaign,” *The Washington Post*, July 5, 2005.

15 See generally Robert A. Katzmann, ed., *Judges and Legislators: Toward Institutional Comity* (Washington, D.C.: Brookings Institution, 1988); Robert A. Katzmann, *Courts and Congress* (Washington, D.C.: Brookings Institution, 1997); Charles Gardner Geyh, “Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress,” *New York University Law Review* 71 (1996): 1165.

16 See, for example, Judith Resnik, “Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power,” *Indiana Law Journal* 78 (2003): 225–227.

lemma is acute today, and general prescriptions alone may not be sufficient. The agency theory of judicial accountability underlying recent attacks on the courts is not only irreconcilable with traditional notions of judicial independence. It is subversive of norms of respect and mutual accommodation that are essential to productive interbranch relations.

The modern federal judiciary should be (1) responsive to appropriate requests for information from Congress; (2) prepared to offer the judiciary's views on proposed legislation (whether or not requested to do so), and even to seek to initiate legislative action, in areas of legitimate institutional concern to the judiciary; (3) generous in interpreting the universe of appropriate requests for information from Congress; and (4) circumspect in defining areas of legitimate institutional concern to the judiciary. In light of the formidable information base available through the Administrative Office of the United States Courts and the Federal Judicial Center, and the formidable base of expertise and insight available through the committees of the Judicial Conference, the main challenges in satisfying these norms involve matters of judgment, timing, and tactics.

Matters of judgment include when to resist a request for information as inappropriate and how to define the areas that are deemed to be of legitimate institutional concern to the judiciary. The boundaries of appropriate requests for information are limned by a definition of federal judicial accountability that is faithful to our history, including, in particular, the norms and customs that, with the public's support, have enabled our tradition of judicial independence. They are exceeded by requests reflecting aberrant definitions, such as that which in recent years transformed oversight of

the federal judiciary's implementation of the Sentencing Guidelines into oversight of an individual federal judge's sentencing practices. Requests for information (or action) that evidently reflect a contrary view should be resisted. If persuasion and compromise fail, the politics of power may require the judiciary, an individual judge, or both to yield. Yet, even though legislative foolishness or mischief must be abided (if it is not unconstitutional), the foolishness or mischief should be made plain for all to see.

In defining areas of legitimate institutional concern to the judiciary – where it should feel free to make comments and even to seek to initiate legislative action – Judith Resnik's work is particularly valuable and persuasive in arguing that, even when asked to do so, the federal judiciary should resist becoming embroiled in discussions and debates about proposed legislation that would create new, or alter existing, substantive rights.<sup>17</sup> For, just as some legislators may be tempted to transform oversight of the federal judiciary's implementation of a law into oversight of an individual judge, so may some judges be tempted to view a bill that would increase the docket burdens of the federal courts through the prism of a general theory of federalism. Institutional comments on such a bill from that perspective would inevitably be viewed as taking sides on the merits, and they might be invoked in legislative debates by those whose position they favored. Moreover, the resentment harbored by legislators holding a different view on the merits – and their cynicism about whose interests the judiciary's representatives were protecting – could only increase if, the legislation having been enacted, all or part of it were declared unconstitutional.

<sup>17</sup> *Ibid.*, 294.

Attention to the possibility that proposed legislation would add to the burdens of the judiciary, when some courts are already overtaxed, suggests a partial exemption from this prophylactic norm. On the assumption that the federal judiciary can provide reliable estimates of the workload and other resource implications of proposed legislation, such information is obviously germane to legislative deliberations. A history of unreliable estimates would, however, create suspicion either of incompetence or of concealed policy preferences on the merits – neither of which would well serve the interests of productive inter-branch relations.

The suggested norm against comment by the judiciary on proposed legislation that would create new, or alter existing, substantive rights would not apply to proposed legislation on matters of practice and procedure governing the conduct of litigation in the federal courts. Indeed, with the exception of criminal sentencing matters, it is likely that the greatest volume of communications between the federal judiciary and Congress in recent decades has concerned proposed legislation affecting the rules of procedure that the Supreme Court promulgates under the Rules Enabling Act.<sup>18</sup> Such communications are usually not problematic. However, the judiciary should reconsider its practice of objecting to provisions in proposed legislation that contain discrete (non-uniform) procedural rules designed to accommodate legislative policy with re-

spect to a particular substantive law scheme, as many such so-called procedural rules have substantial effects on substantive rights.

Matters of timing and tactics include how to proceed in seeking legislation favorable to the judiciary and how to negotiate over the content of legislation that is of legitimate institutional concern to the judiciary. As to the former, the judiciary would be well-advised to follow the Golden Rule. Having (justly) complained about instances in which legislation affecting the judiciary was enacted without prior notice or consultation, it ill behoves that institution to game the system in the same way because the potential fruits are sweet rather than bitter. As to the latter, one who enters into negotiations should be aware of any norms peculiar to the institutional context, as well as of general norms governing negotiating behavior.

A norm peculiar (albeit by no means unique) to the context of congressional negotiations is that of “logrolling.” The horse-trading and compromises that are part and parcel of the legislative process may not be congenial to members of the judiciary – at least not when done publicly. For, although judges on plural courts engage in a similar process when negotiating an opinion for a court or panel,<sup>19</sup> doing so may be thought inconsistent with the traditional vision of law as a determinate body of rules that judges find and apply. To the extent that the position of the federal courts “depend[s] on preserving [their] difference from the other branches of government,”<sup>20</sup> judg-

18 See Act of June 19, 1934, ch. 651, 48 Stat. 1064 (current version at 28 U.S.C., section 2072 – 2074 [2000]). Under this statute, rules promulgated by the Supreme Court that are reported to Congress by May 1 become effective on December 1 if legislation to the contrary is not enacted. 28 U.S.C., section 2074 (2000).

19 See Barry Friedman, “The Politics of Judicial Review,” *Texas Law Review* 84 (2005): 280 – 290.

20 Robert G. McCloskey, *The American Supreme Court*, 4th rev. ed. (Chicago: University of Chi-

es negotiating on behalf of the judiciary may fear that by performing such a non-judicial function, they put that position at risk among members of Congress and members of the public who may not distinguish between the judicial and non-judicial activities of Article III judges.

A general norm of negotiations is that a negotiating party does not like to have reached what appeared to be a deal, only to be told that the person negotiating on the other side lacked final authority. The institutional federal judiciary is a latter-day hierarchy imposed on what had been a highly decentralized collection of largely autonomous actors. When speaking as an interest group, which is how it may appear to be speaking in its dealings with Congress, the federal judiciary attempts to speak with one voice. Even though it is not possible to prevent individual federal judges from disagreeing, there is no excuse for the institutional judiciary itself to change voices late in the process.

The perception that the institutional judiciary is an interest group when commenting on prospective legislative action is, of course, another way of framing the abiding dilemma confronting the federal judiciary of participating in a political system without becoming the victim of politics. Viewed as just another interest group, the federal judiciary has no special reason to complain when Congress enacts legislation affecting the institution without prior notice or an opportunity to comment at hearings. From this perspective, the challenge for the

federal judiciary is to avoid the perception that it is “just another interest group” – that its politics are ordinary politics.

One way of doing that is to avoid the tactics of interest groups preoccupied with victory and, as a result, willing to initiate, or at least to go along with, irregularities of the legislative process to which they would object if the shoe were on the other foot – hence, my invocation of the Golden Rule in discussing timing and tactics for seeking favorable legislation. More generally, the leaders of the federal judiciary should give sustained thought to the question of the forms and methods of politics that are consistent with the judiciary’s historic roles and functions and with its status as a co-equal branch of the federal government. In doing so, they will find it helpful to distinguish between the political arts of Richard Arnold and those of Tom DeLay.

Robert Katzmann’s prescription for better interbranch relations evidently reflects the insight that good institutional relations are more likely to result from good interpersonal relations and that good interpersonal relations are built on dialogue and trust.<sup>21</sup> Yet the insight suggests why the challenges of contemporary interbranch relations affecting the federal judiciary are so daunting. For where in contemporary politics is the evidence of dialogue and trust, let alone of other hallmarks of good interpersonal relations, such as patience and compromise? Moreover, in the current climate is there not a heightened risk that, by seeking greater communication with elected politicians and their agents,

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cago Press, 2005), 20. Professor McCloskey was commenting here on the Court’s “shrewd insight” in refusing “to perform ‘non-judicial’ functions,” to wit, “that the Court’s position would ultimately depend on preserving its difference from the other branches of government”; *ibid.*

21 See Katzmann, *Judges and Legislators*, 105–106, which explores the ways in which a dialogue could emerge between the judiciary and legislature, in a section entitled “Promoting Ongoing Exchanges.”



members of the federal judiciary will foster the notion of judicial accountability that treats judges themselves as policy agents and courts as part of ordinary politics?

Judge Arnold was candid about, and humorous in describing, the politics of his appointment to the federal bench.<sup>22</sup> He was also characteristically modest in attributing his appointment and lengthy tenure as chair of the Budget Committee of the Judicial Conference of the United States to his pre-judicial service as legislative assistant to Senator Dale Bumpers, a member of the Appropriations Subcommittee for the judiciary.<sup>23</sup> Judge Arnold enjoyed his service as chair of the Budget Committee, he said, because, “[i]t has a little touch of politics about it . . . and I have always enjoyed politics.”<sup>24</sup> He also observed that “[p]olitics is people, . . . and it should be and can be an honorable profession.”<sup>25</sup> On another occasion, however, noting that “many members of the public seem to feel that judges are just politicians in another guise,” Judge Arnold concluded that “[s]ometimes some of us are, but we should not be.”<sup>26</sup>

These views are not inconsistent. Judge Arnold, although a judge while

acting as chair of the Budget Committee, was not acting as part of a court exercising judicial power. Moreover, he could and likely would have distinguished between a federal judge and an elected politician with words similar to those he used to describe why the federal judiciary is not usually uppermost in the minds of members of Congress: “we lack a particular constituency.”<sup>27</sup> In any event, that Judge Arnold disapproved of deeming federal judges “just politicians” hardly suggests that he intended the bright line between law and politics that the distinction might suggest.

I believe that Judge Arnold would have recognized that the more indeterminate law is, and therefore the more room there is for the play of policy and preference, the more legitimate – and the more important – it is for a court of last resort also to take account of considerations that bear on the perceived legitimacy and continuing effectiveness of the judiciary as a whole. If so, he would have distinguished between (1) a situation in which, responding to popular sentiment at the time, a court evaded a result that either clear and controlling precedent or the unmistakable tenor of positive law required, and (2) a situation in which (precedent or positive law not unmistakably dictating the result) the court considered the implications of alternative decisions for the continuing ability of courts not to “pull their punches” in other cases – namely, those in which the law as generally understood leaves no room for equivocation.

In the first situation, the court would be engaged in a political act difficult to distinguish from the behavior of an elected politician responding to a constituency. In the second, the behavior would be “political” only in the sense

22 See, for example, Richard S. Arnold, “The Federal Courts: Causes of Discontent,” *Southern Methodist University Law Review* 56 (2003): 767–768; “So I got confirmed in the elevator,” 768.

23 Richard S. Arnold, “Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive,” *St. Louis University Law Journal* 40 (1996): 22.

24 Obituary, *Arkansas Democrat-Gazette*, September 25, 2004.

25 *Ibid.*

26 Richard S. Arnold, “The Future of the Federal Courts,” *Missouri Law Review* 60 (1995): 545.

27 Arnold, “Money,” 25.

that statesmanship, deference, and compromise in a world of disputable premises and conclusions are part of the art of governance. Judge Arnold understood that courts are involved in politics, and, far from regretting that fact, he rejoiced in it. He once observed:

The courts, like the rest of the government, depend on the consent of the governed. And we judges are, in a sense, political. I have sometimes described myself as a professional politician, because I think that the courts are, in the finest and broadest sense of the word, a political institution. We function not on paper or in the abstract, but as part of a real, living system of government, each part of which has its own role to play.<sup>28</sup>

For Richard Arnold, the notion that law is nothing more than politics was not a cause of despair because, for him, law was equally nothing less than politics: specifically, the art of seeking to improve the human condition through intelligence, patience, persuasion, and compromise.

What I have called the agency theory of judicial accountability is most vividly demonstrated at the federal level in the appointment strategies of presidents who follow what Sheldon Goldman calls a policy agenda (as opposed to a personal or partisan agenda) in making judicial nominations.<sup>29</sup> Presidents following a

28 Richard Arnold, Judge for the U.S. Court of Appeals for the Eighth Circuit, Address, in *Symposium on the Judiciary*, ed. Patricia A. Eables and John P. Gill (Arkansas Bar Association, 1989), 12.

29 See Sheldon Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* (New Haven: Yale University Press, 1997), 3–4, which distinguishes a policy agenda from a partisan or personal agenda; Carolyn Dineen

policy agenda seek to fill judicial vacancies with individuals they believe will reliably decide cases in accordance with their preferred policies. Moreover, whether because they fear the power of the rule-of-law ideal or the phenomenon Ted Ruger calls “judicial preference change,”<sup>30</sup> some presidents seek protection against changes of mind or heart by nominating individuals with preferences seen to be hard-wired. There is ample and persuasive evidence from both Supreme Court and lower federal court appointment experience that presidential pursuit of a policy agenda in making judicial nominations (and the reaction to it by senators of the opposition party) is the chief cause of the politicization of judicial selection at the federal level.<sup>31</sup>

Selecting strong ideologues with hard-wired preferences is not the only means of seeking judicial policy agents. If a judicial aspirant is not adequately equipped to be a reliable policy agent by back-

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King, “Current Challenges to the Federal Judiciary,” *Louisiana Law Review* 66 (2006): 667: “What this selection process conveys to the public is the notion that the Judiciary is yet another political branch of the government, a kind of stepchild of the other two branches.”

30 See Theodore W. Ruger, “Justice Harry Blackmun and the Phenomenon of Judicial Preference Change,” *Missouri Law Review* 70 (2005): 1210, 1217–1219.

31 See Burbank, “Alternative Career Resolution II,” 1535–1536: “Both the relatively non-controversial confirmations of Justices Ginsburg and Breyer and a comparison of lower court nominations that generated controversy with those that did not suggest much more likely causal influences [than lengthening tenures]: the increasingly common practice of presidents to pursue what Sheldon Goldman calls a policy agenda in making nominations to all federal appellate courts and the Senate’s reaction to those nominated pursuant to such an agenda.”

ground, education, or experience, perhaps he or she can be induced nonetheless to commit to a desired path of judicial decision in advance. Thus, the First Amendment has been enlisted in an effort to assimilate judicial elections to the elections of ordinary politics, and judicial independence therefore has been sacrificed at the altar of a degraded notion of judicial accountability. The Supreme Court's decision in *Republican Party of Minnesota v. White*,<sup>32</sup> and in particular its treatment of the concept of judicial impartiality, has paved the way for a self-fulfilling prophecy.

If such prophecies are to be confounded rather than fulfilled, and if we are therefore to have judges who are free of policy commitments other than a commitment to the rule of law, we shall need to rescue both judicial accountability and politics itself from their current degraded states. Today's complex legal landscape cries out for judges who renounce the partisan and who are not slaves either to a belief system or to an identifiable constituency. It also cries out for humility, by which I mean recognition, in Judge Arnold's words, that "holding... a commission signed by the president does not in and of itself confer moral superiority."<sup>33</sup>

In the current political climate, there is reason for concern about adherence to long-standing customs or norms and hence about resort to blunt instruments of influence or control by members of Congress determined to work their will

32 536 U.S. 765, 775–778 (2002), which holds that a Minnesota Announce Clause, prohibiting judicial candidates from announcing their personal views on disputed issues likely to come before the judge (if elected), violated the First Amendment.

33 Arnold, "Judges and the Public," 5.

on the federal courts and to "take no prisoners" in the process.<sup>34</sup> The same is true in a number of states. The proper response is not – it cannot be – assertions of power that do not exist. The judiciary not only lacks a purse and a sword; its shield is very narrow. Wiser heads must prevail, and, if necessary, informed public opinion must be brought to bear on those who are ignorant of, or choose not to heed, the lessons of our constitutional history.

The judiciary needs more judges who are politicians in the sense that Richard Arnold was a politician. These are judges for whom people are more important than abstractions, for whom dialogue and deference – involving litigants, other courts, and the other institutions of gov-

34 This was Tom DeLay's admiring assessment of the approach of the so-called House Working Group on Judicial Accountability. See Editorial, "Rehnquist to DeLay: Bug off on Judges," *San Antonio Express*, January 12, 2004. In correspondence with Todd Metcalf, a legislative assistant to Representative Max Sandlin, who sought my views on certain questions raised by the reported plans of this group, I observed:

Representative Sandlin would know better than I whether a self-appointed group of members of the House from one side of the aisle has standing or power to do anything, other than further pollute discourse that is already debased. I would have thought not. The risk, however, is precisely that, by adding to a legislative corpus of misinformation and inter-branch hostility that is already too large, the House Working Group will influence those who do have power. In that regard, the quoted characterization of the group's "take no prisoners" approach, however praiseworthy in the pursuit of termites, manifests a woefully ignorant and inappropriate attitude towards an institution for the establishment of which our ancestors fought and died and which has been a cornerstone of our freedoms.

Email from Stephen B. Burbank to Todd Metcalf, October 23, 2003 (on file with author).

ernment – are a two-way street, and for whom reasonable processes and institutions of accountability are viewed not as obstructions but, like the law itself, as “those wise restraints that make us free.”<sup>35</sup> Such people need not have a background in politics. Indeed, although the example of Judge Arnold suggests that political experience can be helpful, one can easily imagine a different kind of politics, one infected with ideology of the strong sort or with relentless partisanship, that would be a handicap. The notion that the judiciary might take the lead in reestablishing such a politics – of custom, dialogue, compromise, and statesmanship – will come as a shock only to those who believe that politics and law, like judicial independence and accountability, are irreconcilable, or those whose exposure to politically feckless judges has caused them to forget those who are adepts.

Richard Arnold was an adept at the politics of judging and the politics of the judiciary, and it would help if other judges followed his example. It would thus help if fewer federal judges were inclined to “[p]osterity-worship”<sup>36</sup> and

institutional aggrandizement.<sup>37</sup> For, if judges forget that their independence exists for the benefit of the judiciary as a whole – and ultimately, of course, for the benefit of our system of government – they may discover that, in the world of power politics, the reality of judicial independence does not match the rhetoric.

35 This language is part of the citation read by the president of Harvard University in conferring the JD degree at commencement. See Marvin Hightower, *The Spirit and Spectacle of Harvard Commencement*, <http://www commencement.harvard.edu/background/spirit.html> (accessed December 20, 2006).

36 Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949), 287 – 288: “No doubt it expands the ego of a judge to look upon himself as the guardian of the general future. But his more humble yet more important and immediate task is to decide individual, actual, present, cases. . . . Such judicial legislation as inheres in formulating legal rules is inescapable. But courts should be modest in their legislative efforts to control the future. . . . The future can be-

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come as perniciously tyrannical as the past. Posterity-worship can be as bad as ancestor-worship,” quoting *Aero Spark Plug Co. v. B.G. Corp.*, 130 F.2d 290, 295 – 296 (2nd Cir. 1942) (Frank, J., concurring).

37 See Michael W. McConnell, “Institutions and Interpretation: A Critique of *City of Boerne v. Flores*,” *Harvard Law Review* 111 (1997): 163, which notes that *Boerne* represents a “startlingly strong view of judicial supremacy”; Peter M. Shane, “When Inter-Branch Norms Break Down: Of Arms-for-Hostages, ‘Orderly Shutdowns,’ Presidential Impeachments, and Judicial ‘Coups,’” *Cornell Journal of Law and Public Policy* 12 (2003): 510, which notes that of “151 federal statutes declared unconstitutional in whole or part by the Court between 1789 and June 2000, 40 – over 26% – were declared unconstitutional since 1981”; see also Richard A. Posner, “Judicial Autonomy in a Political Environment,” *Arizona State Law Journal* 38 (2006): 13: “In short, would we not be better served by greater judicial modesty?”

# Judith Resnik

## *Interdependent federal judiciaries: puzzling about why & how to value the independence of which judges*

Judicial independence is a norm presumed to have been settled upon at the founding of the United States.<sup>1</sup> Yet the authority accorded to judges has been a hauntingly provocative topic since the country's inception. Article III of the U.S. Constitution institutionalized the federal judiciary and gave its judges two forms of protection: they can neither be fired nor have their salaries cut. In theory, such insulation from the two other branches of government leaves judges free from political constraints that could undermine their willingness to render impartial judgments based on the merits of each case.

But which cases do judges get to decide? And what remedies do they have the power to order? How are they fund-

ed, and how many are needed to make meaningful the notion that the judiciary is one of three branches of government? The Constitution left to the other branches the decisions about the number of federal judges and levels of courts. Furthermore, the Constitution makes no mention of budgets, and its provisions relating to jurisdiction are ambiguous. Thus, concerns are raised perennially that judicial independence – as well as the court system that it has helped to spawn – is either overvalued or at risk.

One burden of this essay is to contrast the *thinness* of the constitutional protections with innovations of the twentieth century that have demonstrated a *thick* political commitment to the deployment of judges in service of national norm enforcement. The federal judiciary as it functions today is a relatively recent invention, which has been endowed over the course of the last century by Congress and the executive with expanded jurisdictional authority and institutional girth.

The federal courts have obtained stature through the joint venturing of all

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<sup>1</sup> This essay expands on remarks given at the 1870th Stated Meeting of the American Academy of Arts and Sciences held on May 15, 2003, in Washington, D.C.



three branches of government, responding to public and private demands for adjudication. Given that attention is easily drawn to examples of conflicts among the branches of the federal government, narratives about judicial authority often overlook the cooperative effort that has produced the contemporary federal judicial system. On many metrics, the interdependent judiciary has flourished by virtue of support from its sibling branches that regularly rely on judges to implement their agendas.

My second purpose is to reflect on how some of the twentieth-century innovations that can be understood to have been sensible adjustments aimed at equipping the administrative state with judicial resources have, nevertheless, undermined practices supportive of judicial independence. Reflected in this essay's title by the pluralization of "judiciaries" is the point that the federal system ought not to be considered in the singular. Over the last several decades, Congress has invented new kinds of federal judges ("non-Article III judges") lacking life tenure; their dockets are often filled with the neediest of litigants, some of whom challenge governmental action. Yet these lower echelon jurists wielding federal adjudicatory power outside the parameters of Article III are vulnerable to incursions from all quarters.

Congress has also created new modes and venues for adjudication that shift decisions from public to private processes in both courts and agencies. Revisions of rules within courts, coupled with the outsourcing of cases to administrative agencies and requirements that litigants use private dispute resolution systems, make public access difficult or impossible. Discussions of judicial independence have not paid much attention to the role played by the public dimension of adjudication that (to borrow from

Jeremy Bentham) is the "soul of justice" that puts judges who preside at trial themselves on trial.<sup>2</sup>

What Bentham in 1843 described as desirable "publicity" subsequently became the constitutional *right* to attend court proceedings. Bentham argued the utilities of the public aspects of adjudication in terms of the production of more accurate outcomes, but he did not focus on how adjudication can itself be a democratic activity. When rules of litigation provide participatory parity, disputants are forced to treat each other as equals. Even the government can be compelled to answer its adversaries. Through public display, observers can watch adjudication's processes, debate its outputs, and either approve or seek to revise the governing legal norms. The reasons for wanting judges to be independent from coercion are thus in plain view, helping to maintain cultural and legal commitments to this insulation for judges.

The devolution of decision-making to non-Article III judges and the privatization of adjudication are not the only developments of the twentieth century that raise questions about how to sustain support for judicial independence. When the Constitution was written, the executive and legislative branches of government were perceived to be the principal sources of threats to judges. But today, the media, repeat-player liti-

2 See Jeremy Bentham, "Chapter X 'Of Publicity and Privacy, as Applied to Judicature in General, and to the Collection of the Evidence in Particular,'" *The Works of Jeremy Bentham*, Vol. 6 (London: Simpkin, Marshall, 1843), 355 (reprinting Jeremy Bentham, *Rationale of Judicial Evidence*, Vol. 1 [1827]); see also Judith Resnik and Dennis E. Curtis, "From 'Rites' to 'Rights' of Audience: The Utilities and Contingencies of the Public's Role in Court-Based Processes," in *Representations of Justice*, ed. Antoine Masson and Kevin O'Connor (Brussels: P. I. E. Peter Lang, 2007), 195–236.

gants, and political candidates need to be taken into account as either friends or foes. These actors play vivid roles in those state courts that select or retain judges through elections but also are relevant on the federal side, where media and political campaigns funded by organizations seeking to shape outcomes in cases through judicial selection similarly aim for judges of a certain stripe. Thus far, the Supreme Court has been unwilling to regulate such efforts, framing them as protected First Amendment activity rather than as encroachments on the norm of judicial independence.<sup>3</sup>

Actions of the judiciary itself also need to be brought into the narration of contemporary challenges to judicial independence. Over the last several decades, as the federal judiciary gained its own administrative structure and rule-making authority, it has used its corporate voice to take an active role in policy-making. In the 1990s, official spokespersons for the federal courts issued a long range plan, recommending that Congress provide less access to the federal courts. By functioning as what political theorists might style a rent-seeking agency, advancing its leadership's understanding of the desirable boundaries of federal adjudication, the judiciary undercuts one of the rationales for judicial independence – that judges stand outside the ordinary fray of politics as they mediate between special interests and render decisions.<sup>4</sup>

In short, the constitutional provisions for judicial independence set forth at the founding of the United States have

<sup>3</sup> See *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

<sup>4</sup> See Judith Resnik, "Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III," *Harvard Law Review* 113 (2000): 924 – 1037.

proved to be sparse and ambiguous. They are capacious enough to support enormous growth as well as to tolerate radical reconfigurations of adjudication. The topic of judicial independence returns so often to legal and popular consciousness because questions abound about whether and how to generate practices justifying remarkably unusual roles for those government employees we call "judges."

Conversations about judicial independence in the federal courts have tended to take one of three forms. The first provides generalities praising the importance of an independent judiciary and delighting in the American example, centered on that portion of the U.S. Constitution providing the outlines for federal courts. The text of Article III, Section 1 is worth revisiting:

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

The words about holding office "during good Behaviour" have been translated to mean life tenure.<sup>5</sup> Because such constitutional judges can neither be fired nor lose their salaries, Article III can be read as insulation from the other branches of the federal government. A distinct concern (sometimes couched as "accountability") is how to be loyal to judicial freedom while imposing codes of con-

<sup>5</sup> Alternative readings are argued by Saikrishna Prakash and Steven D. Smith, "How to Remove a Federal Judge," *Yale Law Journal* 116 (2006): 72 – 137.

duct and disciplinary mechanisms on judges.<sup>6</sup>

A second strain of conversation raises questions about the value of judicial independence, the degree of autonomy appropriate for judges, and the wisdom of life tenure. Some critics complain about jurists holding too much authority and having too few checks. Some locate adjudication itself as a counter-majoritarian democratic problem and propose either that judges abjure from certain decisions or that legislatures take cases away from them. Other times, attacks are leveled at particular judges, with calls for impeachment.

During the last decade, the system of life tenure has come under renewed scrutiny. The system in the United States is anomalous in that other democracies, also committed to judicial independence, require either fixed terms of office or mandatory retirement. Furthermore, while at the country's inception, life-tenured lower-court judges served on average about fourteen to sixteen

years, but more recently, they have averaged about twenty-four years. Given the concentration of power in a small number of persons for such a long period of time,<sup>7</sup> a spate of proposals has been put forth to provide (either through constitutional interpretation or amendment) term limits in general or fixed terms for Supreme Court justices, including the chief justice.<sup>8</sup>

The third sort of discussion about judicial independence praises the idea but is less than sanguine about its instantiation. Actions by the other two branches of government are seen as threatening or undermining judicial independence.<sup>9</sup> Several distinct problems – from judicial selection through confirmation, jurisdiction, and remedies – can be tracked by reference to different pieces of constitutional text.

One concern about how to pick judges comes from a focus on Article II, Section 2, Clause 2, which provides that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States.” How does this constitutional commitment giving the two elected branches the power of selection affect

6 For example, when in 1980 Congress created a procedure for complaints about judges to be brought confidentially to the chief judges of each federal circuit, judges subjected to it argued (unsuccessfully) that it violated the Constitution. More recently, in the wake of criticism of the administration of that system, the chief justice of the United States appointed a committee chaired by Justice Stephen Breyer to evaluate the process. See Judicial Conduct and Disability Act Study Committee (Breyer Committee), *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* (September 2006); available at <http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf>. In April 2008, revised rules went into effect. See Judicial Conference Committee on Judicial Conduct and Disability, *Rules for the Judicial-Conduct and Judicial-Disability Proceedings* (March 2008); available at [http://www.uscourts.gov/library/judicialmisconduct/jud\\_conduct\\_and\\_disability\\_308\\_app\\_B\\_rev.pdf](http://www.uscourts.gov/library/judicialmisconduct/jud_conduct_and_disability_308_app_B_rev.pdf).

7 See Judith Resnik, “Judicial Selection and Democratic Theory: Demand, Supply, and Life-Tenure,” *Cardozo Law Review* 26 (2005): 579 – 658.

8 See Paul D. Carrington and Roger C. Cramton, eds., *Reforming the Court: Term Limits for Supreme Court Justices* (Durham: Carolina Academic Press, 2006); Stephen G. Calabresi and James Lindgren, “Term Limits for the Supreme Court: Life Tenure Reconsidered,” *Harvard Journal of Law & Public Policy* 29 (2006): 769 – 877.

9 See generally Charles Gardner Geyh, *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* (Ann Arbor: University of Michigan Press, 2006).

judicial independence? Some argue that if judicial selection is “political” in the sense of seeking individuals aiming to shape law, then independence is at risk; choosing nominees according to a “litmus test” results in judges who will follow a party line. Others insist that the constitutional authorization that the majoritarian branches select judges permits efforts to seek to entrench particular visions through identifying judges whose mindsets match their agendas. Given life tenure, this popular check, *ex ante*, is part of how judgments are legitimated, *ex post*.<sup>10</sup>

Whichever interpretation one adopts, another question is how to understand the constitutional allocation of power *between* the president holding the power to nominate and the Senate serving as the gatekeeper of confirmation. What degree of deference ought the Senate accord to presidential nominees? The answer for some is that senatorial deference ought to depend on the kind of process used for selection. If the president relies on bipartisan merit commissions and professional bodies’ appraisals of the qualification of lawyers as well as a good deal of consultation in advance with senators, then a presumption of confirmation should result. Others see the choice as within the president’s exclusive purview, while yet others believe the Senate is constitutionally positioned to exercise its own independent assessments of candidates.

10 See generally Stephen B. Burbank and Barry Friedman, eds., *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks, Calif.: Sage Publications, 2002); see also Jack M. Balkin and Sanford Levinson, “The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State,” *Fordham Law Review* 75 (2006): 489–535.

Once nominees are put forth, another issue is whether values of judicial independence ought to be reflected in the process used by the Senate when considering confirmation. One hears periodically that the Senate either is not living up to or is overstepping its mandate, with complaints about a “crisis” of vacancies due to senatorial delays as well as objections of presidential “court packing.”

Of particular relevance to judicial independence is the use of public hearings, which some commentators commend and others bemoan. Over the last several decades, hearings on Supreme Court nominees have enabled us to see what legal precepts are so settled as to be unquestioned and which propositions remain contested. In response to inquiries, nominees insist on their attachment to, skepticism about, or silence on certain understandings of law, such as whether the Fourteenth Amendment’s guarantee of “equal protection of the laws” applies to women, whether abortion is protected by the Constitution, and whether judges may learn from foreign law when interpreting the U.S. Constitution.<sup>11</sup>

Confirmation hearings thus provide insights into what is at stake when judges are selected and what laws are under siege. But critics argue that the process has become dysfunctional, either because it is too slow, too intrusive, or too much show and too little substance. Part of the divide comes from differing assessments of the value of the resources spent on nominations and the attention paid to appointments against the backdrop that, once a person’s nomination is presented to the Senate, confirmation is very likely. During the last decades,

11 I explore the norm generativity of confirmation hearings in “Judicial Selection and Democratic Theory,” cited above.

lower-court judges have been confirmed more than 90 percent of the time. Eight Supreme Court positions have been filled since 1986 with the Senate rejecting one nominee, while a few others have been named but withdrawn.

Another set of questions arises in relationship to the jurisdictional authority of federal courts. A different part of Article III – Section 2 – becomes relevant, for it specifies a set of cases to which the “judicial Power shall extend.” Included are those arising under federal law or involving subject matters such as admiralty and maritime as well as cases predicated on the status of a party (for example, public ministers, states, or citizens coming from different states). Yet, by also providing that the Congress “may from time to time ordain and establish” the lower courts, the Constitution could be read to make the very existence of those courts as well as their jurisdictional reach utterly dependent on the grace of Congress. Further, while stipulating that the Supreme Court exists and has original jurisdiction over a few specified cases, the Constitution also provides that, as to its appellate jurisdiction, Congress has the power to make “exceptions and regulations.” Legions of law review articles parse these provisions as their authors argue about whether Article III requires Congress to vest jurisdiction in federal courts and the degree of control Congress has to divest courts of power once cases have been assigned to them.<sup>12</sup>

That literature in turn has been sparked by congressional threats to enact leg-

islation limiting access to the federal courts, a practice that objectors label “jurisdiction stripping.” While proposals have been made to do so for decades, only in the 1990s did several become law, as Congress cut back on access for immigrants, prisoners, and, in the wake of 9/11, detainees at Guantánamo Bay and elsewhere. The narrowed access to courts for those in custody brings into play other parts of the Constitution, including constraints on suspending the writ of habeas corpus, which is directly protected under Article I.<sup>13</sup>

Judicial independence is also implicated in less dramatic moments, such as when Congress channels disputants away from life-tenured judges and into administrative agencies (like the Social Security Administration) or to specialized courts (for bankruptcy, contract claims against the government, or tax disputes). And sometimes, when Congress “federalizes” rights and removes jurisdiction from state courts, questions are raised about whether such actions not only violate federalism principles but also undermine the independence of state judges.

Another way in which Congress can encroach on judicial decision-making is in the area of remedies. Congress has sometimes prioritized remedies, but in other instances Congress has gone further, for example mandating that decrees involving conditions of confinement for prisoners expire unless new wrongdoings are proven. On the criminal side of the docket, when Congress imposes mandatory minimum sentences for certain kinds of crimes, it constrains the power of judges to make individualized sentencing decisions.

12 This debate is tracked in a book used both for teaching and as a kind of encyclopedia of the law of the federal courts. See Richard H. Fallon, Jr., Daniel Meltzer, and David Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System*, 5th ed. (New York: Foundation Press, 2003).

13 The specific provision, Article I, Section 9, Clause 2, is known as the Suspension Clause. In June 2008, the Supreme Court relied on this clause when finding unconstitutional provi-



This overview of the classic constitutional questions (whether discussed in a celebratory, skeptical, or anxious mode) circles around problems of potential incursions on the judiciary by the executive and Congress. Those fears are grounded in experiences that predated the drafting of the U.S. Constitution, for in seventeenth-century England judges' commissions ended along with that of a king's reign. The 1701 Act of Settlement marked the beginning of the independence of judges from the crown, but the colonialists still worried about the power of the monarch over American judges, "dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries."<sup>14</sup> Article III aimed to fix what the founders saw to be problems. In many respects they succeeded.

But Congress has been much more than minimally respectful, for it has repeatedly turned to the federal courts to enforce new rights and endowed the courts with significant resources to do so. Reflective of these commitments is the phrase in popular culture "don't make a federal case out of it," a sentence that was not a part of common parlance until the 1950s. Moreover, working in conjunction with life-tenured judges, Congress has also manufactured whole new sets of federal judges and empowered them to decide hundreds of thousands of claims. These federal judiciaries came into being through a rereading of the constitutional text of Article III that rendered legal the adjudicatory

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sions of the Military Commissions Act of 2006 that limited access to courts for aliens deemed by the executive to be "enemy combatants." See *Boumediene v. Bush*, 128 S.Ct. 2229, 2262 – 2274 (2008), discussed below.

14 The Declaration of Independence, para. 11 (U.S. 1776).

authority of federal judges who lack what is there stipulated: life tenure and protected salaries.

Below, a few charts map the growth of diverse kinds of federal judges. Chart 1 shows that, about a hundred years ago, some seventy trial judges were dispersed across the United States. In several states – such as Maryland, Indiana, and Massachusetts – a single district judge presided. In contrast, by 2001, more than 665 judgeships existed, and fifteen more district-court judgeships were chartered in 2003. Chart 1 also makes plain that, in 1901, the appellate courts were staffed by fewer than thirty authorized judgeships; today some 180 positions are provided.

The growth in the number of judges reflects the expansion of their jurisdiction. During the twentieth century, Congress created several bodies of new law ranging from securities to the environment, from civil rights to consumer law. By one count, between the 1970s and the 1990s, Congress authorized more than four hundred new federal causes of action.<sup>15</sup> Because of this production, we are all federal rights holders, subject to laws that affect our lives in various ways, from taxes and pensions to the water we drink and the money we invest.

The power of the federal judiciary does not come from its size and docket alone. During the second half of the twentieth century, life-tenured judges (constitutional judges) gained the authority to appoint other judges – the statutorily chartered magistrate and bankruptcy judges serving fixed and renewable terms. In 1968, when Congress created the position of federal magistrate, the job was conceived to be primarily part-time, as Chart 2 illustrates.

15 Administrative Office of the U.S. Courts, Revision of List of Statutes Enlarging Federal Court Workload (September 18, 1998) (memorandum).

Chart 1  
Article III Authorized Judgeships: District, Circuit, and Supreme Courts, 1901, 1950, 2001

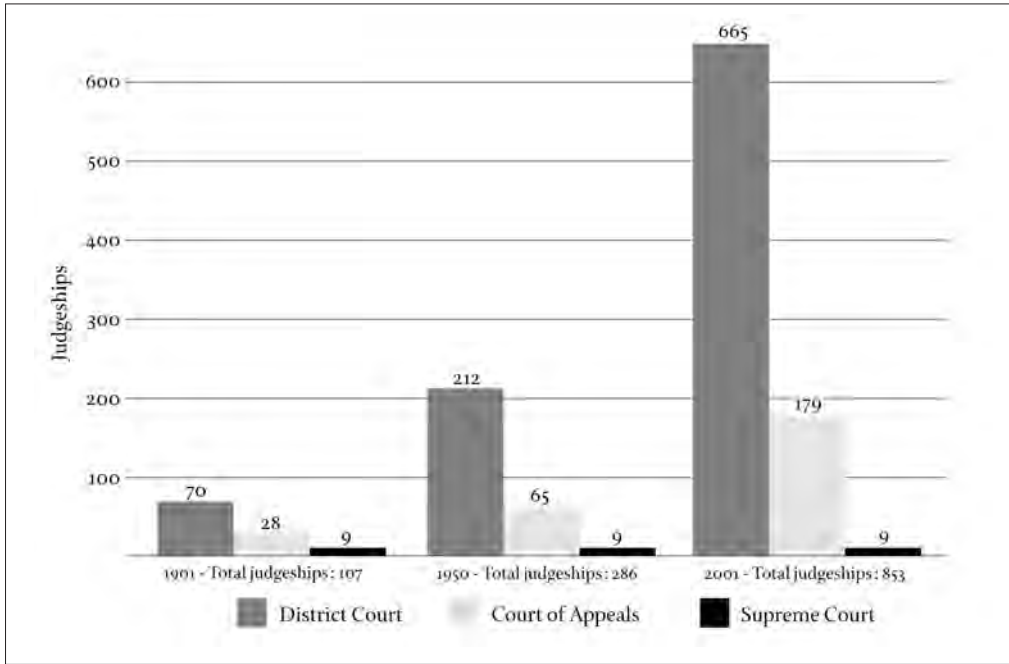
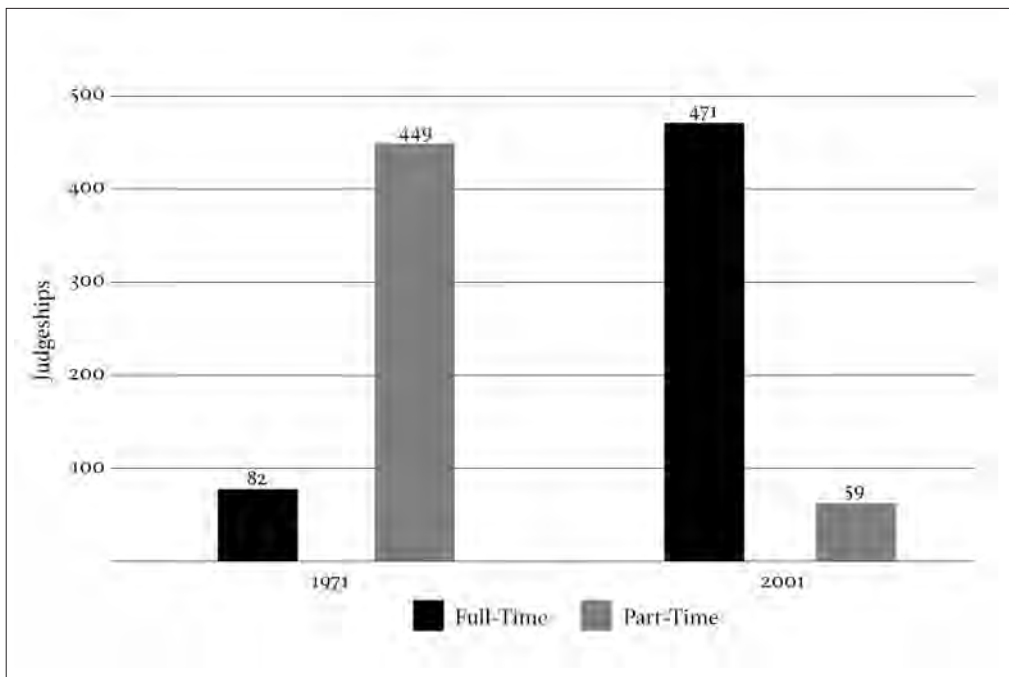


Chart 2  
Authorized Magistrate Judgeships: 1971 and 2001



In 1971, about 450 such positions existed. Within short order, the job became full-time and, by 2001, more than 470 magistrate judgeships were chartered. That group joins another set of non-Article III jurists – bankruptcy judges – first authorized in 1984 and now numbering more than 330, as Chart 3 details. Magistrate and bankruptcy judges serve for fixed and renewable terms of eight and fourteen years, respectively.

Unlike Article III judges who have life tenure and protected salaries, the jobs of statutory judges can be abolished and their salaries cut. But consistent with the narrative of the cooperative expansion of the judicial system, those prospects are unlikely. These jurists are both central to the functioning of the courts and literally built into the system, with courtrooms dedicated to their use in more than five hundred federal courthouses around the United States. Much of their work is akin to that done by life-tenured judges. For example, if parties (or their lawyers) consent, magistrate judges can preside at civil trials, and both magistrate and bankruptcy judges have the power of contempt. Bankruptcy judges in turn can sit on appellate panels reviewing decisions made by their colleagues. Chart 4, which brings these positions together, shows all of the authorized trial judgeships in federal courthouses around the United States; those without life tenure outnumber those with life tenure.<sup>16</sup>

For constitutional theorists, these facts present a puzzle: Article III's text makes no mention of "federal judicial

power" vesting in judges lacking the constitutionally stipulated attributes of life tenure and protected salaries. As a consequence, in the early part of the twentieth century, the Supreme Court was loath to permit too much devolution of what the Court called the "essential attributes of judicial power"<sup>17</sup> to decision-makers outside those parameters. By century's end, however, the Court had reread Article III to enable the shift of significant amounts of federal adjudicatory power to non-Article III judges.<sup>18</sup>

Various justifications underlie that doctrinal shift. One idea is that when Congress creates statutory (or "public") rights, it can shape an adjudicatory system to administer them. Further, some of the disputes are styled "non-adversarial" in that the government is presumed committed to providing relief if mandated by statute. Another proposition is that a proliferation of subordinate judges within the Article III branch raises no questions of judicial independence because the sub-judges are under the wing of the life-tenured.

Such interpretations enable the selection and appointment of scores of new judges outside the process stipulated for life-tenured judges, who must be nominated by the president and confirmed by the Senate. The innovative reading has thus facilitated the expansion of federal judicial capacity without the political burdens imposed by the Constitution.

This approach to the Constitution also supports the authority of another cohort of statutory judges, called Administra-

17 See *Crowell v. Benson*, 285 U.S. 22 (1932).

18 That transition is mapped and analyzed in Judith Resnik, "'Uncle Sam Modernizes His Justice': Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation," *Georgetown Law Journal* 90 (1998): 607–684.

16 The actual number of judges in each position does not match the number of judgeships authorized because life-tenured judges can take "senior status" and continue to work while opening up a vacancy to be filled through the appointment process. Magistrate and bankruptcy judges can also be "recalled" to serve.

Chart 3  
Authorized Bankruptcy Judgeships: 1984, 1991, 2001

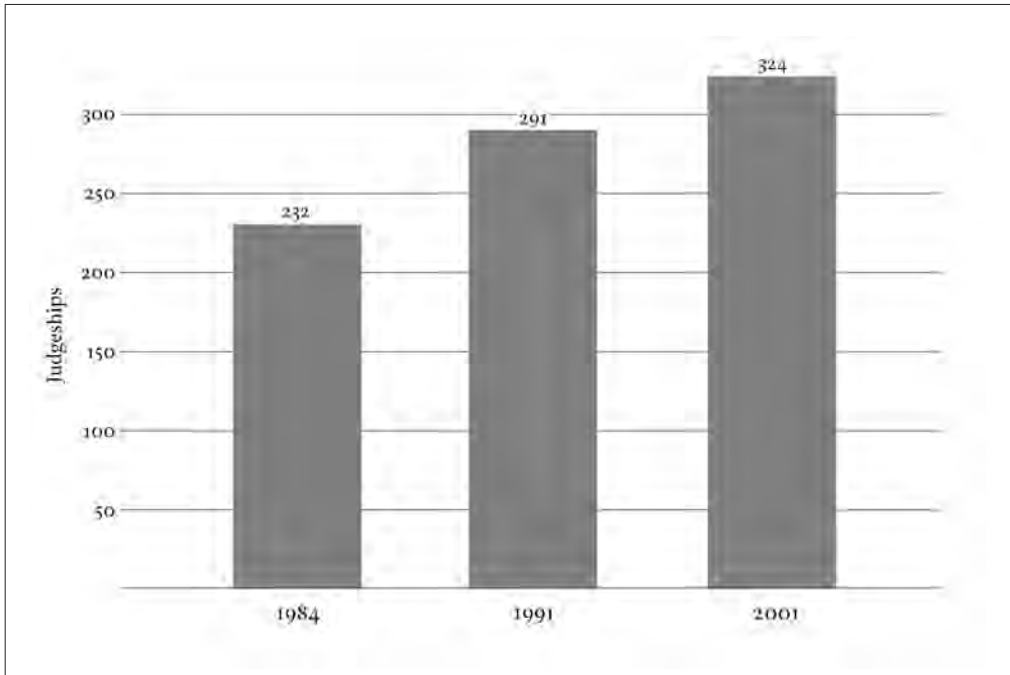
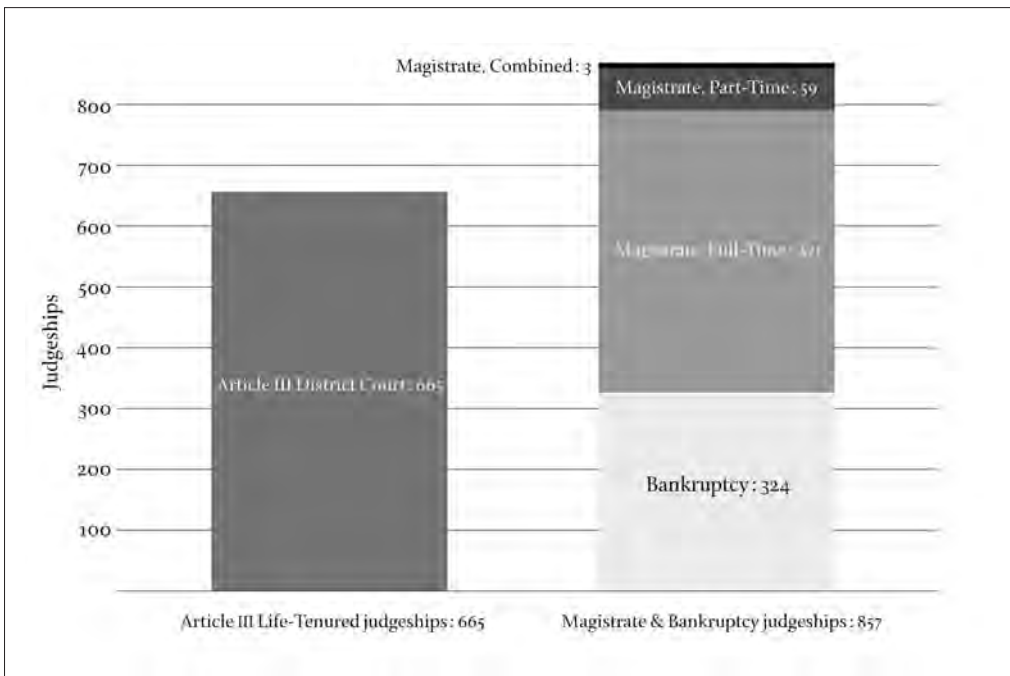


Chart 4  
Authorized Trial-Level Judgeships in Federal Courts (nationwide, 2001)



tive Law Judges (ALJs), brought into being via the 1946 Administrative Procedure Act (APA). As Chart 5 details, ALJs number about 1,400; they make hundreds of thousands of adjudicatory decisions in federal agencies such as the Social Security Administration. Moreover, as Chart 6 portrays, while trials are vanishing in federal courts, about seven hundred thousand evidentiary hearings (which include not only trials but whenever a witness testifies) occur in the four federal agencies with substantial dockets. In contrast, about one hundred thousand hearings involving the taking of testimony occur before either constitutional or statutory judges in federal courthouses. Thus, much of federal adjudication happens outside buildings labeled federal courthouses, and hundreds of judges rendering judgments of great import to claimants do not have life tenure.

Further, as one can see by looking again at Chart 5, in addition to the judges chartered under the APA and therefore protected through special selection and dismissal provisions, hundreds of others – presiding officers, administrative judges, hearing officers, examiners (constituting what Professor Paul Verkuil has called “the real hidden judiciary”<sup>19</sup>) – are line agency employees who decide thousands of cases but do so without the protections that the APA provides to both ALJs and disputants. The estimates are that more than 3,300 such non-APA judges can be found in the federal system, and some hold exceedingly important powers. For example, persons called “immigration judges” work for the Department of Justice and, as Chart 6 indicates, decide thousands of

cases a year. These “immigration judges” can be (and some have been) reassigned to other positions at the direction of the attorney general.

This enormous expansion of judicial resources came about through reliance on goodwill among all three branches. Dozens of shared initiatives produced the current landscape, with hundreds of federal facilities, more than three hundred thousand annual civil and criminal filings, and more than a million bankruptcy filings in the federal courts, as well as tens of thousands more in federal agencies, resulting in decisions articulating the meaning of and enforcing rights under federal law. The cooperative work of Congress, the courts, and the executive has equipped this nation with several thousand judicial officers in a hierarchy that has life-tenured Article III judges at its top.

What is the relationship between this broadening of judicial capacity and the norm of judicial independence? While popular understandings imagine three robust branches of government, powers significantly separated, and judges able to make rulings on the merits of cases without fear of losing their jobs or their resources, the constitutional text says less than might be expected.

Article III applies to only a subset of federal judges, and even for those constitutionally protected, Article III misses completely the idea of salary-setting independent of Congress as well as financing the institutional needs of a judiciary servicing millions of litigants. While salaries cannot be diminished, the text provides neither for raises, cost-of-living adjustments, funds for facilities and securities, nor for paying subordinate judges, other staff, jurors, librarians, clerks, probation officers, public defenders, or other auxiliary service providers.

19 Paul R. Verkuil, “Reflections Upon the Federal Administrative Judiciary,” *UCLA Law Review* 39 (1992): 1341 – 1363.



Chart 5  
Authorized Judgeships in Federal Courts and in Federal Agencies (as of 2001)

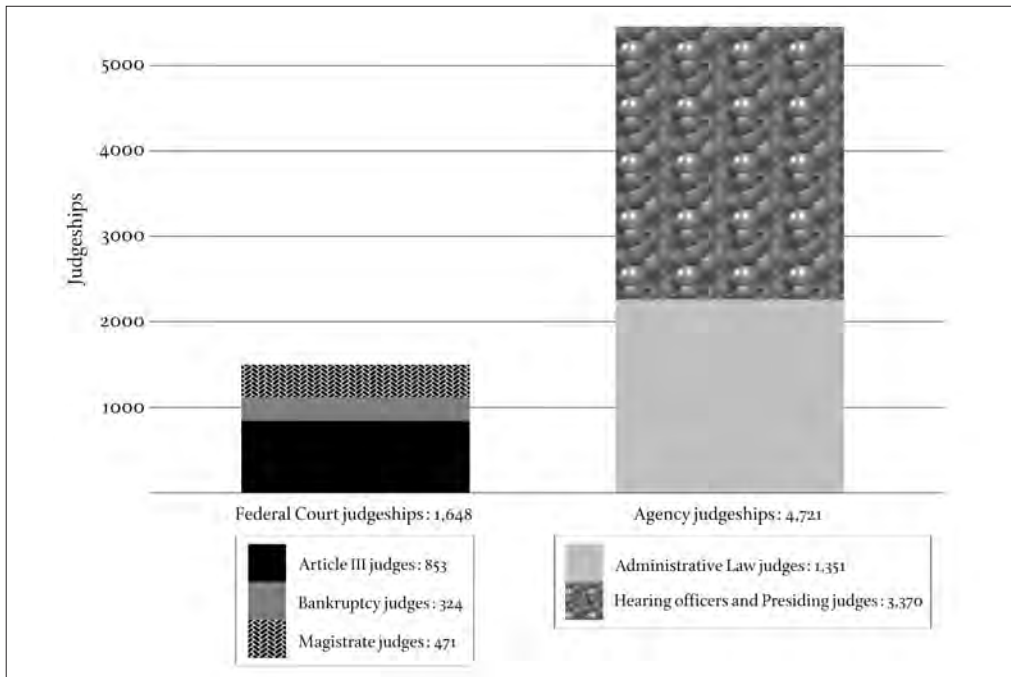
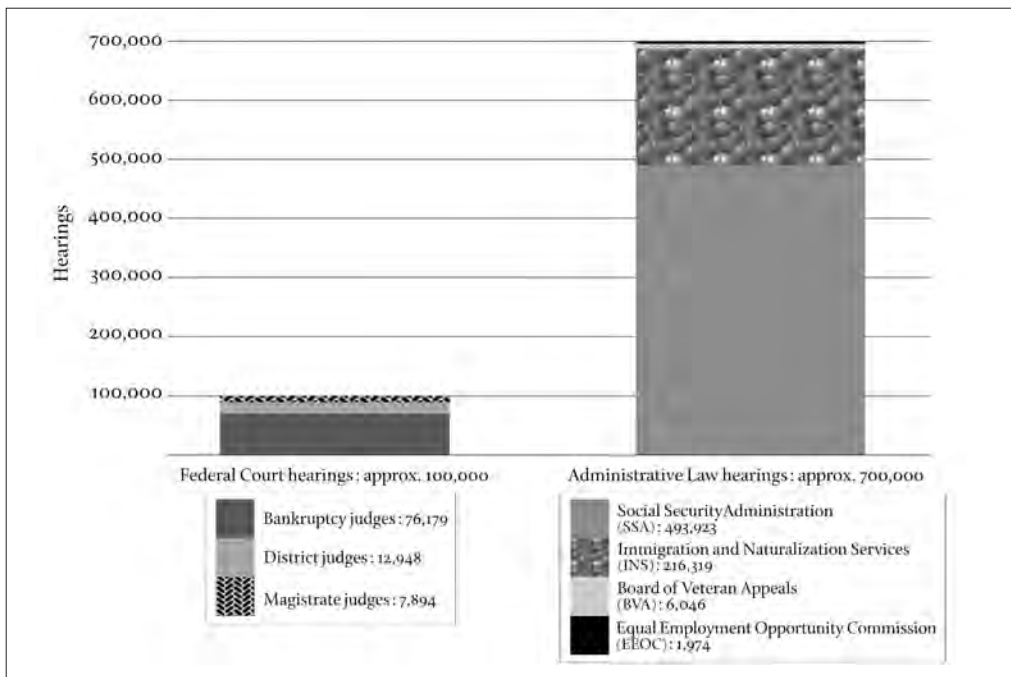


Chart 6  
Estimate of Evidentiary Hearings in Federal Courts and in Four Federal Agencies (2001)



The problem of resources is not theoretical. Throughout the twentieth century, members of the judiciary have objected that Congress had set their salaries too low to maintain excellence and had budgeted too little for court facilities, staff, and security. While members of Congress have questioned the need for new buildings, a broad group supports improved salaries. In addition, some federal judges have filed lawsuits arguing that the failure to give cost-of-living adjustments violated the constitutional guarantee against salary diminution. Within two years of assuming his post, Chief Justice John Roberts devoted his “state of the judiciary” address in its entirety to the problem of the lagging salaries of federal judges.<sup>20</sup>

In contrast to the current jurisprudence in the federal system of the United States, other democracies (as well as some state courts within this country) have interpreted mandates for judicial independence and separation of powers to include economic support for the judicial branch. For example, a 1997 decision of the Supreme Court of Canada dealt with the question of salaries for provincial court judges.<sup>21</sup> Reasoning that judicial independence depended on “security of tenure, financial security, and administrative independence,” the Court concluded that support for the judiciary ought not put judges in the position of supplicants seeking funds from the legislature. Rather, a depoliticized process “free from political interference through economic manipulation by the other branches of government” was required. The Canadian Supreme Court

held that judicial independence required salary setting by an independent body, making non-binding recommendations that could not be set aside unless justified; moreover, those explanations were themselves to be subjected to judicial review.

Turning to the “other” federal judges sitting outside Article III, the vulnerability of those working in administrative agencies was made plain in the 1990s when Congress stopped funding the Administrative Conference of the United States (ACUS), an institution that had been dedicated to research about and support of ALJs. Of equal concern are incursions from the executive, sometimes pressuring judges to conserve resources as they rule on claims against the government. Further, because ALJs have statutory protections against discharges, some agencies have tried to avoid using them by turning instead to line employees to serve as their judges.

Controversy emerged, for example, when a former attorney general asserted his authority to reassign persons working as “immigration judges” as he thought appropriate – and, as others thought, motivated by dislike of their judgments. Moreover, the inadequacies of decision-making in immigration cases have been detailed in several appellate courts criticizing the absence of evidentiary support for judgments, the unfair treatment of claimants, and the failures of internal administrative review by the Bureau of Immigration Appeals (BIA). One extensive empirical review of asylum claims documented that those seeking relief from deportation can expect radically different outcomes depending on the place in which the request is filed. “[A] Chinese asylum seeker unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of success on her asylum claim,

20 John G. Roberts, Jr., 2006 Year-End Report on the Federal Judiciary (2007).

21 *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 S.C.R. 3 (Canada).

as compared to 47% nationwide. Moreover, if this same asylum seeker had presented her claim 400 miles to the south, before the Orlando Immigration Court, she would have had a 76% chance of winning asylum, over ten times the Atlanta grant rate.”<sup>22</sup>

This example demonstrates how the constitutional doctrine developed by life-tenured judges to welcome administrative adjudication has left some of the most vulnerable litigants to do battle against the United States before judges more dependent on the government than others. Further, even while critical of decision-making by the BIA, life-tenured judges do not require (or often advocate) that such cases come, at first instance, either before them or before judges with structural protections paralleling those of Article III. The devolution of judicial power has not been accompanied by an insistence on the devolution of structural guarantees of judicial independence.

Another administrative-like system for individuals alleged to be “enemy combatants” has also come under criticism. After the attacks of 9/11, the president rejected the use of extant judicial systems (including military courts operating to try U.S. soldiers). The executive asserted the right to detain and to decide the fates of such individuals free from the Article III judiciary and, initially, free from constraints imposed by the Due Process Clause of the Constitution.

In 2004, the Supreme Court disagreed, at least as to U.S. citizens, by holding that federal-court review was available and due process constrained the executive.<sup>23</sup> The Department of Defense then created proceedings that in some respects resemble administrative adjudication to classify detainees. Some information (which, if the government claims national security requires confidentiality, is not disclosed to the accused) is presented to military personnel empowered to make decisions about detention. Further, “military commissions” were authorized to try individuals and to impose sentences from long-term incarceration to death. Protests have ensued, including from some members of the military who have described the proceedings as fundamentally unfair.<sup>24</sup>

In 2005, Congress enacted the Detainee Treatment Act, stating rights to be free from torture and from degrading and inhuman treatment but precluding detainees from enforcing them in Article III courts. Rebuffed again in some respects in 2006,<sup>25</sup> Congress responded in the Military Commissions Act of 2006 that provided narrow opportunities for life-tenured judges to consider some claims of alien detainees deemed to be “enemy combatants.” In 2008, five members of the Supreme Court held that those constraints violated the Constitution’s requirement that the privilege of habeas corpus not be suspended without the provision of an adequate substi-

22 Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, “Refugee Roulette: Disparities in Asylum Adjudication,” *Stanford Law Review* 60 (2007): 295–412; 329–330. Also documented are significant disparities for those coming from other countries as well as significant variations in the reversal rates of such decisions by life-tenured judges sitting in different appellate courts; *ibid.*, 328–339; 363–372.

23 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); see also *Rasul v. Bush*, 542 U.S. 466 (2004).

24 See, for example, Morris D. Davis, “AWOL Military Justice,” *Los Angeles Times*, December 10, 2007; available at <http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story?coll=la-opinion-rightrail>.

25 *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

tute and that Congress had not provided sufficient procedures as an alternative.<sup>26</sup>

As suggested above, cutting off access to life-tenured judges is not only taking place in the context of 9/11 – as was reflected in the argument by the Department of Defense that its classification regime for detainees resembled the decisional processes of other agencies. Indeed, when initially closing off public access to these “combatant status review tribunals,” the Department of Defense labeled that work as “administrative.” Furthermore, over the last fifteen years, Congress has divested federal courts of forms of authority over cases involving aliens and ordinary prisoners, and limited redress for civil litigants, such as those claiming violations of federal securities law.

Moreover, administrative judges are not the only ones who can be subject to oversight. Recall from the charts on magistrate and bankruptcy judges that hundreds of these judges work within Article III courts but lack Article III protections. The constitutionality of such judges was affirmed by life-tenured judges who reasoned that no threats to judicial independence could come from within the judicial branch. Yet, magistrate and bankruptcy judges owe their positions to the life-tenured judges who appoint them. Thus far, a distinguished group of individuals has been selected, and they play important roles that have only expanded since the positions were first established. The system has also become something of a training ground, as several have become life-tenured judges.

But we have not come to grips with two issues: whether a significant propor-

tion of federal judges should be selected with little democratic input, and whether they should then be reappointed through the same process. Finding justifications for life-tenured judges to have the singular authority to appoint hundreds of other jurists is difficult. While being a federal judge oneself may be helpful in understanding the qualities needed to do the job well, the grant of life tenure is predicated on the obligation to render judgments – not to become a source of patronage for others to gain jobs. Furthermore, to subject magistrate and bankruptcy judges to review for reappointment renders them dependent on their superiors for the continuation of their jobs. (When one bankruptcy judge was not renewed, he filed a lawsuit and argued that the process of reconsideration was unfair.) Given that judicial independence is premised on creating the freedom not to have to please others, the statutes ought to be rewritten either to turn the positions into life-tenured ones (as was proposed for bankruptcy judges in the 1980s) or to provide different selection mechanisms and non-renewable terms.

In sum, while the joint venture of the three branches of government has produced a host of new judgeships, the devolution of adjudicatory power to such judges has not been accompanied by an insistence that they share forms of insulation that inscribe the norm of independence. Developments of the last century have generated hundreds of federal judges who lack sufficient structural protection against aggressive efforts, whether they emanate from the media, litigants, the executive, Congress, or even Article III judges.

Life-tenured judges have not only gained the ability to clone themselves. They have also reconfigured their own

<sup>26</sup> *Boumediene v. Bush*, 128 S.Ct. 2229 (2008); see also *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007), vacated and remanded in light of *Boumediene v. Bush*, 128 S.Ct. 2960 (2008).

roles and the institutional structures that envelop them, and, again, many of these developments sit uneasily within the rationales for judicial independence.

To understand how a programmatic judiciary developed and its relevance to judicial independence, a quick summary of the infrastructure of the federal courts is necessary. The charts above showed some hundred life-tenured judges in 1901. At that time, they were not only few in number but also had little institutional means of talking with each other, let alone to anyone else. The attorney general gave Congress reports on the federal courts and asked Congress for the judiciary's funds. As Chief Justice William Howard Taft put it, each judge had "to paddle his own canoe."<sup>27</sup> Furthermore, before the 1930s, federal trial judges followed the local practices of the state in which they sat. But in 1934, Congress licensed the federal judiciary to make procedural rules that spanned the nation. The first set of civil rules, promulgated in 1938, helped to shape the identity of federal judges as a united cadre sharing uniform practices that at a daily level brought them into common cause with colleagues thousands of miles away.

Rules of court embody normative premises, and the federal judiciary's initial efforts aimed to ease access to courts and to simplify proceedings while expanding investigatory capacities of litigants through creating new rights to discovery of information. Revisions in the 1960s provided for class action remedies, to enable large groups of people to pursue rights through combining forces. But during the second half of the twentieth century, as they faced rising caseloads born in part from these new procedural

opportunities, federal judges began to worry that their rules made access too available, to be exploited by lawyers. Judges seized on judicial case management as a way to cope with their workloads and reframed the rules, as well as doctrine, to raise more barriers to entry.

Under current provisions, managerial judges press for dispositions without adjudication, either through settlement or alternative forms of dispute resolution. The enthusiastic promotion of these alternatives relies heavily on anti-adjudicatory rhetoric, instructing litigants and their lawyers that trial is a disfavored mode of decision-making. Interacting with many other factors (including the high cost of lawyer services), these efforts have affected rates of trials, which have declined dramatically over the last several decades. By 2002, of one hundred civil cases filed, fewer than two started a trial – prompting lawyers and judges to worry about what has come to be called "the vanishing trial"<sup>28</sup> and members of Congress to pause when asked by judges for more courthouses. As judges shift away from adjudication and toward mediation, and as they press for resolutions without public process, one justification for independence – rendering public judgment without fear or favor – weakens.

This privatization of adjudication at the trial level is paralleled by the transformation of processes for appeal. Many cases are disposed of without oral arguments and without published decisions. If arguments are had, they may be as brief as ten minutes per side. Further, even if decisions are available to read, some circuit courts stipulate that their judgments cannot be relied upon by

27 William Howard Taft, "Possible and Needed Reforms in Administration of Justice in Federal Courts," *ABA Journal* 8 (1922): 601 – 607; 602.

28 See Marc Galanter, "The Hundred-Year Decline of Trials and the Thirty Years War," *Stanford Law Review* 57 (2005): 1255 – 1274.



other litigants as precedents. A 2004 review reported that almost 80 percent of appellate court opinions were neither published nor to be used as authority.<sup>29</sup>

Moving from the reconfiguration of procedures for decision-making in individual cases to the infrastructure, over the past few decades the judiciary has emerged as a spokesperson in various public debates other than those related to resources sufficient to discharge its obligations. The ability to do so stems again from the efforts of William Howard Taft, who insisted on the need for organization. He succeeded in the 1920s when Congress created an official policy-making body of judges, now called the Judicial Conference of the United States. Comprised today of twenty-seven judges (the chief judge from each appellate circuit, whose positions come from seniority, and one district judge selected from each of the circuits), the Conference is chaired by the Supreme Court's chief justice. That body adopts official policy positions through the votes of its members. Staff support is provided by the Administrative Office of the United States Courts, chartered in 1939 to take over tasks from the Department of Justice. That office collects data, submits budgets, and oversees facilities for the federal court system. In 1967, Congress added resources through establishing a Federal Judicial Center to focus on education and research.

In the early days, the Judicial Conference avoided taking positions on matters of what it termed "legislative policy," such as whether Congress should create new federal rights. Beginning in the 1950s, under Chief Justice Earl Warren, the Conference occasionally raised

29 Penelope E. Pether, "Inequitable Injunctions: The Scandal of Private Judging in U.S. Courts," *Stanford Law Review* 56 (2004): 1465–1580; 1465.

questions about some federal jurisdictional provisions but often demurred on the grounds that such issues were matters for Congress. In the 1960s, the federal judiciary took up another task: teaching judges through educational programs that aimed to train judges to be better handlers of their dockets. As case loads grew and data collection methods improved, the judiciary's leadership focused on the volume of tasks assigned to it.

Beginning during Warren Burger's tenure, chief justices began to make "state of the judiciary" speeches; his annual addresses reflected some of his views about the desirability of limiting federal adjudication through deference to states and the development of other means for resolving disputes. Under the leadership of Chief Justice William Rehnquist and via a "futures planning process," the Judicial Conference approved ninety-three recommendations made to Congress as part of an official document, entitled the *Long Range Plan for the Federal Courts*, issued in 1995. There, the Judicial Conference stated its commitment to judicial independence while arguing for limited growth in the number of life-tenured judges, for greater reliance on adjudication by judges lacking life tenure, for less federal jurisdiction, and for a presumption against creation of federal rights if enforced in federal court.<sup>30</sup>

For example, the Judicial Conference told Congress – while legislation was pending – that it should not create new rights enforceable in federal courts if computers crashed in Y2K, that Congress should not give veterans access to

30 In 2008, an assessment of the impact of that plan was issued. See Administrative Office of the U.S. Courts, *Implementation of the Long Range Plan for the Federal Courts: Status Report* (April 2008).

life-tenured judges to challenge benefit awards, and that, if it created federal rights to health care, Congress should not vest jurisdiction in federal courts for enforcement of such provisions. Moreover, both before and after the passage of the Violence Against Women Act, then-Chief Justice William Rehnquist raised objections to it. Subsequently, in 2000, he wrote the five-person majority opinion in *United States v. Morrison* that held the civil rights remedy within that act to be an unconstitutional exercise of congressional power under the Commerce Clause and the Fourteenth Amendment.<sup>31</sup>

In short, over the last few decades, the federal judiciary as a corporate entity has taken on the roles of education, planning, and lobbying about the shape, nature, and future of judging and the role of federal law. These new roles leave the judiciary open to forms of politicization, as insiders understand that the judiciary is an organization that takes positions in Congress. Sophisticated repeat players (such as the government, insurance companies, corporations, and civil rights groups) attempt to lobby the judiciary to adopt certain stances.

As the judiciary adopts a collective voice to opine on theories of jurisdiction and to support or oppose access for certain kinds of rights to be pursued in federal court, the more it seems to function as other federal agencies do, participating in politics to advance its own agendas. Holding aside questions of how the judiciary operates internally such that the leadership can claim to represent the hundreds of life-tenured judges on behalf of whom it purports to speak, the position-taking puts the judiciary into politics rather than functioning as the

adjudicator of other “interested” parties’ claims.

I began this essay by outlining the constitutional ambiguities surrounding judicial independence. I then described how a dynamic of cooperation produced the important federal judicial system that is familiar today. But I have also analyzed how the inventions of the last century, all plausible responses to pressing needs readily explained by reference to political economy, have resulted in new sets of judges more vulnerable than the iconic judges found within the U.S. Constitution and in institutional practices that put pressure on the rationales for judicial independence.

But as I argued, Article III – our emblem of judicial independence – does not in its own terms explain the contemporary configuration of the federal judiciaries. Those developments move beyond the sparse textual provisions and rest on history, practices, and cultural understandings of the desirability of judicial action and its appropriate boundaries. Further, I have shown how dynamic the system is, as statutes, rules, and decisions by the judiciary innovatively respond to problems. As a consequence, practices that seemed unimaginable only decades ago (from the mundane examples of the relatively new reliance on court-based settlement programs and administrative adjudication to the stunning assertions by the U.S. government of the legitimacy of according little or no procedural rights to individuals at Guantánamo Bay and elsewhere) are now parts of our collective landscape.

Given these transformations, one ought not to assume the stability of the norm of judicial independence. Yet there are good reasons to seek to reinscribe its importance. While the United States was once at the fore in proclaiming such

31 *United States v. Morrison*, 529 U.S. 598 (2000).

a commitment in the constitutional text of 1789, it has now been joined by a worldwide chorus that an independent judiciary is a *sine qua non* of democracies. That proposition can be found in many countries' constitutions, as well as in transnational conventions such as the Covenant on Civil and Political Rights and the UN-promulgated principles on the judiciary.<sup>32</sup> Indeed, the recent efforts by the executive in the United States to try to escape decision-making in open court by life-tenured judges are testaments to the promise of transparent adjudication.

But perpetuating a commitment to judicial *independence* requires recognizing judicial *interdependence* on other branches of government, litigants, the media, and on the public itself. Needed is a culture that cherishes judging, respects individual judgments when rendered after deliberation, obliges judges to take responsibility for their decisions through explanation and publication, and constrains judges when they move outside their role as adjudicators. To shape that culture requires revamping some of what has come to seem normal as a result of the innovations of the twentieth century.

Key to refocusing on adjudication's contributions to the workings of democracies are public processes, an aspect of

32 See, for example, International Covenant on Civil and Political Rights, adopted December 19, 1966, art. 14, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force March 23, 1976) ("everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"); Basic Principles on the Independence of the Judiciary art. 1, G.A. Res. 40/32, U.N. Doc. A/RES/40/32 (November 29, 1985); G.A. Res. 40/146, U.N. Doc. A/RES/40/146 (December 13, 1985), available at [http://www.unhcr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhcr.ch/html/menu3/b/h_comp50.htm). ("The independence of the judiciary shall be guaranteed by the State and

adjudication that is only mentioned in Article III in a little read provision: Section 3, Clause 1, requiring that no one can be convicted of treason "unless on the Testimony of two Witnesses . . . or on Confession in open Court." The more general proposition that the public has rights of access to civil and criminal proceedings stems from a long tradition in the common law. During the twentieth century, the Supreme Court relied on those customs coupled with the First Amendment guarantees of the right to petition for redress, the Sixth Amendment guarantee of criminal defendants' rights to "a speedy and public trial," and Fifth and Fourteenth Amendment due process protections to insist that, as a matter of constitutional right, court proceedings and dockets have to be open to the public. The European Convention on Human Rights includes a similar proposition, as its Article 6 requires "a fair and public hearing" and that judgments are to be "pronounced publicly."<sup>33</sup>

What is the relationship between commitments to judicial independence and the public processes of adjudication? Litigation forces dialogue upon the unwilling (including the government) and momentarily alters configurations of authority. When cases do proceed in public before independent judges, courts institutionalize democracy's claim that it imposes constraints on state power, jurists included if they are required to explain why their power is used. In addition to undermining the

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enshrined in the Constitution or the law of the country.")

33 Convention for the Protection of Human Rights and Fundamental Freedoms, article 6, opened for signature November 4, 1950, 213 U.N.T.S. 221 (entered into force September 3, 1953).

state's monopoly on power, forging community ownership of norms, demonstrating inter-litigant obligations, and equalizing the field of exchange, open courts can express another of democracy's promises – that rules can change because of popular input. The public and the immediate participants see that law varies by contexts, decision-makers, litigants, and facts, and they gain a chance to argue that the governing rules or their applications are wrong. Through such democratic iterations, norms can be re-configured.

Judicial independence is an instrumental value, and we who value it need to insist on repeated examples of its utility in ordinary as well as extraordinary moments so as to generate a widespread understanding of how judges contribute to a democratic polity. Constitutional texts alone cannot do this work. All of us within the constitutional polity need to appreciate our own dependence on thriving judiciaries that, in turn, must make their processes and decisions publicly accessible.

Vicki C. Jackson

*Packages of judicial independence:  
implications for reform proposals on the  
selection & tenure of Article III judges*

Judicial independence is necessary to assure the rule of law and protection of rights; accountability in some form is necessary for legitimate judicial review in a democracy.<sup>1</sup> Rules about selection, tenure, and removal of judges are important parts of the “package” of provisions, practices, and institutional designs that influence the degree and shape of judicial independence and public accountability. This package includes legal, institutional, political, psychological, sociological, and cultural elements that affect judicial independence in complex ways. These elements are often interdependent; a change in one may create, or call for, changes in others. This essay focuses on the selection and tenure rules that are parts of the package of institutional designs protecting the independence of Article III federal judges, in

light of recent controversies over the nomination process and proposals for “term limits” for Supreme Court justices.

The U.S. Supreme Court justices, and the judges who serve in the federal district courts and circuit courts of appeals, are all Article III judges, appointed and holding office pursuant to Article III of the Constitution.<sup>2</sup> Nominated by the president and confirmed by the Senate, Article III judges hold office “during good Behaviour” and their salary cannot be reduced once in office. On conventional understandings, they can be removed from office only by impeachment in the House and conviction in the Senate, by a two-thirds vote, for “Treason, Bribery, or other high Crimes and Misdemeanors.” Article III judges are not the only federally appointed judges, but function as part of a much larger system of judging and justice that includes non-Article III federal judges and the state-court judges.

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1 This essay is drawn from a longer one, “Packages of Judicial Independence: The Selection and Tenure of Article III Judges,” which first appeared in *The Georgetown Law Journal* 95 (4) (2007).

2 See U.S. Const., article III, providing for a Supreme Court, and for “inferior” or lower federal courts to be established by Congress.



The appointments process for Article III judges is a political one by constitutional design. The process allows for a form of democratic participation, through elected representatives, in the selection of federal judges and for the possibility of democratic accountability for those selections. Through a variety of rules – some constitutional, others a matter of Senate or White House practice – this process has worked in complex ways to accommodate concerns by the political branches about partisan affiliation and ideology, competence, and the demographic mix of appointees. Although most nominees to the Article III courts continue to be approved by overwhelming majorities in the Senate, many observers believe that the rancor of the process in recent years has sharpened, leading to suggestions for change in the Senate’s voting rules on nominations. The political nature of the process has the potential for disputes to become so contentious that some fear they could threaten the culture and practice of judicial independence in the Article III courts.

For these reasons the tenure rules assume especial importance in safeguarding judicial independence. The long tradition that Article III judges are not removed from office based on disagreement with their legal decisions has been an important part of the package. A number of scholars have recently argued that the terms of Supreme Court justices should be limited to eighteen years. Comparative experience suggests that serious levels of judicial independence can be attained in some settings with long, nonrenewable terms (and without life tenure). But such a change in an established and ongoing system, with an existing package of institutional features operating in a specific constitutional culture, could have ramifications

elsewhere – for the confirmation process, for the internal dynamics of the Court, for its relationship to the lower federal and state courts, possibly for the stability of law – that require careful and cautious consideration.

The Article III federal courts, headed by the Supreme Court, have functioned as judicial anchors for the supremacy of federal law in a large country, with many different selection systems (including elections for fairly short terms in some of the state courts), that has managed to sustain a serious commitment to the rule of law. The federal courts are part of the overall package that is the U.S. court system, whose commitment to the rule of law under the Constitution has accommodated the states’ freedom to adopt different approaches to judicial selection and tenure, perhaps in part by assuring strong tenure and salary protections for the independence of the Article III federal judiciary.<sup>3</sup> Our public representatives and fellow citizens must think hard before deciding whether it would make sense to change one of the pillars of this ongoing system.

There are different meanings and degrees of judicial independence, different forms of accountability, and different balances between independence and judicial accountability. While all who act as judges are expected to exercise independent judgment, in the sense of being impartial between the parties and not having a personal stake in the dispute, there is disagreement about how independent from the public, or from elected political branches, judges should be in

<sup>3</sup> See U.S. Const., article III, which provides that Article III judges shall hold office “during good Behaviour” and specifies that their compensation “shall not be diminished during their Continuance in Office.”

interpreting and applying the law. There is, moreover, a range of accountability mechanisms, both within the federal judiciary (giving public reasons for decisions, appeal to a higher court, or internal discipline, for example) and by the political branches that appoint federal Article III judges, fund the courts, and enact the laws, including those concerning federal courts' jurisdiction. There are ranges of political responses to unpopular decisions (including constitutional amendment) that may be more, or less, consistent with the decisional independence of judges. Judges who must stand for frequent election or reappointment have more reason to be concerned that making an unpopular decision will harm their livelihood than do judges appointed under Article III. Indeed, the decisional independence promoted by the tenure and salary protections of Article III is often admired, even as the consequences of this independence in checking other branches of government can be highly contentious.

The selection and tenure rules for Article III judges affect both the decisional independence of individual judges and the institutional independence of the judiciary as a whole.<sup>4</sup> But these selection and tenure rules do not function in isolation from other legal rules, including those governing the courts' jurisdiction, when it is exercised, who can invoke it, and who can change it; the finality of the courts' judgments, who they bind, and

4 Compare John A. Ferejohn, "Independent Judges, Dependent Judiciaries: Explaining Judicial Independence," *Southern California Law Review* 72 (1999): 353, which distinguishes the independence of individual judges from the dependence of the judiciary as an institutional matter on legislative decisions – for example, about jurisdiction or funding.

how judgments are enforced;<sup>5</sup> judges' salaries, court funding and control of administration, hiring, and location of work;<sup>6</sup> restrictions on judges' nonjudicial speech or activities;<sup>7</sup> and availability of pensions for disability or retirement.<sup>8</sup> Legal structures alone, moreover, do not necessarily result in judicial inde-

5 On the importance of finality, see, for example, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), which held unconstitutional a federal statute that permitted one side in a private litigation to reopen final judgments entered by Article III courts; on enforceability, see, for example, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 362 (1816), which directly affirmed the judgment of the lowest level state court rather than remanding to the state appellate court, which had previously challenged the Supreme Court's authority; on the binding effect of constitutional decisions, see Vicki C. Jackson, "The Binding Effect of Constitutional Adjudication: A View from the United States," in *L'interprétation constitutionnelle*, ed. Ferdinand Mélin-Soucramanien (Paris: Dalloz, 2005), 219.

6 See, for example, Mark Ramseyer, "The Puzzling (In)dependence of Courts: A Comparative Approach," *Journal of Legal Studies* 23 (1994): 725–728, describing political control of Japanese judges through job assignment, including less favorable geographic locations.

7 See, for example, ABA Model Code of Judicial Conduct, Canon 2, Rule 2.10(a) (2007): "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court . . ."; *ibid.*, Canon 3, which limits judges' extrajudicial activities; see also, 5 U.S.C. App., sections 501, 502, which limit outside income and prohibit many activities that could generate outside income; but compare *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which holds unconstitutional, under the First Amendment, a state rule that generally prohibited candidates for judicial office from expressing views on specific legal issues which might come before the court on which the candidate sought to serve.

8 See generally Artemus Ward, *Deciding to Leave: The Politics of Retirement from the United*

pendence; they are only part of the story. Some political scientists, for example, argue that effective party competition in electoral politics is keenly associated with independent courts.<sup>9</sup> Important as well are the professional norms of lawyers and judges,<sup>10</sup> the political culture and popular conceptions about law,<sup>11</sup> and the capacities of all branches of government for self-restraint.<sup>12</sup> But it seems plausible to assume, at least for present purposes, that selection and tenure rules play some role in supporting commitments to the independence of judging and the rule of law.

A brief look at the history and structure of the most directly relevant constitutional provisions may help set parameters for further analysis of what judicial independence is for, what judges are to

be independent to do, and how the selection methods and tenure rules relate to these goals. In a sense, the question of what Article III judges were to be independent *from* is most readily answered: judges were to be independent of popular passions and certain kinds of pressures from other branches of the government. These were the purposes of the provisions for life tenure, the high standard for removal by impeachment, and the clause that salaries cannot be diminished while a judge is in office. The harder question is, what were judges to be independent to do? Some answers: they were to be independent to judge according to law; they were to have the independence to *interpret* the law in order to render judgment; they were to protect minorities from popular passions that would violate their legal rights; and they were to check the other branches of government when they departed from the fundamental commitments set forth in the Constitution.<sup>13</sup>

The proponents of the Constitution in the ratification debates recognized (as did the opponents of ratification) that there were risks of according judges this kind of independence. In The Federalist No. 79, Hamilton acknowledged suggestions that there be a provision to remove judges for “inability,” but concluded that such a provision “would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose.” No human institution can avoid some defects, Hamilton’s comment suggests, and a provision for removal other than by impeach-

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*States Supreme Court* (Albany: State University of New York Press, 2003), 8–9, 16–19.

9 See, for example, Ramseyer, “The Puzzling (In)dependence of Courts,” 722; Matthew C. Stephenson, “‘When the Devil Turns . . .’: The Political Foundation of Independent Judicial Review,” *Journal of Legal Studies* 32 (2003): 78–84.

10 See ABA Model Code of Judicial Conduct, Canon 2 (2007), which requires judicial impartiality. For a somewhat idealized version of what those aspirations were, see Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Belknap Press, 1993), 116–121.

11 See, for example, Barry Friedman, “Attacks on Judges: Why They Fail,” *Maine Bar Journal* 13 (1998): 124, discussing the role of “popular sentiment.”

12 On judicial self-restraint, see John A. Ferejohn and Larry D. Kramer, “Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint,” *New York University Law Review* 77 (2002): 962.

13 See Alexander Hamilton, The Federalist No. 78, in *The Federalist Papers: A Collection of Essays Written in Support of the Constitution of the United States: From the Original Text of Alexander Hamilton, James Madison, John Jay*, ed. Roy P. Fairfield (Baltimore: Johns Hopkins University Press, 1981), 226, 227–229, 231–232.

ment would pose too great a risk of misuse, even if its absence allowed some lacking in “ability” to remain on the bench. Hamilton likewise rejected suggestions that a mandatory retirement age be adopted, as existed in New York. Public accountability of the courts was to be achieved in other ways: in the political selection of learned lawyers with integrity, through Congress’s passage of laws (including those controlling the federal courts’ jurisdiction), through the possibility of constitutional amendment, and, for judicial “malconduct,” through impeachment proceedings to remove a sitting judge.<sup>14</sup>

So, in a classic example of separated powers and checks and balances, Article III of the Constitution distributes authority with respect to the establishment and staffing of the courts between the Congress and the president, and specifies that it is the courts that exercise the “Judicial Power of the United States.” It further provides that the judges of both the Supreme and inferior courts shall hold office “during good Behaviour” and specifies that their compensation “shall not be diminished during their Continuance in Office.” The need to secure the independence of the federal judiciary was a point of consensus in the Constitutional Convention. How to select those judges was, however, very much in controversy. Indeed, for quite some time during the three-month Convention held in Philadelphia in the summer of 1787 it appeared that the Senate would have exclusive authority to appoint judges. On June 13, members of the Convention adopted a proposal by James Madison, one of the Convention’s most influential members, that the Senate select judges. In July, a proposal to give

14 Hamilton, *The Federalist* No. 79, in *The Federalist Papers*, ed. Fairfield, 234 – 235.

the power of appointment exclusively to the president was voted down in convention. Until rather late in the drafting process the power of appointment was vested exclusively in the Senate, out of fear of giving the president the “dangerous prerogative” of appointing the judiciary.<sup>15</sup> Not until September 7 was the present rule agreed to; the Constitution was signed on September 17, 1787, and ultimately ratified by the states.

The selection mechanisms contemplated by the Constitution represent a distinctive set of choices. For example, unlike in some other countries, the Constitution did not mandate any self-replicating or professionally controlled selection process: Article III judges do not select, nominate, confirm, or appoint other Article III judges and have no formal consultative or advisory role.<sup>16</sup> Rather, the process of judicial nomination and confirmation is allocated to two other branches of government. Moreover, unlike in some other systems, neither the president nor the Senate, acting on their own, has authority to select any permanent members of the Article III judiciary. Instead, the two political institutions of government *must* work together, in a system intended to impose significant

15 Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven: Yale University Press, 1997), 5 – 6, quoting George Mason. I am indebted to Professor Goldman’s book, from which the description in this whole paragraph generally is drawn, and to his regular articles on federal judicial selection, which were very helpful in preparing the longer essay from which this short essay is drawn.

16 Article III judges do participate in selecting non-Article III judges, who perform important adjudicatory functions within the Article III court system as a whole. For discussion, see note 18 below and Judith Resnik’s essay in this issue of *Dædalus*.

checks on the authority of any one actor to make appointments to the life-tenured bench.

Finally, one selection tool that the Constitution provides for some offices – direct or indirect election by the people – is not used for the selection of judges. Rather, by allocating selection to the president, with confirmation by the less populist house of Congress, the framers designed a system to select persons whose competence was believed best discernible through means other than popular elections. A political selection system, requiring agreement or compromise between the president and Senate, would appoint those with specialized competency in law.

Other choices are reflected in an array of federal tribunals, whose judges do not enjoy Article III tenure and salary protections. Our current federal judiciary is an amalgam of Article III judges, of other judicial officers appointed by Article III judges, of Article I or “legislative” tribunals in the territories and for specific subject matters (such as tax disputes, contracts or “takings” claims against the government, or veterans benefits) and of administrative judges who sit in executive or administrative agencies to perform their adjudicatory functions. The non-Article III magistrate and bankruptcy judges, whose numbers come close to those of the Article III judiciary,<sup>17</sup> now

perform a large amount of adjudicatory work in federal district courts, in both civil and criminal cases (though their decisions are in theory subject to review by Article III judges). Non-Article III, “statutory” federal judges are selected in a variety of ways and may have to meet specific criteria; they are often subject to limited-term appointments; and they may be evaluated for reappointment or continued fitness.<sup>18</sup>

All judges are supposed to be impartial and fair-minded in judgment, for reasons identified with the Due Process Clause and which may also inhere in the concept of judging itself. Article III judges, however, have added institutional protections, designed to secure a greater degree of independence from political, social, or economic pressures than is required by the Due Process Clause, a degree of independence often associated with the federal courts’ obligation to serve as a check on the actions of the other branches of the federal government. In contrast to the “statutory” federal judges, for active Article III judges there are no minimal professional qualifications, no term limits, no regular evaluations of fitness or of whether the judge should continue in office. Appointment of an Article III judge is an investment in, and gamble on, the future, for she may sit for thirty or more years. And it is Article III judges who, in the end, have

17 According to the Administrative Office of the U.S. Courts, in 2006 there were 678 authorized district-court judgeships and 179 authorized judgeships on the courts of appeals, as well as 857 full-time magistrate and bankruptcy judges’ positions authorized. See U.S. Courts, Judicial Facts and Figures, Table 1.1, <http://www.uscourts.gov> (accessed July 14, 2008); follow link for “library,” then “statistical reports,” then “Judicial Facts and Figures.”

18 Judith Resnik uses the term “statutory judges” to refer to the non-Article III federal judiciary. See Judith Resnik, “Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III,” *Harvard Law Review* 113 (2000): 924; Judith Resnik, “‘Uncle Sam Modernizes his Justice’: Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation,” *The Georgetown Law Journal* 90 (2002): 607. For a more detailed discussion, see Jackson, “Packages of Judicial Independence,” 972–973, Appendix I, 1010–1011, 1025–1027.



jurisdiction to review questions of constitutional and other federal law, from cases in the state courts as well as the non-Article III federal courts, and to “say what the law is.”<sup>19</sup> Thus, for Article III judges, the stakes of the initial appointment decision are the highest.

Current debates question whether the selection process for Article III judges allows too much room for political partisanship and consideration of judges’ ideology, and whether the tenure rules promote too much of, or the wrong kinds of, judicial independence. In recent decades, a number of highly contentious disputes in the nominations process (especially involving lower federal courts) have raised concerns about whether the selection process is “broken.”<sup>20</sup> “Precommitments” of how a nominee would rule (for example, on current controversies about which nominees are likely to be questioned at public hearings) could compromise the appearance and actuality of impartiality and commitment to fair judicial process in the resolution of cases, although nominees generally resist answering such questions. Even without precommitments, a highly ideological or partisan selection process might convey the expectation that decisions should be in accord with political ideology, affecting the norms of judging according to law and also adversely affecting public views of the courts’ legitimacy; courts that lack public trust may be less able to function independently of popular passions.

19 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

20 See, for example, Sheldon Goldman, “Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts,” *University of Richmond Law Review* 39 (2005): 871.

An unpleasant selection process might discourage the best qualified from serving, yielding judges not competent enough to use their independence to judge according to law, and might also lead to escalations of political battles that affect judicial independence in other ways. Some also fear that a trend toward choosing Supreme Court justices from lower courts could affect the decisional independence of lower court judges. Finally, “recess” appointments, the use of which reemerged in 2000 and 2004 after a twenty-year hiatus, allow temporary judges, with greater incentives to worry about the political branches’ evaluation of their actions, to hear the most serious matters, including criminal trials.<sup>21</sup>

Law reviews and op-ed pages have been unusually full of reform proposals relating to selection and tenure rules for Article III judges, and understandably so. The idea that any public service position is held for life as a matter of right is in tension with modern conceptions of merit and public accountability. Legitimate constitutional government, moreover, requires both independent courts and effective democratic participation in governance; dissatisfaction with the relationship between the courts and the work of the elected branches of government, arising out of judicial invalidation or failure to invalidate actions of other branches and levels of government, has fed interest in reform proposals.

Some critics, on both the right and the left, seek institutional changes designed to produce a more populist or democratically constituted Supreme Court, after an unusually long period (1994 – 2005) of unchanging membership on that court. Others attribute high levels of

21 For development of these points, see Jackson, “Packages of Judicial Independence,” 974 – 986.

partisanship and rancor in the confirmation process to the voting rules, or the high stakes produced by the interaction of life tenure and the random and unpredictable pace at which vacancies become available (particularly on the Supreme Court). Still others are concerned with the capacity of Supreme Court justices to time their resignations for strategic political purposes. I will comment briefly on two sets of proposals that have received attention: (1) changing voting rules for confirmation of judges and (2) changing judicial tenure for Supreme Court justices, either by statute, by constitutional amendment, or through incentives.

The Constitution requires simply the “Advice and Consent” of the Senate to proposed nominations, language long interpreted as requiring only consent by a majority in the Senate. The great majority of federal judges are confirmed by overwhelming votes that far exceed two-thirds of the Senate.<sup>22</sup> In the wake of Justice Thomas’s confirmation by an unusually close (52 – 48) vote, proposals emerged to require a two-thirds vote

22 See Judith Resnik, “Judicial Selection and Democratic Theory: Supply, Demand, and Life Tenure,” *Cardozo Law Review* 26 (2005): 636, chart 5, which shows that the overwhelming majority of President Clinton’s and President Bush’s nominees to the lower federal courts, through 2003, were confirmed by affirmative votes of at least 91 senators, and that of the 548 nominees for lower-court Article III judgeships who reached the floor of the Senate from 1993 through 2003, only three of President Clinton’s and three of President Bush’s were confirmed with less than 61 votes (three-fifths of the senators); see also Lee Epstein, “A Better Way to Appoint Justices,” *Christian Science Monitor*, March 17, 1992, stating that since 1937, “only one successful nominee to be an associate justice [of the Supreme Court] might have failed to gain 67 Senate votes” had a two-thirds rule for confirmation been in place.

to confirm judges for life-tenured seats. Proponents argued that a higher supermajority was appropriate because judges serve such long terms, far beyond the term of the administration then in power, and exercise such important responsibility in interpreting the Constitution insofar as it constrains other branches; moreover, a supermajority rule would foster a more cooperative process of identifying high-quality nominees who can win approval from segments of both major parties, thereby improving the process and producing high-quality “moderate” or “mainstream” judges.<sup>23</sup> The Senate’s authority by internal rule to require a two-thirds vote on judicial nominees is unclear, in light of the limited supermajority voting rules specified in the Constitution itself;<sup>24</sup> a constitu-

23 See Epstein, “A Better Way,” which argues that a two-thirds rule would produce nominees chosen more for their “legal credentials” to gain “true bipartisan support” and notes that, historically, a two-thirds vote would have had force on only a small number of nominations, though at the margin a different voting rule might produce some different votes; Resnik, “Judicial Selection and Democratic Theory,” 637 – 638, which argues for a three-fifths voting rule as generating “movement towards a middle ground.”

24 Compare John O. McGinnis and Michael B. Rappaport, “The Constitutionality of Legislative Supermajority Requirements: A Defense,” *Yale Law Journal* 105 (1995): 483, arguing that the constitutional authority given to each house of Congress to provide for its own rules permits either house to adopt a supermajority voting requirement for its own action, with Susan Low Bloch, “Congressional Self-Discipline: The Constitutionality of Supermajority Rules,” *Constitutional Commentary* 14 (1997): 1, arguing that, in light of the Constitution’s specificity in defining those circumstances in which a two-thirds vote is required, neither house has constitutional authority to require a supermajority for bill passage or for giving advice and consent to presidential nominations.

tional amendment would in theory be possible. Other recent proposals, not directed at the Senate's rules but, rather, at some form of bipartisan nominating commission, likewise aim to secure a broader political consensus for nominees.<sup>25</sup>

A very different kind of proposal is animated not by a desire for greater consensus but for more pure majority voting in the Senate, by abolishing the minority's power to filibuster judicial nominations.<sup>26</sup> The filibuster is a device available in unusual cases (because political restraints prevent its use more general-

25 For example, Senator Schumer reportedly proposed use of commissions, with equal numbers of Democrats and Republicans, to identify a single nominee, to be selected by the president unless he found the candidate "unfit for judicial service." Editorial, "Balancing Judges," *The Boston Globe*, May 6, 2003. This proposal may raise serious constitutional questions. Compare *Pub. Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), which construed the Federal Advisory Committee Act not to apply to the ABA's work on judicial nominations, in part because of constitutional concerns about restrictions on the president's authority in the nominating process; *ibid.*, 467 (Kennedy, J., concurring), which concluded that the statute reached the ABA's activity but was unconstitutional in so doing. President Carter relied on presidentially appointed nominating commissions, which made *advisory* recommendations of possible candidates for the federal courts of appeals. For a recent ABA recommendation favoring the use of bipartisan commissions to help identify prospective nominees to the lower federal courts, see American Bar Association, Standing Committee on Federal Judicial Improvements Recommendation to the ABA House of Delegates (Resolution 118) (2008), [http://www.abanet.org/scfji/pdf/SCFJI\\_Res\\_HOD.pdf](http://www.abanet.org/scfji/pdf/SCFJI_Res_HOD.pdf). (I participated in a task force that worked on this recommendation.)

26 See generally Michael Gerhardt, "The Constitutionality of the Filibuster," *Constitutional Commentary* 21 (2004): 445.

ly) to require supermajority voting on particularly controversial candidates. The filibuster differs significantly from a general rule requiring a supermajority vote for judicial nominees: a general rule suggests that a high degree of consensus should ordinarily be required for such judicial appointments, while reliance on the filibuster suggests that supermajority voting rules need special justification and are a departure from the norm.

Although arguments are made on both sides of this question, the case for having heightened voting rules – as a general rule or available in exceptional cases – for the appointment of life-tenured officeholders seems relatively strong, as compared to its use for officeholders whose terms are shorter. Supermajority voting rules are required for the selection of justices to some constitutional courts in Europe.<sup>27</sup> Here, the argument for heightened voting rules is at its strongest with respect to appointments to the Supreme Court, because of its final authority within the hierarchy of courts.<sup>28</sup> Closely divided votes on confirmation of judges may, over the long run, diminish the judges' stature in the public eye and diminish the sense of law as a constraint that exists somewhat apart from politics. Conversely, procedures that conduce to more cooperation in evaluating professional standards may help reinforce the distinctiveness of law and legal judgments from partisan poli-

27 See John A. Ferejohn and Pasquale Pasquino, "Constitutional Adjudication: Lessons from Europe," *Texas Law Review* 82 (2004): 1681, 1702.

28 Compare John O. McGinnis and Michael B. Rappaport, "Supermajority Rules and the Judicial Confirmation Process," *Cardozo Law Review* 21 (2005): 546, arguing that filibusters, which work toward moderation in appointments, should be available for Supreme Court but not lower-court nominations.

tics. Given the necessarily political nature of the process, and the association of political differences with differences over constitutional issues, it is neither realistic nor necessarily healthy to expect that ideological views would no longer play a role. Voting rules changes might, however, at the margin foster a more cooperative focus on finding nominees with broader support, thereby reducing the arena (and dominance) of ideological battle.

The question of term limits or mandatory retirement for Supreme Court members has arisen episodically. In the late 1980s, for example, Henry Monaghan, a law professor at Columbia University, proposed term limits of fifteen to twenty years for Supreme Court justices.<sup>29</sup> After the Rehnquist Court had served a full decade of service with no change in membership, proposals for reform multiplied. Kevin McGuire, a political scientist at the University of North Carolina, proposed a statutory financial incentive for justices to retire, by setting higher pensions for those who retire before a specific age.<sup>30</sup> A number of scholars have proposed a mandatory retirement age comparable to those of other

29 Henry Paul Monaghan, "The Confirmation Process: Law or Politics?" *Harvard Law Review* 101 (1988): 1211, which argues that judicial independence can be achieved with long, nonrenewable terms: "[W]hat relieves judges of the incentive to please is not the prospect of indefinite service, but the awareness that their continuation in office does not depend on securing the continuing approval of the political branches."

30 Kevin T. McGuire, "An Assessment of Tenure on the U.S. Supreme Court," *Judicature* 89 (2005): 8, 15, which suggests a statute providing for a pension of 200 percent of salary if a justice retires prior to a certain set age or term of years, or 100 percent of salary as a pension if the justice retires after those points.

Western democracies,<sup>31</sup> and some have suggested that the chief justiceship be rotated or time-limited.<sup>32</sup>

Two different sets of authors, building on earlier work, have recently proposed schemes – one statutory, one requiring a constitutional amendment – for eighteen-year term limits for Supreme Court justices. Both would apply only prospectively to new appointees. Paul Carrington and Roger Cramton, law professors at Duke University and Cornell University, respectively, have proposed a statute that would, in effect, redefine the office of Supreme Court justice, making it one served for eighteen years, after which the justice would remain an Article III judge serving on the lower federal courts (and would be available as a "back up" justice on the Supreme Court if one of the nine more junior justices were unable to sit on a case).<sup>33</sup> A considerable number of academics, associated with different parties and ideologies, have expressed their agreement with the general principle of this statutory propos-

31 See, for example, Resnik, "Judicial Selection and Democratic Theory," 614–615, 640–641; see also Ward, *Deciding to Leave*, 12.

32 See Alan B. Morrison, "Opting for Change in Supreme Court Selection, And for the Chief Justice, Too," in *Reforming the Court: Term Limits for Supreme Court Justices*, ed. Roger C. Cramton and Paul D. Carrington (Durham: Carolina Academic Press, 2006), 210–223; Judith Resnik and Lane Dilg, "Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States," *University of Pennsylvania Law Review* 154 (2006): 1588, 1644–1647.

33 See Paul D. Carrington and Roger C. Cramton, "The Supreme Court Renewal Act: A Return to Basic Principles" (as revised, January 2005, and abbreviated, July 5, 2005), in *Reforming the Court*, ed. Cramton and Carrington, 467–471.

al.<sup>34</sup> Steven Calabresi and James Lindgren, law professors at Northwestern University, disagree that this change can or should be made by statute; they have proposed a constitutional amendment to limit terms on the Supreme Court to eighteen years.<sup>35</sup> Each proposal generally contemplates selection of a new justice every two years.

Most other Western democracies, including those with high courts regarded as independent and of high quality, provide either for single nonrenewable terms, mandatory retirement ages, or

both.<sup>36</sup> These approaches appear to be compatible with judicial independence.<sup>37</sup> The “during good Behaviour” provisions of Article III were enacted in the late eighteenth century, when average life spans were far shorter than today. Some reasons given at that time for life tenure (such as the need to avoid judges’ worrying about earning a living after their service) have been basically mooted by the provision of pensions for Article III judges. And studies indicate some lengthening of the average term in fact served by justices of the Supreme Court, though magnitudes depend somewhat on the precise periods selected for comparison.<sup>38</sup>

34 Among the more than fifty legal experts reported to “have endorsed the Carrington-Cramton proposal ‘in principle,’” meaning, to have endorsed “the statutory proposal in general terms without commitment to the specific form or language of either the proposed statute or the document presenting it,” are Professors Bruce Ackerman, Jack Balkin, Jerome Barron, Walter Dellinger, Norman Dorsen, Richard Epstein, Richard Fallon, Lino Graglia, Yale Kamisar, Larry Kramer, Sanford Levinson, Frank Michelman, Richard D. Parker, H. Jefferson Powell, L. A. Scot Powe, Jr., David L. Shapiro, Carol S. Steiker, Nadine Strossen, Lawrence H. Tribe, and Mark V. Tushnet. See Paul D. Carrington and Roger C. Cramton, *The Supreme Court Renewal Act 2005: A Return to Basic Principles* (July 5, 2005); available at <http://paul.carrington.com/Supreme%20Court%20Renewal%20Act.htm>; see also “Reforming the Supreme Court: An Introduction,” in *Reforming the Court*, ed. Cramton and Carrington, 5–7.

35 Steven G. Calabresi and James Lindgren, “Term Limits for the Supreme Court: Life Tenure Reconsidered,” *Harvard Journal of Law and Public Policy* 29 (2006): 769, 824–831. The Calabresi-Lindgren and Carrington-Cramton proposals build on earlier work. See, for example, Philip D. Oliver, “Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court,” *Ohio State Law Journal* 47 (1986): 799.

36 See Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law*, 2nd ed. (New York: Foundation Press, 2006), 497–500.

37 Query whether other rules, such as minimum age requirements for service, or post-employment prohibitions, might be helpful to minimize the use of judicial positions as “stepping stones” to advancement and the ensuing possibility of non-merits incentives for decision. In Germany, with a minimum age of 40 for appointment to the Constitutional Court, it is reported that on completion of their single nonrenewable terms, Constitutional Court justices might be attractive candidates for appointments to other courts. See Donald P. Kommers, *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* (Beverly Hills, Calif.: Sage Publications, 1976), 87, 116.

38 See, for example, Calabresi and Lindgren, “Term Limits for the Supreme Court,” 778–781, comparing the 26.1 years average tenure for justices retiring after 1970 with 14.9 years for justices leaving office from 1789 through 1970 and showing an average tenure of 20.8 years for justices who left office between 1821 and 1850; Resnik and Dilg, “Responding to a Democratic Deficit,” 1595, which found a twenty-year average tenure for Supreme Court justices whose tenure terminated between 1833–1853 and a twenty-four-year average tenure for



Thus, if we were starting from scratch in designing an independent judiciary, there would be a range of alternatives to life tenure, some perhaps superior, to consider. But we in the United States are not starting from scratch. We have an ongoing working system; making changes could have unforeseen effects, including a sense of diminished independence born from the direction of the proposed change. It is thus important to consider carefully the problems such a significant change would be addressed to.

Term limit proposals are motivated in part by frustration at the Court's substantive decisions and workload (including how few cases are being taken for review on the merits), accompanied by worries over "hubris" and potential "overreaching" from lengthy office-holding; in part by concerns over the rancorous (and seemingly more ideological) nature of the selection process, believed to be related to the unpredictability of vacancies; and in part by concerns whether opportunities for appointment are distributed fairly across democratically elected presidential administrations and are frequent enough for appro-

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justices whose service terminated between 1983–2003; but compare McGuire, "An Assessment of Tenure on the U.S. Supreme Court," 9–12, arguing that on some measures justices "are spending no more time on the Court than their brethren who have served over the past 150 years" and suggesting that the retirement of Justice O'Connor, plus one more vacancy (which soon thereafter arose with Chief Justice Rehnquist's death) "would return the Court to its historical norm" median years of service; Susan Low Bloch et al., *Inside the Supreme Court: The Institution and Its Procedures*, 2nd ed. (St. Paul, Minn.: Thomson/West, 2008), 1116, estimating an average of fifteen years of service for the justices sitting in mid-2007.

priate political accountability. Also contributing to the recent support for term limits is an increased knowledge of the structure and organization of other constitutional courts in the world, as well as concern for the effects of age on mental acuity and the role of partisan factors in the timing of retirements. Both of the proposals noted above are directed only at the Supreme Court, which is justifiable since the Court is the final decision-maker, within the judicial hierarchy, on the meaning of laws. Each proposal raises serious questions and concerns.

To make such a large change by an ordinary *statute* seems especially problematic, for reasons that include its uncertain constitutionality,<sup>39</sup> its complexity, and the possibility that to make such a change by statute would create a slippery slope toward a considerably less independent judiciary.<sup>40</sup> Once some departures from existing understandings of life tenure are justified, it could well become easier, and more tempting, to move toward others – removal of

39 For arguments that the statutory proposal is unconstitutional, see, for example, John Harrison, "The Power of Congress Over the Terms of Justices of the Supreme Court," in *Reforming the Court*, ed. Cramton and Carrington, 361, 372; David R. Stras and Ryan W. Scott, "Retaining Life Tenure: The Case for the Golden Parachute," *Washington University Law Quarterly* 83 (2005): 1408–1421; see also Stephen B. Burbank, "Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices," *University of Pennsylvania Law Review* 154 (2006): 1512–1513, stating that the constitutional "question is neither uninteresting nor without difficulty."

40 See Ward Farnsworth, "The Regulation of Turnover on the Supreme Court," *University of Illinois Law Review* 2005 (2) (2005): 451–452; Ward Farnsworth, "The Case for Life Tenure," in *Reforming the Court*, ed. Cramton and Carrington, 251, 266–267.

judges for reasons short of the impeachment standard, for example.<sup>41</sup>

Before deciding whether a *constitutional amendment* to provide for staggered eighteen-year terms for members of the Supreme Court is, on balance, a good idea, careful analysis (beyond what space permits here) of the fit between the problem and the remedy is required. For example, concerns for judicial disability have been largely (though not wholly) addressed by informal practice, and “decrepitude” can emerge even during an eighteen-year term. If the concern is that the Supreme Court should better mirror present political sentiments,<sup>42</sup> there is disagreement as a matter of principle about whether this goal is desirable or whether the structural role of the Court is not to provide a check on current politics and a link with our constitutional history, as judges of earlier generations must be persuaded of the constitutionality of challenged laws.<sup>43</sup> If the concern is to advance a particular

ideology or methodology of interpretation,<sup>44</sup> it is doubtful that any proposal along these lines will be effective over the long run because preferences as to ideology and methodology may conflict, and the distribution of those preferences is unstable.<sup>45</sup>

On the other hand, if the concern is to remove the randomness of whether elected presidents get to appoint justices in numbers commensurate with their term, and to assure more regular democratic inputs to the Court, staggered terms with appointments every two years would be effective toward that goal – but so might other approaches, for example some expansion of the Supreme Court’s bench, or staggered terms that expire every four years for two (or three) seats. Moreover, politically motivated retirements – however large or small a problem this is considered – would be limited under some versions of the proposal, but could also be addressed through mandatory retirement ages. Finally, if the concern is to reduce the rancor of the confirmation process, some argue that with confirmations expected every two years, the incentives and willingness to wage major battles would decline. But it is unclear whether staggered single terms would necessarily have this effect or if, given interest-group politics around confir-

41 Although the conventional understanding is that impeachment proceedings are the exclusive method for removing Article III federal judges, some scholars propose that Congress could by statute authorize courts to remove federal judges from office for misbehavior. See Saikrishna Prakash and Steven D. Smith, “How to Remove a Federal Judge,” *Yale Law Journal* 116 (2006): 74–79.

42 See Calabresi and Lindgren, “Term Limits for the Supreme Court,” 810–811, 833, which argues that turnover “must be relatively frequent and regular” in order for the democratic check of the appointments process to be effective, and that with more regular turnover, there would be a “more direct link between the will of the people and the tenor of the Court.”

43 Compare Farnsworth, “The Regulation of Turnover on the Supreme Court,” 411–418, describing the “slower law” of constitutional adjudication.

44 See, for example, Calabresi and Lindgren, “Term Limits for the Supreme Court,” 823, 852–853, which suggests that with staggered, eighteen-year terms more “originalist” or “textualist” judges would be appointed.

45 Compare Burbank, “Alternative Career Resolution II,” 1514, which finds “little basis to believe that the public at large has understandings of constitutional meaning, as opposed to results . . . let alone understandings of competing interpretive approaches.”

mations, it would turn an episodic fracas into a regular one.<sup>46</sup>

Indeed, one question for further analysis might be whether a change to staggered, fixed terms would require other changes, including supermajority voting rules in the Senate, to achieve the desired goals. If Supreme Court nominations were to happen every two years, should the package of rules relating to judicial independence and accountability be changed as well to provide for confirmation by a three-fifths or a two-thirds vote in the Senate? Would any tendency of a more regular and frequent nomination process to promote posturing and confrontation be mitigated by the anticipated effect of supermajority voting rules to produce nominees whose qualifications, attitudes, and character appealed more broadly to segments of both major parties?

These proposals raise interesting questions for debate, about how to preserve the good that judicial independence promotes while smoothing out opportunities for political accountability through appointments (and avoiding some concerns about disability and retirement).<sup>47</sup>

46 See *ibid.*, 1514 – 1515, 1537 – 1547; see also Arthur D. Hellman, “Reining in the Supreme Court: Are Term Limits the Answer?” in *Reforming the Court*, ed. Cramton and Carrington, 298 – 303.

47 Some courts have staggered terms for groups of justices that expire around the same time, raising the possibility of compromise over “slates” among or within appointing authorities. Compare, for example, Kommers, *Judicial Politics in West Germany*, 128 – 144, describing a “modus vivendi,” by which different political parties were able to fill different seats on the German Constitutional Court, subject to others’ veto; Jackson and Tushnet, *Comparative Constitutional Law*, 498 – 499, which notes the informal cooperation among parties and chambers of the legislature in selecting German justices.

Although many of the European courts rely on single nonrenewable terms, they do so for courts which, in the European tradition, are specialized constitutional courts that do not hear the range of cases the U.S. Court does. The Supreme Courts of Canada and Australia may be more comparable to the U.S. Court than the constitutional courts of Europe. Situated in the common law tradition, Canada and Australia have a supreme or high court with jurisdiction over constitutional and statutory matters; their constitutions protect judges from being removed from office except in limited circumstances;<sup>48</sup> and each country amended its constitution in the mid-twentieth century to provide for a mandatory retirement age for their judges.<sup>49</sup> While it is healthy to look comparatively at how successful constitutional courts have been structured in other Western democracies, it is important to give close and careful consideration to the varying contexts.<sup>50</sup>

48 In Canada the constitution provides that superior court judges “shall hold office during good behaviour,” Constitution Act, 1867, section 99(1) (Can.), while in Australia the constitution provides that High Court and federal judges can be removed only on a finding of “proved misbehaviour or incapacity,” Const. of Austl., article 72(ii). These judges are removable only on the procedure of “address” by both houses of their respective legislatures. See Constitution Act, 1867, section 99(1) (Can.); Const. of Austl., article 72(ii).

49 See Jackson, “Packages of Judicial Independence,” 1005 n. 172, describing Canadian and Australian constitutional amendments setting mandatory retirement ages of 75 and 70, respectively.

50 See Vicki C. Jackson, “The Supreme Court, 2004 Term: Comment: Constitutional Comparisons: Convergence, Resistance, Engagement,” *Harvard Law Review* 119 (2005): 125 – 126.

Other ideas, for example very short terms for federal judges, are plainly designed to diminish judicial independence and move toward a more populist judiciary.<sup>51</sup> As Chief Justice Rehnquist wrote in his 1992 book, *Grand Inquests*, the idea of an independent judiciary was one of the most “original contributions to the art of government” made by the Constitutional Convention that met in Philadelphia. The Senate’s rejection in the Chase impeachment of removal based on disagreement with a judge’s decisions or views was, in his view, central to the success of the idea of the independent judiciary. Even though it would be easy at times of intense conflict and polarization for those “engaged in the struggle to see it as an apocalyptic confrontation between good and evil, when customary restraints must be cast off,” Rehnquist wrote, enough Senators maintained their loyalty to the Constitution, over narrow partisan interest, to help secure judicial independence through their vote to acquit.<sup>52</sup> At a time when more of the world’s countries are moving to a system of independent courts for constitutional review, it would be quite a step for the United States – which contributed the idea of judicial review by independent courts to the world – to move away from it.

Article III judges were designed to function with great independence –

51 See, for example, Saikrishna B. Prakash, “America’s Aristocracy,” *Yale Law Journal* 109 (1999): 568 – 569, which suggests that life tenure be eliminated for all federal judges and that they serve renewable three-, four-, or six-year terms.

52 Quotations in this paragraph are from William Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New York: Morrow, 1992), 275 – 278.

independence from political and popular pressures, independence to interpret and apply the law, including the Constitution, so as to resist encroachments by other branches of government. This does not mean that courts necessarily have the final word on large questions of substance. Legislative disagreements with judicial decisions interpreting statutes can be expressed in amended statutes. Disagreement with constitutional interpretations can sometimes be addressed through revised laws, through litigation over time, or through a constitutional amendment: term limits are not the only response to concerns about judicial policy-making or for more democratic forms of lawmaking.

Just as it is almost impossible to envision a confirmation process in which politics and ideology play no roles, so it is difficult to imagine that, on deliberation, members of Congress or members of the public would abandon the tradition of strong judicial independence for the federal judiciary. The federal Article III courts function as part of a much larger set of connected systems of adjudicators, including the state courts and non-Article III federal courts. Many other courts, federal and state, whose judges lack Article III protections, make initial decisions on important questions – and most of these decisions end up not being reviewed in an Article III court. Yet they are made in the shadow of the supremacy of federal law and the possibility of Article III court review.<sup>53</sup>

53 Supreme Court review of state-court judgments and the availability of the inferior federal courts to assure states’ compliance with federal norms are fundamental to the overall operation of the U.S. Constitution and the American court systems. See, for example, Lawrence Gene Sager, “The Supreme Court, 1980 Term: Foreword: Constitutional Limi-

The United States is unusual not only in having life tenure for its Article III judiciary, but also in the degree to which it relies on popular elections for the selection or retention of its state-court judiciary.<sup>54</sup> The strong institutional independence of Article III judges anchors the legal infrastructure that accommodates elected judges in the state courts with the rule of law. This anchoring role provides added reason why proposals to jettison central features of the traditional structure of federal judicial indepen-

dence should be evaluated with great caution and with attention to the effects that change in one part of the “package” could have on other parts. For the federal courts do not function alone, but as part of a broader federal system.

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tations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts,” *Harvard Law Review* 95 (1981): 45–57, which concludes that under the Constitution, “superintendence of state compliance with” supreme federal law is an “essential function” of the federal judiciary; compare O. W. Holmes, *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920), 295–296: “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States”; quoted in Geoffrey Stone et al., *Constitutional Law*, 4th ed. (Gaithersburg, Md.: Aspen Law & Business, 2001), 50.

54 See, for example, Hans Linde, “Elective Judges: Some Comparative Comments,” *Southern California Law Review* 61 (1988): 1996: “To the rest of the world the American adherence to judicial election is as incomprehensible as our rejection of the metric system”; see also Herbert Jacob et al., *Courts, Law, and Politics in Comparative Perspective* (New Haven: Yale University Press, 1996), 390, finding that among the several countries studied the United States uses “the most partisan selection process” for choosing judges; Roy A. Schotland, “Comment,” *Law and Contemporary Problems* 61 (1998): 153, which notes the shortness of terms of many elected judges, and reports that 62 percent of elected trial judges serve terms of no more than six years, while 45 percent of elected appellate judges serve six-year terms.



Viet D. Dinh

*Threats to judicial independence,  
real & imagined*

Public criticism of the federal courts is nothing new.<sup>1</sup> Since the beginning of the republic to the present day, politicians and populace have attacked judicial opinions and decried judicial activism. For example, the response to the landmark Supreme Court decisions of the 1950s, in particular those involving desegregation and church-state relations, was a nationwide movement to remove Chief Justice Warren from the bench.<sup>2</sup> Billboards around the country proclaimed their aim: “Impeach Earl Warren.”<sup>3</sup> Petitions circulated, and over one million Americans signed their names in support of the impeachment effort.<sup>4</sup> Some even proposed that Warren be hanged.

For as long as there has been a federal judiciary, federal judges have been blasted for purportedly overstepping their bounds. Yet by and large the judges have not abdicated their duty to invalidate laws that they believe offend the Constitution. Public criticism of judicial decisions does not, by itself,

necessarily threaten the independence of the judiciary; in fact, under some circumstances, such critiques paradoxically can help bring about a more robust form of judicial independence.

Under our constitutional system, the federal judiciary wields carefully circumscribed powers, but within its proper sphere judicial authority is final and therefore absolute. Among other limitations, federal judges may not issue advi-

1 A modified version of this essay first appeared in *The Georgetown Law Journal* 95 (4) (2007).

2 Kelly A. MacGrady and John W. Van Doren, “AALS Constitutional Law Panel on Brown, Another Council of Nicaea?” *Akron Law Review* 35 (2002): 373, which cites Ed Cray, *Chief Justice: A Biography of Earl Warren* (New York: Simon & Schuster, 1997), 389–392.

3 See Charles J. Ogletree, Jr., “Judicial Activism or Judicial Necessity: The D.C. District Court’s Criminal Justice Legacy,” *The Georgetown Law Journal* 90 (2002): 693, which cites Kermit L. Hall, “The Warren Court: Yesterday, Today, and Tomorrow,” *Indiana Law Review* 28 (1995): 326.

4 Robert L. Brown, “From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint,” *University of Arkansas at Little Rock Law Review* 28 (2005): 2–3.

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sory opinions and have no authority to engage in policy-making. But while the Constitution rules certain functions out of bounds for the courts, it also insulates federal judges from the pressures that can be brought to bear in response to an unpopular, but legally required, decision. Article III guarantees that federal judges shall hold their offices for life with continued “good Behaviour.”

By setting up an independent judiciary, the framers intended to prevent the other branches of government, or the people themselves, from undermining the judiciary’s decisional impartiality. It is “essential to the preservation of the rights of every individual, his life, property, and character, that there be an impartial interpretation of the laws, and administration of justice.”<sup>5</sup> The insulation of judges from popular pressures ensures that all citizens receive equal justice under the law, and prevents judges from being influenced by the whims of the public (or a powerful faction) when they decide cases. In *The Federalist* No. 78, Alexander Hamilton emphasized:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

5 Peter D. Webster, “Who Needs an Independent Judiciary?” *Florida Bar Journal* 78 (2004): 24–25, which discusses the creation of and need for an independent judiciary.

The way to achieve this impartiality – to free judges to decide cases based on what the law actually requires, and on nothing else – is to ensure that the judiciary is independent, or, put differently, not subject to reprisals for decisions on the bench.

But judicial independence is not an absolute or singular value defining our courts. The principle of judicial restraint is equally important – and it is inextricably linked to judicial independence. At one level, the tension between the two seems inescapable. But there is an important sense in which an independent judiciary and judicial restraint are flip sides of the same coin. Both aim to minimize the influence of extraneous factors on judicial decision-making. A judge must not decide a case with an eye toward public approbation, because whether a particular result is popular is irrelevant to whether it is legally sound. In the same way, a judge must not consult his own policy preferences (or those of whatever moral philosopher happens to be *au courant* at the time) when construing the Constitution or a statute, because those personal views are immaterial to what the law, fairly construed, actually provides. Judicial independence and judicial restraint thus work together hand-in-glove to channel judges’ attention to the factors that are actually relevant to the proper resolution of cases.

Much is at stake if the judiciary becomes too independent or too restrained, namely individual rights and the proper functioning of the government. Those who criticize courts advocate more restraint to ensure that judges do not exceed the scope of their powers. But at the same time, it must be stressed, as Justice Sandra Day O’Connor did in a recent speech, that a court’s ability to be effective depends “on the notion that we won’t be subject to retaliation for our ju-

dicial acts.”<sup>6</sup> The upside of judicial independence, then, is that it insulates judges who faithfully apply the law (albeit in unpopular ways); the downside is that judicial independence insulates judges who use their lack of accountability to shape the law in favor of their own preferred policies.

Criticism of courts comes in many forms, and recent years have witnessed many if not all of the variations. But if we compare the nature and intensity of today’s criticisms with the vitriol directed at judges in years past, it becomes apparent that they are not unique. Indeed, public critiques of federal judges have been commonplace throughout American history and, when done thoughtfully and honestly, they contribute both to a healthy democracy and to judicial independence.<sup>7</sup>

Congress has attempted to enact legislation that restricts or eliminates the jurisdiction of federal courts to hear certain types of cases. Congress’s power to do so derives from the Exceptions Clause,<sup>8</sup> which provides that “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” The best-known of these limitations concerns review by federal courts of prior adjudications by other bodies, such as administrative agencies or state courts. In the early 1990s, the public (and some members of Congress) grew increasingly frustrated with what was perceived as federal courts’ penchant

for allowing state convicts to relitigate their cases in the federal system. In response to these and other concerns (including fears about terrorism), Congress in 1996 enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA).<sup>9</sup> Among other things, AEDPA limits the ability of federal courts to consider habeas challenges to state-court criminal convictions.

Similar concerns led Congress (also in 1996) to enact the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>10</sup> The IIRIRA prevents federal courts from reviewing a final order of the Immigration and Naturalization Service to deport a person with a criminal record, and expands the class of crimes that constitute an aggravated felony, including terrorism. More recently, in December 2005, just months before the Supreme Court was scheduled to hear the *Hamdan v. Rumsfeld* case, Congress passed and the president signed the Detainee Treatment Act (DTA),<sup>11</sup> which purported to remove from the federal courts jurisdiction to hear challenges brought by suspected terrorists to their detention and treatment at Guantánamo Bay. After the Supreme Court held in *Hamdan* that the DTA did not strip the courts of jurisdiction over habeas petitions pending during the DTA’s enactment, Congress and the president tried again. They passed the Military Commissions Act of 2006, which stripped federal courts of jurisdiction over Guantánamo detainees’ cases, including those that were pending.

The 109th Congress was asked to remove federal court jurisdiction to re-

6 Editorial, “Injudicious Intimidation,” *Detroit Free Press*, April 16, 2006.

7 Melvin B. Lewis, “Criticism of Court Challenged,” *Chicago Tribune*, October 16, 1985.

8 U.S. Const., article III, section 2.

9 Public Law No. 104–132 (1996).

10 Public Law No. 104–208 (1996).

11 Public Law No. 109–148, sections 1001–1006 (2005).

view the constitutionality of hot-button issues, like abortion. The Marriage Protection Act of 2005 intended to strip federal courts of jurisdiction to consider the constitutionality of the Defense of Marriage Act, which declares that no state shall be required to recognize legally same-sex marriages performed in another state.<sup>12</sup> Other proposals aimed to deny courts jurisdiction to assess the constitutionality of the Pledge of Allegiance<sup>13</sup> and public displays of the Ten Commandments.<sup>14</sup> While all of these measures failed to secure final passage by Congress, they have been reintroduced in the 110th Congress.<sup>15</sup>

Jurisdiction-stripping is not a new phenomenon. Congress has exercised the authority to strip federal courts of jurisdiction for centuries, and judicial independence has not suffered measurably for it. The Supreme Court's decision in *Ex parte McCordle* affirmed the power of Congress to restrict the jurisdiction of the Article III courts, upholding a law that removed from the Court's jurisdiction any cases appealed from circuit courts under the Act of 1867.<sup>16</sup> In fact, like the Detainee Treatment Act, which was passed while *Hamdan* was

pending, the law at issue in *McCordle* was enacted while the *McCordle* case was pending before the Supreme Court. And the judiciary responds when it deems necessary. For example, in the recent *Boumediene v. Bush* decision, the Supreme Court held that Congress unconstitutionally suspended the writ of habeas corpus by stripping the federal courts of jurisdiction to hear habeas actions of Guantánamo detainees.

Criticism of judges by politicians is not new either, but its frequency has picked up in recent decades. While virtually everyone agrees that federal judges may be impeached if they commit crimes,<sup>17</sup> in the modern era threats of impeachment often follow unpopular rulings. In 1996, Judge Harold Baer, a federal district judge in New York, ordered the suppression of evidence found during a traffic stop in New York City's Washington Heights neighborhood. The judge reckoned that, in that neighborhood, it was understandable for people to fear the police, and so the defendants' running did not give the officers a reasonable basis for searching the car.<sup>18</sup> Judge Baer's ruling was immediately denounced, by members of both political

12 Marriage Protection Act of 2005, H.R. 1100, 109th Cong. (2005); see also Defense of Marriage Act, 28 U.S.C., section 1738C (2000); James P. George, "Civil Law, Procedure, and Private International Law: Access to Justice, Costs, and Legal Aid," *American Journal of Comparative Law* 54 (2006): 315 n. 5.

13 Pledge Protection Act, H.R. 2028, 108th Cong. (2004), 109th Cong. (H.R. 2389), 110th Cong. (H.R. 699).

14 Ten Commandments Defense Act, H.R. 2045, 108th Cong. (2003).

15 H.R. 724; H.R. 699, 110th Congress (2007).

16 *Ex parte McCordle*, 74 U.S. 506 (1869).

17 See *Nixon v. United States*, 506 U.S. 224 (1993). A federal judge who was convicted at a criminal trial of making false statements before a federal grand jury sought judicial review of his removal from office. He claimed that the Senate had failed to "try" him within the meaning of the Impeachment Clause. (See U.S. Const., article I, section 3.) The Supreme Court held that Nixon's challenge presented a nonjusticiable political question because the Impeachment Clause also granted the Senate "sole" power to try impeachments. As such, judicial review of senatorial impeachment proceedings is inappropriate.

18 Don Van Natta, Jr., "Judges Defend A Colleague From Attacks," *The New York Times*, March 29, 1996.

parties. The Clinton administration called for the judge's resignation, while some congressional Republicans proposed impeachment. Several weeks later, Judge Baer reconsidered the case and reversed his prior ruling.<sup>19</sup> His critics were victorious.

More recently, former House Majority Leader Tom DeLay advocated impeachment investigations of several sitting judges such that Congress could be "a check on the court system."<sup>20</sup> The House Judiciary Committee has considered creating an office of inspector general for the judiciary, to investigate allegations of judicial misconduct. The goal of such proceedings is not necessarily to remove the judges from the bench. Rather, threats of impeachment can serve as a tool of intimidation, having a chilling effect that encourages judges to look over their shoulders when deciding cases.

While the volume of criticisms may be louder now than in the past, the fact is that federal judges have endured threats of impeachment for years. Perhaps the most famous example dates from the earliest days of the republic. In 1805, President Thomas Jefferson, a Democratic-Republican, supported an effort to impeach Justice Samuel Chase because he objected to Chase's Federalist jurisprudence.<sup>21</sup> The script will be

19 See *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), overruled by *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996); see also Robert Gearty and Tracy Connor, "Judge: Keep Cons Cool," *New York Daily News*, July 28, 2004.

20 See Anthony Lewis, "An Independent Judiciary," *St. Louis University Law Journal* 43 (1999): 292.

21 Stephen B. Burbank, "The Past and Present of Judicial Independence," *Judicature* 80 (1996): 117–118.

familiar to any observer of today's debates over the conduct of the courts: Jefferson attacked Chase for what he characterized as judicial rulings that went beyond what was required law; for his part, Chase saw the attacks as an attempt to undermine judicial independence. In the early twentieth century, President Theodore Roosevelt often criticized rulings of the federal judiciary that blocked his preferred social reform legislation.<sup>22</sup> Roosevelt's platform as a Progressive Party candidate in 1912 advocated the recall of unpopular judicial opinions and judges by popular vote. And, of course, some who objected to the Warren Court's rulings launched an advertising campaign, of which the most conspicuous feature was the "Impeach Earl Warren" billboards, in an effort to influence the Supreme Court justices. Federal judges have endured these criticisms with scant negative consequences for their independence, and there is no reason to suppose that today's threats will prove any more effective.

The Senate has always closely examined nominees to the federal bench, but recently even closer attention has been paid to prospective judges' ideological leanings. Historically, the Senate's scrutiny has not been strictly limited to nominees' professional qualifications, but also sometimes has included some inquiry into their general judicial philosophies. For years, the approach was to wave nominees through without much, if any, ideological examination. Until the 1930s, presidential judicial nominees were not even invited to testify before the Senate Judiciary Committee, and it was not until 1955 that testimony before

22 Michael R. Belknap, "From Pound to Harley: The Founding of AJS," *Judicature* 72 (1988): 81.



the Senate was compelled.<sup>23</sup> Prior to that point, nominees were not questioned about their positions on substantive legal issues. Still, for much of the latter half of the twentieth century, candidate questioning was mostly ceremonial, unless a particular nominee was controversial. Even as recently as Justice Ruth Bader Ginsburg's hearings, the nomination process was generally quiet; Ginsburg received careful scrutiny, but was not subjected to overly intrusive questioning. Indeed, at one point, Senator Strom Thurmond, who did not hail from the nominating president's political party, even encouraged Ginsburg to decline to answer any questions she believed could come before her on the Court: "Well, you don't have to answer it, then, if you feel that you shouldn't."<sup>24</sup>

Recent years have seen the Senate demand much more from judicial nominees; the Senate sometimes seeks assurances (implied, if not explicit) as to how nominees would rule in particular cases. Usually this takes the form of questions about the nominee's personal views on controversial issues of the day: abortion, affirmative action, the death penalty, the rights of criminal defendants, and other topics. This growing trend dates at least from the Robert Bork and Clarence Thomas hearings. Robert Bork was questioned regarding how his judicial philosophy would affect his interpretation of

key issues such as right to privacy, civil rights, gender discrimination, criminal procedure, separation of powers, anti-trust law, and labor relations. He also fielded questions about his personal views on such controversial Supreme Court decisions as *Griswold v. Connecticut*, *Roe v. Wade*, and *Brandenburg v. Ohio*.

This growing trend also was evident at the recent Roberts and Alito hearings. During Chief Justice John Roberts's confirmation hearings, one senator asserted that Roberts's lack of a paper trail as a judge required him to divulge his views on critical issues. But when Justice Samuel Alito came before the Senate Judiciary Committee, the same senator argued that Alito's sixteen-year record as a judge, and his correspondingly lengthy paper trail, necessitated that he be even more responsive than Roberts was.<sup>25</sup> When Roberts and Alito declined to tell how they would rule on particular issues, the senator accused them of dodging. Another member of the Senate Judiciary Committee asked Alito's opinion on *Bush v. Gore*, characterized as a "great example of judicial activism."<sup>26</sup> Both justices were questioned at length on *Roe v. Wade*. Nor is such pointed questioning limited to nominees to the highest court. Probing questions also are asked increasingly of appellate nominees.<sup>27</sup> Nominees are required to respond to a variety of inquiries ranging

23 Ibid.; William G. Ross, "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees," *Tulane Law Review* 62 (1987): 119.

24 *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States, Hearings Before the Committee on the Judiciary, United States Senate, 103rd Cong.* (1993), 145.

25 Jonah Goldberg, "Senate 'Show Trial' is Product of a Too-Powerful Court," *USA Today*, January 11, 2006.

26 Marcia Davis, "For Democrats, A Most Tender Roast of Alito," *The Washington Post*, January 11, 2006.

27 See William G. Ross, "The Judicial Appointments Process: The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process," *William & Mary Bill of Rights Journal* 10 (2001): 119–120.

from their opinions on previous court decisions to whether they would adhere to particular precedents. Nominees also are asked their personal opinions on hot social and political issues and are queried about their opinions on issues they might need to adjudicate in the future.

This increased ideological scrutiny of nominees is problematic from the standpoint of both judicial independence and judicial restraint. It certainly is proper for senators to inquire about nominees' general judicial philosophies and interpretive methodologies. But asking about a nominee's preferred outcomes in particular cases – or trying to glean them from the nominee's views on prior precedents – may pose a threat to the proper functioning of the federal judiciary. The danger is that judges will come to be agents of the Senate's policy preferences, and that is no more acceptable than that judges should become the agents of the president's policy preferences. "By demanding to know in advance how a particular nominee will rule in a given kind of case, the political branches are exerting precisely the sort of direct control over the judiciary that Hamilton and the other Framers sought to avoid with the creation of a separate and distinct third branch."<sup>28</sup>

The Supreme Court seldom finds itself in unanimity on controversial legal questions, but all nine members of the Court agree about the dangers of judges precommitting themselves to particular outcomes. In the 2002 case of *Republican Party of Minnesota v. White*, the Court struck down Minnesota's Announce Clause, which prohibited candidates for elected judicial office from publicizing their views on disputed legal or politi-

cal issues.<sup>29</sup> The dissent acknowledged: "In the context of the federal system, how a prospective nominee for the bench would resolve particular contentious issues would certainly be 'of interest' to the President and the Senate.... But in accord with a longstanding norm, every Member of this Court declined to furnish such information to the Senate, and presumably to the President as well." That "longstanding norm" was "crucial to the health of the Federal Judiciary."<sup>30</sup> The majority did not dispute this, and only held that judges who wish to share their legal views cannot be *forbidden* from doing so: "Nor do we assert that candidates for judicial office should be *compelled* to announce their views on disputed legal issues."<sup>31</sup>

Recently the federal judiciary has been met with mounting criticism and a public that is increasingly skeptical of courts' ability – even their willingness – to do their job properly. Critics worry that the judiciary, the least accountable branch, is abusing its authority and exercising undue influence over the nation's political policy. In particular, critics see abuses of courts' authority in what is loosely known as "judicial activism" and "career judging." Calling the judiciary to task for these practices is not only not a threat to the courts' independence, it can be an important part of a robust democracy. Equally important, it can be a crucial part of safeguarding judicial independence: criticism can help ensure that judges perform only that role which has been delegated to them and consider law, not public opinion, when deciding cases.

29 536 U.S. 765 (2002).

30 *Ibid.*, 807 n. 1 (Ginsburg, J., dissenting).

31 *Ibid.*, 783 n. 11 (emphasis in original).

28 Diarmuid F. O'Scannlain, "Today's Senate Confirmation Battles and the Role of the Federal Judiciary," *Harvard Journal of Law and Public Policy* 27 (2003): 174.

The perennial criticism of judges is that they engage in judicial activism. Everyone seems opposed to judicial activism, yet no one agrees what it means. Some have branded as activist the Supreme Court's recent rulings on partial-birth abortion, homosexual sodomy, and the death penalty.<sup>32</sup> The Rehnquist Court was dubbed the most activist in history by some because of the number of federal statutes it struck down – more than three dozen federal laws.<sup>33</sup> And it was not just for its rulings that the Rehnquist Court was deemed activist, but for the manner in which it went about undertaking judicial review, namely its perceived reluctance to show some deference to the constitutional interpreta-

tions of Congress and the president before striking down democratically passed legislation.

Some elements are common to many understandings of judicial activism. It can involve (1) deciding a case on the basis of one's own policy preferences; (2) deciding a case on the basis of an *en vogue* philosophical theory;<sup>34</sup> (3) reaching out to decide an issue the resolution of which is not essential to the outcome of the case;<sup>35</sup> and (4) too readily discarding a prior precedent without considering whether it is entitled to stare decisis treatment.

This is not the place to define judicial activism with precision. Instead, my objective is to explain how judicial activ-

32 *Stenberg v. Carhart*, 530 U.S. 914 (2000), which holds that a Nebraska statute criminalizing partial-birth abortions was unconstitutional; *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), which declares unconstitutional a statute that criminalized homosexual conduct; *Roper v. Simmons*, 543 U.S. 551, 575 – 578 (2005), which outlaws execution of persons who were under eighteen when their crimes were committed; and *Atkins v. Virginia*, 536 U.S. 304, 316 n. 21 (2002), which bans execution of mentally retarded defendants.

33 See, for example, Catherine Crier, "What Conservatives See as the 'Right' Stuff," *USA Today*, November 3, 2005; Christopher P. Banks, "Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change," *Akron Law Review* 32 (1999): 247, 249: "[T]he ruling [of the Rehnquist Court] in [several cases] disclose[s] that the Rehnquist Court is engaging in a conservative brand of judicial activism"; see also *United States v. Lopez*, 514 U.S. 549 (1995), which strikes down the Gun-Free School Zones Act of 1990; *United States v. Morrison*, 529 U.S. 598 (2000), which holds the civil remedy provision of the Violence Against Women Act unconstitutional; and *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), which deems rights and remedies in the Americans with Disabilities Act unconstitutional as applied against states.

34 *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting): "This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*"; see also Christopher Wolfe, "Moving Beyond Rhetoric," *Florida Law Review* 57 (2005): 1080: "[N]either does [the Constitution] enact John Rawls's *A Theory of Justice* or Ronald Dworkin's *Taking Rights Seriously*. There is no requirement of moral neutrality in the Constitution, which left to the states the police powers to protect the safety, health, welfare, and morality of the community"; Keith Burgess-Jackson, "Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal Punishment," *Notre Dame Journal of Law, Ethics, and Public Policy* 18 (2004): 409: "[T]he recent Supreme Court decision on sodomy, *Lawrence v. Texas*, shows that it all but enacts John Stuart Mill's *On Liberty*."

35 *PDK Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring): "[T]he cardinal principle of judicial restraint – if it is not necessary to decide more, it is necessary not to decide more – counsels us to go no further."

ism, however defined, and the public's response to it relate to judicial independence. As mentioned above, judicial independence and judicial restraint (the opposite of activism) are inextricably tied to one another. Both aim to prevent judges from consulting extrinsic materials (whether public opinion or their personal views) when they decide cases. Seen in this light, public criticism of judges for activism is not necessarily a threat to judicial independence; it is a complement to judicial independence. After all, it remains the role of the legislature to legislate and the judiciary to interpret. An activist court "legislates from the bench," and thus "encroaches on the legislature's constitutional turf."<sup>36</sup> Legislating from the bench "destroys the proper end of judging and, therefore, is the greatest threat to judicial independence, the means to that proper end."<sup>37</sup> Criticizing judges for judicial activism is a way of reminding judges to perform their proper function – interpreting the Constitution – as members of the judicial branch. Criticism encourages judges to realize more fully the practice of ignoring irrelevancies when they decide cases, the same objective that judicial independence strives to achieve.

Up to this point, I have voiced some doubts that public criticism of judges poses a severe threat to judicial independence. But there is one way in which pervasive criticism of judges' decisions can

36 Michael D. Weiss and Mark W. Bennett, "New Federalism and State Court Activism," *Memphis State University Law Review* 24 (1994): 260, which cites Carl T. Bogus, "Pistols, Politics & Products Liability," *University of Cincinnati Law Review* 59 (1991): 1157.

37 Thomas L. Jipping, "Legislating from the Bench: The Greatest Threat to Judicial Independence," *South Texas Law Review* 43 (2001): 145.

compromise the independence of the courts, without offsetting benefits in the form of democratic participation or judicial restraint. A real danger exists that the publicly stated views of political elites – activists, the news media, and officeholders – will condition the environment in which judges operate, leading career-minded members of the federal judiciary to tailor their rulings to conform to the views of the politically influential.

The process by which career judges – those who seek promotion to higher or more prestigious courts – can internalize elite opinion is fairly straightforward. It is only natural that many state-court judges and judges on lower federal courts would seek to advance through the ranks. They know that presidents and senators historically have preferred to appoint judges who have previous judicial experience.<sup>38</sup> They also know that judges whose prior rulings have proved unpalatable to presidents or senators have had a harder time being nominated and confirmed to new judicial posts. Such career judges thus will have an incentive to placate the officeholders who they anticipate would play a role in their future elevation (as well as the private opinion-makers who would hold forth on their nominations). Career judges will have reason to decide cases based not just on their honest estimation of what the law actually requires, but also, at the margins, on their sense of what outcomes the political elites may favor.

My sense is that the threat here largely comes from members of the elite: the presidents who nominate judges, the senators who decide whether to confirm them, the journalists and editorialists

38 Luke Bierman, "Legal Development: Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals," *Albany Law Review* 60 (1996): 355.

who cover the process, and the activists who bring pressure to bear on their allies in office. The threat to judicial independence does not come from criticisms leveled by ordinary members of the public (except insofar as those citizens have the power, either individually or collectively, to move elites). Judicial independence has more to fear from an editorial in *The Washington Post* than from a posting by an anonymous blogger.

A few qualifications are in order. This analysis is not meant to malign the integrity of American judges, who in my experience strive mightily to resolve legal disputes in good faith and seek to minimize the influence of external considerations when they decide cases. It is only to recognize that judges are human beings and that, as humans, they are susceptible to self-interest as everyone else. Note also that elite criticism sometimes can have the opposite effect. It can cause judges to dig in their heels and refuse to buckle in the face of public sentiment. The need to maintain judicial independence notwithstanding the views of powerful elements of the public was one of the reasons the Supreme Court in *Planned Parenthood v. Casey* cited as a basis for retaining *Roe v. Wade*.

How, then, do we counter (or at least minimize) the natural incentive to curry favor with elites that is experienced by judges who hope for elevation to a higher court? A good starting point would be to lower the temperature of the judicial-appointments process. Judges who have no reason to fear that the president or Senate will scrutinize their rulings, line by line, in a hunt for evidence of ideological orthodoxy (or heresy), will be less prone to craft those rulings to be amenable to elite opinion. This is not a call for the Senate to abdicate its historically robust and important role in the confirmation process. It is only a call to focus on

nominees' general judicial philosophies and interpretive methodologies in lieu of their preferred outcomes in particular cases.

Few would dispute that judges must be “free to make decisions according to the law, without regard to political or public pressure.”<sup>39</sup> But judicial independence is not a one-way street. We insulate our judges from day-to-day public pressures not because we want them to function as platonic guardians of the public interest, but precisely because in our constitutional system their role is so carefully circumscribed. In other words, the principal beneficiaries of judicial independence are not the judges themselves, but the litigants who appear before them in the hopes of getting a fair shake, and, ultimately, the American people who look to their courts for impartiality. Seen in this light, public criticism of the courts does not invariably present a threat to judicial independence, but actually can play a key role in ensuring that the judiciary remains independent. Such critiques are a way of calling on judges to remain faithful to their role as detached expounders of the law, and to eschew irrelevancies such as their own predilections and public opinion when deciding cases. As Chief Justice William Howard Taft cautioned, “Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism.”<sup>40</sup>

39 Jipping, “Legislating from the Bench,” 150.

40 Delivered at the Annual Meeting of the American Bar Association in August 1895; revised and published in the *American Law Register and Review* 43 (9) (1895): 577.



# Charles E. Schumer

## *Congress & the court: restoring balance*

The judicial trend of diminishing deference to Congress's power to find facts and then legislate pursuant to those findings deeply concerns many on the Article I side of government.<sup>1</sup> To be sure, courts must be able to assess – with total independence – when and where Congress has exceeded its constitutionally authorized powers. Indeed there have been times in our history when the courts have been the bulwark against Congress's efforts to undermine constitutionally protected rights. However, in recent years the judiciary has abrogated Congress's powers to a troubling degree. Starting with *United States v. Lopez*, the guns in school zones case, running through *United States v. Morrison*, the Violence Against Women Act case, and including *Board of Trustees of the Uni-*

*versity of Alabama v. Garrett*, the disability discrimination case, the courts – most significantly the Supreme Court – have steadily eroded Congress's power to legislate, with the effects felt and often suffered across the nation.

While some recent decisions have fairly noted Congress's failure to establish a nexus between a piece of legislation and a source of congressional power, several of the cases, of the new-federalism jurisprudence ilk, ignore serious, studied, and diligent efforts by Congress to make the necessary findings and establish a proper constitutional exercise of power. Congress holds hearings – for some laws, years' worth of hearings – and takes testimony from citizens, academics, state lawmakers, state attorneys general, and an array of other interested parties. In passing many laws that the courts have then struck down on federalism grounds, Congress has specifically solicited input – and received a green light – from the states on whether there is a need for the national legislature to act. Generally, actions of the Congress do not attempt to violate or weaken states'

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authority; they are the product of what legislators were elected to do. It's a simple proposition, but we seem to have lost sight of it recently.

The fundamental role of Congress is to make laws that address pressing national problems. The executive implements laws, and judges are nominated and confirmed to interpret and apply them. That is the balance the framers struck, and since *Marbury v. Madison* the balance has worked. But now, as at no time in our past, we are seeing a finger on the scale that is subtly but surely altering this balance of power between Congress and the courts. That's not good for our government, and it's not good for our country.

With increasing frequency the courts have tried to become policy-making bodies, supplanting court-made judgments for those of Congress. For better or worse, Congress is charged with making policy. The judiciary's role, while just as important, is quite different. As Justice Breyer wrote in his eloquent dissent in *Morrison*, "Since judges cannot change the world, [it] means that, within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance."

Of course, it was the conservative movement that first took issue with what it perceived as the Warren Court's judicial activism and willingness to make social policy judgments from the bench. For decades, conservatives – often convincingly – argued that elected officials, as opposed to unelected judges, should get the benefit of the doubt with respect to policy judgments, and that courts should not reach out to impose their will over that of elected legislatures. Even many non-conservatives (myself included) have significant sympathy with that position. While it might

be appealing and easy for judges to express their personal views in their opinions, it's not what the founding fathers intended. Ironically, now we have the mirror image of that activism being practiced by some of the very same conservative judges who initially criticized it.

Sixteen years ago, Judge Robert Bork characterized the Warren Court as a "legislator of policy" that reasoned backward from its desired results when ruling to expand equal protection, the right to vote, criminal defendants' rights, and the right to privacy. Today, similar criticisms of the Court – acting as a social policy-maker, actively rejecting the will of Congress – exist, and with good reason. Many in Congress are acutely concerned with the limits that have developed on legislators' power to address the problems of those who have elected them to serve. These limitations affect, in a fundamental way, Congress's ability to address major national issues like discrimination against the disabled and the aged, environmental concerns, and gun violence.

The role of Congress is to make laws. The role of the judiciary is to ensure the constitutionality of those laws. In part, the balance is guaranteed through the process of nominating and confirming federal judges. The three simple standards for federal judges should be excellence, moderation, and diversity. Excellence simply means they should be among the best the bar has to offer – not a controversial proposition. Diversity means that in the selection of federal judges, we should seek racial, ethnic, gender, and experiential diversity to ensure that the federal bench is as reflective of America as possible – not a very controversial notion either. Moderation seems to be the sticking point these days.

On many of our courts there is no balance. The Fifth Circuit, for example, is one of the most conservative courts in the country. (If Charles Pickering, whose 2002 nomination and subsequent 2003 renomination by President Bush hadn't ultimately been turned away, the Fifth Circuit would have been thrown even more out of balance.) President Clinton nominated three eminently qualified moderates to that court, and none of them even got so much as a hearing, much less a vote, in the Republican-controlled Senate Judiciary Committee. Indeed, President Clinton nominated almost exclusively moderate judges to the federal bench. To the chagrin of some, he did not send up legions of liberal legal-aid lawyers and American Civil Liberties Union advocates. Instead, he mostly nominated moderate prosecutors, state-court judges, and law firm attorneys.

In contradistinction, President Bush, during his first campaign, told us he'd pick judges in the mold of Justices Scalia and Thomas; he has followed through with that promise. One or two Scalias or Thomases is one thing, but a bench full of them drives our courts way out of the mainstream – and that's unacceptable. This administration has been willing to take some casualties in this fight. They have sent up waves of Scalias and Thomases. If a couple of controversial nominees get shot down, it's a small price to pay because they still win; they still stack the courts. It's been a bad strategy, both for the courts and for the American people. This is especially the case in an era when the courts are implementing a conservative agenda through unprecedented judicial activism from the right. We need to fill the bench with judges who represent all Americans, not just those with hard-line conservative views.

Congress is certainly imperfect – I sure am – but our laws are entitled to a presumption of constitutionality, and I wonder what part conservative judicial activism plays in eroding some of the constitutional respect Congress deserves. Ideologues, not surprisingly, tend to come with an ideological agenda. Most moderates bring to the bench simple but essential goals of upholding the Constitution and doing justice.

Our numbers of moderate nominees are pretty good, but we can do better with the president's cooperation. Much time is spent vetting nominees like Judge Pickering, for whom red flags were raised, but when everyone agrees that a nominee is legally excellent and ideologically moderate, and when issues of diversity are properly accounted for, the vetting process becomes much simpler.

Fair-minded, moderate nominees are the best candidates to restore the proper balance of power between Congress and the courts and to refrain from engaging in judicial activism. If we see more of those kinds of nominees, we won't need any more lengthy addresses on the problems with the new federalism and the problems with the nomination and confirmation processes; they simply won't be problems anymore.

# J. Harvie Wilkinson III

## *Congress & the court: judicial confirmation*

The congressional-judicial relationship is frayed but not broken.<sup>1</sup> Positive aspects of the relationship don't grab headlines: Congress has frequently been responsive to the judiciary's budget requests and courthouse security needs, and open to discussion on bills affecting the judicial function, for example. But even the best relationships have their ups and downs.

One of the recurrent trouble spots in congressional-judicial relations is the process of Senate confirmation of judicial nominees. The judiciary respects the fact that the Senate has a special constitutional duty to perform in judicial confirmations. Its role requires both care and inquiry before approving what are, after all, significant lifetime appointments. However, two special dangers to the judiciary arise from the present state of affairs. Both dangers, if not attended

to, will have serious adverse impacts on judicial function.

First, over the past decade nominees of real distinction have had an increasingly difficult time with the Senate confirmation process. I have often spoken about the dangers that growth in judgeships poses to the functioning of the federal appellate courts. Regardless of one's views on the issue of increasing the number of judges on the circuit courts, no one can reasonably dispute that we absolutely must maintain the quality of judges nominated for the bench. According to some, stagnant judicial salaries pose the greatest threat to the quality of the bench. But at least as grave a danger is a newly emergent skepticism on both sides of the aisle toward professional distinction of all sorts.

The more distinguished the nominee, seemingly the less likely he or she is to receive a hearing or actually be confirmed. These distinguished nominees have commanded great respect in one or another aspect of the legal profession. Some have achieved prominence in private practice, others in academia, still

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<sup>1</sup> This paper is taken from a talk given at the 1857th Stated Meeting of the American Academy of Arts and Sciences held on March 21, 2002.

others in public service. Some have become premier oral advocates, held high elective office, or served with distinction in state government or within the federal executive branch. Indeed the quality of their professional records is not in dispute.

By all rights, this kind of career record would appear to enhance one's credentials and prospects for service on the federal bench. Yet it too often appears to have become an almost insurmountable obstacle – which is neither proper nor fair. Any career of distinction will involve its share of risks and controversies; that comes with having been in the arena. Honorable positions taken in the course of honorable professional service, though, are regularly becoming an impediment in the confirmation path, blocking the real leaders of our profession from service, even on the lower federal bench.

What are the consequences of this behavior? Just as a legislature would be a poorer place without its more dynamic members, so, too, will a court suffer without members of intellectual breadth and high-level professional experience. Surely our judicial heritage would be all the poorer if the Learned Hands and Henry Friendlys had not made it to the bench due to this or that rough edge in their previous careers. The same could perhaps be said of many of my present colleagues.

So what are we to make of nominees whose professional credentials are nowhere in dispute but who face a prolonged confirmation or, even worse, unsuccessful confirmation? Have we reached the point in the confirmation process where both sides of the aisle consider intellectual distinction a threatening characteristic in a judicial nominee? There could not be a more unfortu-

nate long-term development from the standpoint of the judicial branch.

Many able persons have been nominated to the appellate courts by presidents of both parties. Also, emphasizing distinction is not intended to be elitist. The sole mission of the courts is one of public service. The range of cases that reaches judges is staggering, in fields of law as diverse as criminal, securities and antitrust, labor and civil rights, tax and admiralty, administrative and constitutional. The cases involve questions of both state and federal law, complex statutes, and byzantine regulations, and they require an appreciation of the dynamics of government and the workings of sometimes inscrutable federal agencies. Furthermore, rapidly changing technologies often underlie the most challenging disputes. In a period when many cases are just plain demanding, the public deserves the best intellectual resources and professional experience that this country can provide. This is a bad time to disqualify the most distinguished nominees from judicial service.

The second danger pertains to the role accorded ideology as a criterion for confirmation. While presidents have traditionally consulted judicial philosophy in the broadest sense in making appointments, ideology has often taken a back seat to integrity, experience, and temperament in the confirmation of lower-court judges. To the extent that extreme views should raise red flags, ideology should be taken into account in appointments to the federal bench. There are two problems, however, when ideology becomes an express criterion for confirmation.

One, the role of ideology in lower-court decision-making is frequently exaggerated, and the role of simple professional craftsmanship is too frequently



overlooked or ignored. Whatever strong feelings may be generated by Supreme Court appointments, courts such as the courts of appeals should not become ideological battlegrounds. Certainly a court of appeals sees a wide variety of views in its judges. But what one comes to appreciate in a colleague is not so much ideology but dedication, preparation, intelligence, humanity, and, above all, legal mastery and competence.

With proper discussion and reflection, good appellate judges will reach agreement on cases in the lower federal courts 80 to 85 percent of the time. Even disagreements cannot always be attributed to philosophical or ideological differences. When they can – and sometimes they can – there are often two reasonable and debatable views on the law. Emphasizing ideology overlooks professional habits of mind that will serve the public best, day in and day out.

A second problem with making ideology a confirmation criterion concerns judicial impartiality and independence. If judges are appointed and confirmed for their professional distinction, they will be perceived as performing a public trust. If, however, ideology becomes a paramount consideration in the confirmation process, it will only be a matter of time before the public perceives courts to be ideological bastions rather than the repositories of impartial judgment. We will all lose if the rule of law and the role of courts come to be perceived as mere extensions of politics.

Some argue that ideological considerations have been forced upon Congress by ideological decisions from the courts. Critics point to Supreme Court invalidations of congressional legislation not only under the Commerce Clause but also under Section 5 of the Fourteenth Amendment, in which Congress has been held to have the authority to en-

force but not to redefine basic Fourteenth Amendment rights. (Many of the most controversial decisions have been 5 – 4 votes.) Then, too, the argument goes, with capital punishment, affirmative action, abortion, and church-state relations on the judicial docket, Congress can hardly afford not to take ideological considerations into account, especially if the executive branch itself is hardly blind to them.

This does raise legitimate concerns. The judicial guidepost that Congress can regulate only subjects with “substantial effects” upon interstate commerce is not altogether clear. The same goes for some of the Section 5 and Eleventh Amendment tests as well; this lack of clarity must be a source of frustration within the legislative branch. Also, some in Congress rightly argue that self-restraint should be the hallmark of the judicial function, and that activism of the right or left poses the grave and unacceptable danger of displacing the judgments of the democratic branches of our government with the policy preferences of unelected jurists. Competing brands of activism are in no one’s interest, least of all that of the judiciary.

Congress should, though, accord the Supreme Court’s work a commensurate level of respect. The judiciary is not at liberty to walk away from its duty to interpret. Whether it be the Bill of Rights or the structural dictates of our founding document, the courts have been charged, since *Marbury v. Madison*, with the obligation to state what is the law. The bifurcation between structure and rights that has pervaded much of modern constitutional law is not always wholly understandable. Indeed, the structure of our government makes possible many of the rights we now enjoy, so courts must be attentive to both structure and rights. The same document that confers our

rights also establishes our governmental structure, and the maintenance of structure and the protection of rights are the shared responsibilities of Congress and the courts (and the executive branch, too, for that matter). Questions of structure are not off bounds for the courts any more than questions of rights are off bounds for Congress.

That the Supreme Court, then, should undergo so much criticism for taking structural questions seriously is unfortunate. The basic fact remains that our federal government is one of enumerated and thus limited powers, and that the framers set in place a system of dual sovereignties. The courts cannot ignore those structural dictates without rejecting the sum and substance of the Constitution itself.

**I**n the aftermath of September 11, the political branches of our government stepped forward to address the national crisis, and the judiciary seemed for a time to have receded from the national consciousness; this is as it should be. It is with the political process that America has placed its faith. Congress has the essential functions of taxation, appropriation, oversight, confirmation, ratification, and prescriptive legislation and rule-making, and these functions remain vigorously intact.

Those of us in the judicial system profoundly respect the primacy of the political process and understand that politics is often a messy, rough-and-tumble, half-a-loaf business. We hope in turn that Congress will continue to respect the important role the courts play in a constitutional democracy. The courts are guarantors of many important national values – the liberty, equality, opportunity, security, stability, and order that flow from faithful adherence to the rule of law.

Robert C. Post

*Congress & the court: the scope of national legislative power*

At the beginning of the twentieth century, constitutional law did not sharply distinguish between questions of structure and questions of rights.<sup>1</sup> To the contrary, the Court self-consciously defined individual rights in ways designed to attain structural ends, and, conversely, defined congressional power in ways designed to protect individual rights. The modern divide between structure and rights did not emerge until after the constitutional crisis of the New Deal.

That crisis was triggered by the Court's attempt to restrict legislative efforts to respond to the Great Depression. President Roosevelt responded by seeking to pack the Court. When the dust settled, the country opted for an arrangement in which, roughly speaking, Congress would be allowed to define

the scope of national power while federal courts would be authorized to scrutinize whether that power had been exercised in a manner that violated constitutional rights. This division of labor lasted until the mid-1990s, when a new generation of justices, intent on establishing constitutional limits on what had become a virtually unchecked expansion of federal power, began to unravel the New Deal settlement.

The question of national power concerns the capacity of the national government to meet national needs. When the federal government is constitutionally prevented from addressing what it regards as a national problem, the country faces a vacuum of power that can have potentially serious consequences. For this reason, judicial limitations on federal power raise the most urgent questions of national well-being.

Americans have traditionally understood the division of power between federal and state governments to express the value of federalism. Until the New Deal, the concept of dual sovereignty lay

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at the heart of American federalism. Dual sovereignty regarded state and the federal governments as occupying distinct and exclusive spheres of authority. States were constitutionally forbidden from regulating within the sphere of federal authority; they could not, for example, enact laws restricting *interstate* commerce. Conversely, the federal government was constitutionally prohibited from regulating within the sphere of state authority; it could not enact laws directed at *intrastate* commerce.

Dual sovereignty disappeared as the master trope of American federalism after the mid-1930s, largely because the rapid *de facto* expansion of federal power, and the more or less complete integration of interstate and intrastate commerce, made it exceedingly difficult to draw any coherent or useful boundary between federal and state spheres of authority. Today there is no aspect of American life that is categorically free from federal influence and control. There are also very few areas in which state regulation is categorically excluded. The Supreme Court no longer uses the metaphor of dual sovereignty to analyze state regulations of interstate commerce because it realizes that approaching the problem in that way would strip states of virtually all important regulatory authority.

Recent efforts to limit national power have once again revived metaphors of dual sovereignty. In 2002, for example, the Rehnquist Court proclaimed that “dual sovereignty is a defining feature of our Nation’s constitutional blueprint.” The Rehnquist Court used two different jurisprudential methods to distinguish the sphere of federal power from that of state power.

The first focused on issues of process. The Rehnquist Court held that the federal government could invade the distinct

sphere of state sovereignty only if it first made appropriate findings of fact. The Court struck down national legislation on the ground that Congress had failed to compile a sufficiently detailed and convincing record to justify encroachment on the sphere of state sovereignty. This methodological approach raised the question of the constitutional obligations that could appropriately be imposed by judges on Congress’s fact-finding function.

Courts decide particular cases, and they must accordingly determine the “adjudicative facts” necessary for such decisions. But legislatures, unlike courts, do not determine what occurred in particular cases. What does it mean, therefore, for the Court to hold that Congress cannot exercise its constitutional power to “enforce” the Fourteenth Amendment unless Congress first identifies “a history and pattern” of state action violating Fourteenth Amendment rights? How can Congress determine whether constitutional rights have been violated? Must it make its findings, based upon adjudicative facts, about what has happened to particular persons?

Like any legislature, Congress is neither equipped nor authorized to engage in such a task. Like all legislatures, Congress typically acts based upon broad and sweeping social scientific data. Stripped to its essentials, the Rehnquist Court sought to protect states from national legislative encroachment by forcing Congress to act like a court before it would be constitutionally authorized to enact statutes as a legislature.

This approach essentially discounts the independent *legislative* judgment of Congress. This disrespect may reflect deep changes in the structure and functioning of Congress. During the last sixty-five years, Congress has become far more bureaucratic. It has become less

deliberative and increasingly dependent upon its staff. These changes have been associated with a corrosive loss of respect for Congress within the world of scholarship. Academic study of Congress has come to be dominated by public-choice models postulating that senators and representatives do not act primarily to serve the public good but instead to ensure their own reelection. Why would the independent legislative judgment of such persons merit respect?

The Rehnquist Court used a second jurisprudential method to sustain its newly invigorated commitment to the value of dual sovereignty. Concerned lest “the boundaries between the spheres of federal and state authority would blur,” the Court insisted upon giving especially careful scrutiny to federal efforts to regulate “areas of traditional state concern, areas having nothing to do with the regulation of commercial activities.” The Court mentioned such “areas of traditional state regulation” as family, local crime, and education. Each of these areas, however, is pervaded by federal influence and regulation, ranging from President Bush’s “No Child Left Behind” program to the “war on drugs.” It was thus puzzling how the Rehnquist Court believed it could distinguish between permissible and impermissible federal regulation of such matters. How could the Court separate the domain of national regulation from the domain of what it termed the “truly local?”

Because this distinction is normative, rather than empirical, its application essentially rests on the interpretation of national values. Yet the Court’s interpretation of these values would necessarily occur during judicial evaluation of congressional statutes expressing Congress’s view that sufficient federal interests were present to justify national legislation. When the Rehnquist Court struck

down certain provisions of the Violence Against Women Act, for example, the Court asserted that the federal government should remain outside the sphere of domestic violence. This assertion forcefully challenged Congress’s quite different determination that domestic violence against women posed a national problem with broad ramifications for the entire country. In essence, the Court and Congress faced off on a question of national values.

**H**ow does the Constitution mediate this conflict between the Court and Congress? The Court has sought to justify the priority of its decisions by arguing that judicial containment of federal power is required by the ancient and venerable case of *Marbury v. Madison*, which established the institution of judicial review. *Marbury* stands for the proposition that courts must decide cases by reference to law and that the Constitution is a form of law which courts should use to decide cases. What follows from *Marbury* is that when courts apply the Constitution to decide a case, they apply the Constitution as law and are justified in so doing.

Very few lawyers would disagree with this logic. But this logic does not establish that the Constitution is only law. *Marbury* does not exclude the possibility that the Constitution also contains important political dimensions. Many presidents, including Woodrow Wilson, have observed that the Constitution is not “a mere lawyer’s document.” Underlying the observation lies the notion that the Constitution represents what “We the People” have collectively made and what we aspire to make in the future. Viewed from this perspective, the Constitution stands for our commitment to democracy, for our ability to constitute ourselves as a nation.



There is a conflict between the Constitution understood as law and the Constitution understood as a charter of self-government. The Constitution as a legal document sets limits on how we can govern ourselves; the Constitution as a representation of our collective commitment to self-determination authorizes our continual political evolution as a nation. The Constitution as law limits the political power established by the Constitution as a charter of self-government. Each of these two visions of the Constitution boasts a strong and established pedigree within our constitutional history: we firmly believe in both aspects of the Constitution. In cases limiting the exercise of federal power, the Court has set the Constitution as law against the Constitution as a charter of self-government. It has argued that the legal dimensions of the Constitution must have priority and that they must circumscribe the Congress's political sense of the proper scope of federal authority.

To understand these recent decisions, therefore, we must analyze the relationship between the legal and political dimensions of the Constitution. We must put to one side cases involving individual constitutional rights; whenever we recognize the presence of such rights we signify the priority we attach to the safeguard of legal protections. In decisions involving only the scope of national power, by contrast, these two dimensions of the Constitution are in pure and unmediated conflict. The Rehnquist Court imagined the relationship between these two dimensions as a zero-sum game: if Congress were given authority to interpret the scope of its constitutional power, the Court would lose authority to articulate the limits of the legal Constitution, even perhaps in cases involving individual rights. The Court assumed that the Constitution was *either*

political or legal, so that if the Constitution were once seen as a political document, it could no longer function as a legal one. This is a profoundly misleading image.

The Constitution is always *both* legal and political, and how far it is one rather than the other is a matter of degree. The Supreme Court has in the past developed many doctrinal ways of mediating the conflict between the Constitution's legal and political dimensions without unduly damaging either. In the 1950s and 1960s, for example, the Court both proclaimed judicial supremacy in the interpretation of the Constitution and announced that it would defer to Congress's democratically informed judgment about the limits of national power. The conflict between the legal and political dimensions of the Constitution can always be redefined in terms of how much deference the Court is willing to extend to congressional articulations of national values and national power. Judicial limitations on national power thus tend to pose questions of statesmanship rather than of technical law. For the most part, judicial limitations on national power cannot plausibly be understood as compelled by the text or history of the Constitution.

This suggests that issues of national power do not raise discrete legal issues that can be "correctly" or "incorrectly" decided. They instead raise issues that must be determined by a far more subtle ecology. The Court may or may not agree with the political values driving congressional legislation; it may or may not trust Congress truly to speak for national values; it may or may not respect processes of congressional decision-making.

It follows that Court decisions limiting national power raise important questions for the confirmation process of

judges nominated to the federal bench. A Senate seriously committed to national values embodied in legislation struck down by the Court as beyond congressional power would surely begin to use a nominee's attitude toward federalism as a relevant criterion for confirmation. The Rehnquist Court's decisions have thus inadvertently handed the Senate a perfect Madisonian incentive to confirm judicial nominees on the basis of their view of national power.

I do not mean to imply that the Court's decisions to date have entirely trammled Congress. Recent decisions limiting federal power have been largely a shot across the congressional bow. But those who aspire to promote the image of judges as merely disinterested professionals, as neutral "umpires" calling balls and strikes, ought to be aware that further restrictions of federal power risk transforming the confirmation process into the kind of outright political confrontation that would radically undermine this aspiration.

Although issues of federalism may superficially seem quite removed from the senatorial confirmation of justices, especially when compared to the urgent political controversies that swirl around issues of constitutional rights like abortion, such issues actually express potentially seismic tensions between coordinate branches of the national government. These tensions were well-understood by the authors of *The Federalist Papers*, who conceived separation of powers as a continuous and serious play of ambition against ambition. We are presently only one appointment away from turning these tensions into a scene of mortal combat, with consequences that may well radiate into the entire web of interdependencies that tether the Court and Congress to each other.

# Charles Gardner Geyh

## *Methods of judicial selection & their impact on judicial independence*

Within the legal community judicial independence is understood, not as an intrinsic good or an end in itself, but as a means to achieve other ends.<sup>1</sup> If judges are independent – if they are insulated from political and other controls that could undermine their impartial judgment – it is thought that judges will be better able to uphold the rule of law, preserve the separation of powers, and promote due process of law.<sup>2</sup> Scholars, judges, and lawyers often acknowledge that judicial independence has institutional and decisional dimensions: institutional independence concerns the capacity of the judiciary as a separate branch of government to resist encroachments from the political branches and thereby preserve the separation of powers; decisional independence, in contrast, concerns the capacity of individual judges to decide cases without threats or intimidation that could interfere with their ability to uphold the rule of law.<sup>3</sup>

Properly understood then, judicial independence is circumscribed by the

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purposes it serves: decisional independence, for example, does not mean freedom from all external constraints, but only those constraints that interfere with a judge's ability to uphold the rule of law. Indeed, some forms of independence from decisional constraint, such as the freedom to decide cases for the benefit of friends or in exchange for bribes, are antithetical to the rule-of-law values that judicial independence is

1 The ideas in this essay were first presented at the 2007 conference on The Debate over Judicial Elections and State Court Judicial Selection, convened by the Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center. A modified version of this essay appears in *The Georgetown Journal of Legal Ethics* 21 (4) (Fall 2008). Thanks to Bert Brandenburg, Barry Friedman, Steve Burbank, and Roy Schotland for their comments on an earlier draft of this essay and to Ted Brassfield for his research assistance.

2 Stephen B. Burbank and Barry Friedman, "Reconsidering Judicial Independence," in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Burbank and Friedman (Thousand Oaks, Calif.: Sage Publications, 2002), 9, 11–14.

3 Charles Gardner Geyh, *When Courts & Congress Collide: The Struggle for Control of America's Judicial System* (Ann Arbor: University of Michigan Press, 2006), 6–7.

supposed to further. And so, if judicial independence is to achieve its goals, it must operate within specified constraints. It must, in other words, be tempered by judicial accountability.

Like judicial independence, judicial accountability is not an end in itself. It, too, serves other ends: to promote the rule of law, institutional responsibility, and public confidence in the courts. And like judicial independence, judicial accountability has multiple forms: institutional accountability mechanisms hold judges answerable collectively for their conduct as a separate branch of government, for example by subjecting court budgets to legislative oversight; behavioral accountability mechanisms hold individual judges to account for their conduct on and off the bench, for example by subjecting them to discipline for being abusive to litigants or accepting inappropriate gifts from lawyers who appear before them; and decisional accountability makes judges answerable for their judicial rulings, for example by subjecting their decisions to appellate review.<sup>4</sup> As to decisional accountability, however, suitable mechanisms are ideally limited to those that promote the rule of law by correcting judicial error without obliterating decisional independence by subjecting judges to threats or controls that could cause them to disregard the law and implement the preferences of those who threaten or control them.

The perennial policy struggle is to strike an optimal balance between judicial independence and accountability, to ensure that judges are independent enough to follow the facts and law

without fear or favor, but not so independent as to disregard the facts or law to the detriment of the rule of law and public confidence in the courts. The American Bar Association's Model Code of Judicial Conduct, some variation of which has been adopted by almost every state supreme court, seeks to structure judicial conduct to preserve this balance. The 2007 Code tells judges that they "shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary";<sup>5</sup> "shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially";<sup>6</sup> "shall not be swayed by public clamor or fear of criticism";<sup>7</sup> "shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment";<sup>8</sup> and "shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."<sup>9</sup>

In the context of state judicial selection, the struggle to balance independence and accountability has played itself out over the course of more than two centuries, as five distinct methods of selecting judges – each striking the balance in different ways – have vied for preeminence. In the fledgling states, all judges were selected by one of two methods: gubernatorial appointment with legislative confirmation (five states) or legisla-

4 Charles Gardner Geyh, "Rescuing Judicial Accountability from the Realm of Political Rhetoric," *Case Western Reserve Law Review* 56 (2006): 911.

5 ABA Model Code of Judicial Conduct (American Bar Association, 2007).

6 *Ibid.*, Rule 2.2.

7 *Ibid.*, Rule 2.4(A).

8 *Ibid.*, Rule 2.4(B).

9 *Ibid.*, Rule 2.4(C).

tive appointment (eight states).<sup>10</sup> The colonial courts had been unhappily dependent on the crown, and the new states were committed to curbing their judiciaries' dependence on the executive branch – which is not to say that the new states were committed to an independent judiciary. Several states subjected their judges to a variety of legislative branch controls, including reappointment, which led to a series of independence-threatening confrontations with state legislatures during the 1780s that troubled the framers of the U.S. Constitution enough for them to embed in Article III tenure and salary protections for federal judges.

During the Jacksonian Era of the 1820s and 1830s, populist calls for judicial accountability initiated a movement to select judges via a third method: partisan judicial elections. Although the early catalyst for partisan judicial elections may have been a desire for greater accountability, the partisan election movement did not take hold until after the Jacksonians lost influence, led by reformers who argued that elected judges who derived their authority from the people would be more independent-minded than handpicked friends of governors, or jurists subject to the beck and call of legislatures. Indeed, University of Virginia law professor Caleb Nelson found that the impetus for the judicial election movement was a desire to promote judicial independence from the political branches, rather than to increase democratic accountability for judicial decisions.<sup>11</sup> Mississippi broke the ice in 1832,

10 Anthony Champagne and Judith Haydel, "Introduction," in *Judicial Reform in the States*, ed. Champagne and Haydel (Lanham, Md.: University Press of America, 1993), 3.

11 Caleb Nelson, "A Reevaluation of Scholarly Explanations for the Rise of the Elective Ju-

and by 1909 thirty-five states either entered the Union with judiciaries selected by partisan election or had converted to partisan elections from appointive systems.

In the early twentieth century, elected judiciaries were increasingly viewed as incompetent and corrupt. During the Progressive Era, worries that partisan elections led to the selection of less-than-capable and less-qualified judges who were beholden to party bosses culminated in a fourth form of judicial selection: the nonpartisan election. By 1930, twelve new states had adopted nonpartisan elections as the selection method for their judiciaries.

In the minds of some, however, nonpartisan elections left voters with precious little information upon which to cast an informed ballot, which led to the selection of less-capable and less-qualified judges. In the minds of others, contested elections – partisan or not – failed to divorce judges sufficiently from the political process.<sup>12</sup> In 1913, a fifth method of judicial selection was devised: a "merit selection" system, in which judges were appointed by the governor from a pool of candidates whose qualifica-

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tionary in Antebellum America," *American Journal of Legal History* 37 (1993): 190. See also Kermit L. Hall, "Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920," *American Bar Foundation Research Journal* 9 (1984): 345; F. Andrew Hanssen, "Learning About Judicial Independence: Institutional Changes in the State Courts," *Journal of Legal Studies* 33 (2004): 445–448; Roy A. Schotland, "Myth, Reality Past and Present, and Judicial Elections," *Indiana Law Review* 35 (2002): 661–662.

12 Charles Sheldon and Linda Maule, *Choosing Justice: The Recruitment of State and Federal Judges* (Pullman, Wash.: WSU Press, 1997), 6–7.



tions had been reviewed and approved by an independent commission. Judges so appointed would then run unopposed later in periodic retention elections, in which voters would decide whether the judge in question should be retained for another term. Missouri adopted the first merit selection plan in 1940, and by 1989 twenty-three states had commission-based appointive systems (with and without retention elections) to select some or all of their judges.

More recently, the merit selection movement has stalled. Constitutional amendments to establish merit selection systems in Florida, Michigan, Ohio, and South Dakota have been rejected by voters, and reformers in other jurisdictions have struggled unsuccessfully to place merit selection proposals on their ballots, while in some merit selection states there have been calls for a return to contested elections.<sup>13</sup>

Meanwhile, nonpartisan elections have enjoyed a renaissance. Arkansas, Florida, Georgia, Kentucky, Louisiana, and North Carolina moved from partisan to nonpartisan election systems in the past thirty years. And in 2003 the American Bar Association retreated from its previous position of exclusive support for merit selection, to a more nuanced series of positions, one being that “[f]or states that retain contested elections as a means to select their judges, all such elections should be non-partisan and conducted in a non-partisan manner.”<sup>14</sup>

13 Matthew Streb, “Judicial Reform and the Future of Judicial Elections,” in *Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections*, ed. Streb (New York: New York University Press, 2007), 205–206.

14 *Justice in Jeopardy: Report of the Commission on the 21st Century Judiciary* (American Bar Association, 2003), 76–77. The position of the Com-

Today, the American Judicature Society reports<sup>15</sup> that, at the supreme court level, four states select judges by gubernatorial appointment, two by legislative appointment, eight by partisan election, thirteen by nonpartisan election, and twenty-three by merit selection. At the intermediate appellate level, two states select judges by gubernatorial appointment, two by legislative appointment, six by partisan election, eleven by nonpartisan election, and eighteen by merit selection. Finally, at the trial level, three states select judges by gubernatorial appointment, two by legislative appointment, nine by partisan election, eighteen by nonpartisan election, fourteen by merit selection, and four by a combination of methods. (Even in states that employ contested elections, judges are often initially appointed by governors to fill the unexpired terms of retiring incumbents.)

Each of the five methods of judicial selection described above had its heyday at a different point in American history. Consensus on the optimal method of judicial selection has been elusive. Many have asserted that this is because there is no perfect method of judicial selection – or, more harshly, because there is no good method of judicial selection.<sup>16</sup> A more charitable explanation may be that the objective of a good selection system – an optimal balance between judicial

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mission on this point was subsequently adopted by the American Bar Association.

15 Data discussed in this paragraph are drawn from <http://www.ajs.org/js/JudicialSelectionCharts.pdf>.

16 See, for example, Champagne and Haydel, “Introduction,” in *Judicial Reform in the States*, ed. Champagne and Haydel, 15–16; also *Justice in Jeopardy*, 69.

independence and accountability – is an ever-moving target that generates perennial calls for reform. In recent years, the reform engine has been fueled by a series of developments that have politicized state judicial elections in arguably unprecedented ways.

Partisan judicial elections can be relatively sleepy affairs in states where a single political party is predominant and the outcome of judicial races is all but assured. Conversely, as Alan Tarr, a political scientist at Rutgers University, observes, where party competition is intense and parties establish clear ideological identities, the intensity tends to spill over into judicial elections. In recent years, significant two-party competition has become commonplace in states and regions that traditionally were within the control of only one party:

One of the most dramatic changes during the latter half of the twentieth century was the spread of two party competition throughout the nation. Many states that at one time were dominated by a single party, particularly in the South and New England, now regularly conduct highly competitive elections.<sup>17</sup>

Studies of judicial reform in North Carolina and Texas link recent selection reform efforts there to the intensification of two-party competition for judicial office.

As caseloads increased throughout the twentieth century, states sought to relieve docket pressures on their supreme courts by establishing intermediate courts of appeals and making their supreme courts' appellate jurisdiction discretionary. Armed with the discre-

17 G. Alan Tarr, "State Judicial Selection and Judicial Independence," Appendix D, in *Justice in Jeopardy*, 5.

tion to set their own agendas, supreme courts have increasingly allowed the intermediate courts of appeals to have the final word in garden-variety disputes, in which appellate review is limited to correcting trial-court errors, and confined their dockets to more controversial cases in which the law is unclear and their primary mission is to "say what the law is." The net effect has been to highlight the policy-making role that state supreme courts play when filling gaps in constitutional and statutory law and making common law.<sup>18</sup>

Legal historian Emily Van Tassel explains a related development: "The politicization of state constitutional decision-making coincides with the 'new Federalism' of the Reagan era and the willingness of many state appellate courts to look to their own constitutions for guidance in many areas of law previously left to the federal constitution."<sup>19</sup> That, in turn, has served to "raise the profile of state court judges and make control over state judgeships seem more significant to a greater range of interest groups than in the recent past."<sup>20</sup> To the extent that judges are perceived as making constitutional policy when called upon to interpret their constitutions in new and different ways, it may blur the distinction between judges and legislators in the public mind and intensify calls to hold judges politically accountable for their decisions.

18 Paul Carrington, Daniel Meador, and Maurice Rosenberg, *Justice on Appeal* (St. Paul, Minn.: West Publishing Company, 1976), 150.

19 Emily Van Tassel, "Challenges to Constitutional Decisions of State Courts and Institutional Pressures on State Judiciary," Appendix E, in *Justice in Jeopardy*, 3.

20 Ibid.

As two-party competition has intensified and the political profile of state supreme courts has elevated, campaign spending in judicial races has increased. Average campaign spending in contested supreme court races has increased from \$364,348 in 1990 to \$892,755 in 2004.<sup>21</sup> In 2000, judicial candidates in supreme court races raised \$45 million;<sup>22</sup> in 2002, they raised \$29 million; and in 2004, they raised \$42 million.<sup>23</sup> While these numbers appear to vary wildly, when “outlier” races in Alabama, Illinois, and West Virginia are excluded, spending in the fourteen remaining states that held supreme court elections in 2004 increased by 163 percent since 2002, and in 2002 spending increased by 167 percent since 2000.<sup>24</sup> Between 2004 and 2006, average spending on advertising in supreme court races increased from \$1.5 million to \$1.6 million; and in that time, the median amount raised increased from \$201,623 to \$243,910.<sup>25</sup>

When it comes to fund-raising, the focus of attention has been on supreme court races, where competition for judicial office has been stiffest. Even so, a survey of over 2,400 judges conducted

in 2001 found that 45 percent of lower-court judges felt under pressure to raise money for their campaigns during election years, as compared to 36 percent of high-court judges. In the 2005–2006 election cycle, for example, trial lawyers and corporate interests in a southern Illinois race combined to give more than \$3.3 million to two candidates for a seat on the state court of appeals, quadrupling the state record. Madison County, Illinois, witnessed a \$500,000 trial-court campaign, and a Missouri trial-court judge was defeated after an out-of-state group poured \$175,000 into a campaign to defeat him.

Coinciding with the introduction of big-league spending in judicial campaigns and with heightened two-party competition is the advent of big-league interest-group involvement, in the form of direct contributions to judicial candidates and independently organized campaigns in support of or opposition to the candidates. The lion’s share of interest-group spending has been on a cluster of issues, traveling under the umbrella of “tort reform,” that concern judicial rulings on issues relating to punitive damages, products liability, medical malpractice, and insurance liability. Plaintiffs’ bar and labor unions, aligned with Democratic candidates, have been pitted against the defense bar and business, aligned with Republicans. Thus, in 2006 the two highest sources of contributions were business interests and lawyers, with 44 percent of all funds donated by the former and 21 percent by the latter. Outside of groups devoted to the tort reform issue, there have been other interest groups that have actively sought to defeat incumbents (sometimes successfully) because of an opinion a judge wrote or joined on such issues as capital punishment, criminal sentencing, abor-

21 Chris Bonneau, “The Dynamics of Campaign Spending in State Supreme Court Elections,” in *Running for Judge*, ed. Streb, 63.

22 *The Politicization of the Judiciary* (Common Cause of Ohio, 2005).

23 *2004 State Supreme Court Election Overview* (Justice at Stake Campaign, March 9, 2005).

24 Rachel Paine Caulfield, “The Foreboding National Trends in Judicial Elections,” conference paper available at [http://www.keepmnjusticeimpartial.org/caulfield\\_ia\\_judges\\_conference.pdf](http://www.keepmnjusticeimpartial.org/caulfield_ia_judges_conference.pdf) (June 24, 2005), 2.

25 James Sample, Lauren Jones, and Rachel Weiss, *The New Politics of Judicial Elections 2006* (Washington, D.C.: Justice at Stake, 2007), 3.

tion, gay rights, education funding, and water rights.

As James Gibson, a political scientist at Washington University, notes, “The use of attack ads in judicial elections is a relatively new phenomenon.”<sup>26</sup> In 2004 and 2006, approximately 20 percent of all ads were negative. With increased spending in judicial campaigns and increased interest-group involvement has come a greater emphasis on negative advertising. In a 2001 poll of judges, 54 percent of trial judges and 54 percent of supreme court justices reported that the conduct and tone of judicial campaigns had gotten worse in the preceding five years. Until quite recently, interest groups and political parties were responsible for the bulk of negative television advertising: 90 percent as of 2004. But in 2006 the candidates themselves sponsored 60 percent of the negative advertising.

Since the 1970s, codes of judicial conduct have imposed significant restrictions on judicial speech and association during judicial campaigns. First, judges have been subject to restrictions on what they can say about issues that may come before them as judges: the 1972 Model Code of Judicial Conduct forbade judges from announcing their positions on disputed issues (the Announce Clause), while the 1990 and 2007 Model Codes prohibit judicial candidates from making pledges, promises, or commitments. Second, the codes restrict a judge’s political activities: for example, judges must not serve as officers in, contribute to, or make speeches on behalf of political organizations; they must not publicly oppose or en-

dorse other candidates; and they must not solicit campaign funds other than through their campaign committees. By limiting what judges can say and do in election campaigns, codes of conduct seek to prevent judicial candidates from becoming fully embroiled in the political process and from turning judicial races into referenda on their express or implied plans to decide future cases in specific ways.

In *Republican Party of Minnesota v. White*, the U.S. Supreme Court invalidated the Announce Clause, holding that judicial candidates have a First Amendment right to state their views on issues that may come before them later, as judges.<sup>27</sup> In the aftermath of *White*, the American Bar Association made modest adjustments to its Model Code of Judicial Conduct in 2003: it deleted a clause that subjected judges to discipline for appearing to make commitments (but made apparent commitments a new basis for disqualification) and retained the general prohibitions on pledges, promises, commitments, and political activities.

Beginning in 2003, the ABA’s Joint Commission to Evaluate the Model Code of Judicial Conduct revisited the Model Code’s restrictions on campaign speech and conduct, as part of a larger project to revise the entire Code. The Commission considered three possible courses of action.<sup>28</sup> First, it considered embracing the spirit of *White* by deregulating campaign speech and conduct generally, as North Carolina had done. Second, it considered the midrange op-

27 536 U.S. 765 (2002).

26 James Gibson, “Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and ‘New Style’ Judicial Campaigns,” *American Political Science Review*, forthcoming; draft on file.

28 I served as coreporter to the Commission and was in attendance at all Commission meetings. The views expressed here, however, are my own and are not necessarily shared by the Commission or its members.

tion of retooling the political activities canon to accommodate some specific post-*White* rulings of the lower courts, which would require the Commission to eliminate several restrictions on political activities and narrow significantly, if not eliminate, the Pledges, Promises, and Commitments Clause. Third, it considered the conservative approach of limiting the reach of *White* to its holding and staying the course pending further clarification of *White* from the Supreme Court.

A majority of the Commission remained concerned that the impact of *White* on judicial campaigns was deleterious and was reluctant to deregulate campaign speech and conduct beyond what was required by the letter of the Supreme Court's holding. After lengthy deliberations spanning nearly four years, the Commission effectively chose the third option described above, retaining existing restrictions on campaign speech and conduct in the political activities canon. Instead, the Commission focused its efforts on restructuring new Canon 4 (former Canon 5) to improve clarity and specificity, as the ABA's Report to the House of Delegates explained:

Much of the material in Canon 5 was retained, but was reorganized along several axes. The reorganized Canon 4 differentiates more clearly between sitting judges who are and are not also judicial candidates and nonjudges who become candidates. Canon 4 continues to differentiate between judicial candidates running for public elections and those seeking appointment, and, within the former category, it further differentiates between partisan, nonpartisan and retention elections.<sup>29</sup>

29 ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Report No.

In the aftermath of *White*, judicial candidates have challenged remaining restrictions on their campaign speech and conduct in the lower courts, and while the results have been somewhat mixed, the trend has favored the challengers. Several courts have invalidated the Pledges and Promises Clause, while others have struck down restrictions on political activities. The U.S. Court of Appeals for the Eighth Circuit, revisiting other issues presented by the *White* case on remand from the Supreme Court, held that Minnesota could not discipline judicial candidates for engaging in partisan activities (notwithstanding Minnesota's purported interest in preserving the nonpartisan character of its judicial elections) or bypassing their campaign committees and soliciting funds directly from groups.<sup>30</sup>

Since 2002, when *White* was decided, interest groups on the political left and right have capitalized on the decision by submitting questionnaires to the candidates that solicit the candidates' views on a range of issues likely to come before them as judges and that the candidates ignore at their peril. Indeed, some interest groups have been explicit about supporting only those candidates that respond.

Judicial elections were originally introduced primarily to promote judicial independence by liberating judges from the control of governors and legislators, but they have since morphed into tools that serve primarily to promote judicial accountability. There seems to be a general consensus that the recent developments described above are making judi-

200, Revised Model Code of Judicial Conduct (February 12 – 13, 2007).

30 416 F.3d 738 (8th Cir. 2005) (en banc).



cial elections look and feel more like conventional political branch races, in the sense of being more competitive and costly, with more interest groups taking sides in more acrimonious contests, and more candidates taking positions on the often policy-laden issues that the candidates will be called upon to resolve as office-holders. Where the consensus breaks down is as to whether these developments are welcome and which judicial selection system is best suited to counter or accommodate them.

Contemporary proponents of partisan judicial elections proceed from the premise that, in a democratic republic, voters should choose the public officials who govern them and hold them accountable for their performance in office. Underlying this premise is the general assumption that judges are not significantly different from other public officials, or are not different in ways that warrant a different system of selection. A related assumption is that voters in judicial and political branch races are comparably motivated and equipped to distinguish good candidates from bad – or at least that voters in judicial races are not so unmotivated and ill-equipped as to undermine the legitimacy of the choices they make.

In an article I wrote several years ago, I questioned whether voters in judicial elections were adequately motivated and informed to hold judges accountable in a meaningful way, by pointing to data showing that a substantial majority of the public did not vote in judicial races and was unfamiliar with the candidates. Recent research suggests that my concern was well-founded in traditional, less-competitive races. Available data confirm an often substantial “roll-off” in judicial races, in which voters who come to the polls vote in executive and legislative branch races but not in judi-

cial. The roll-off is commonly attributed to a lack of information about the candidates; indeed, in a poll of American voters conducted in 2001, 73 percent reported that they had only some or a little information about judicial candidates, while 14 percent reported having none.<sup>31</sup> In their study of judicial elections in the news, Brian Schaffner and Jennifer Segal Diascro, political scientists at American University, conclude, “We should not be surprised to find citizens lacking information about judicial races” because “citizens turning to newspapers for information on state supreme court campaigns will find a dearth of coverage on these contests.”<sup>32</sup>

It can be argued, however, that more competitive judicial races, particularly in a post-*White* environment, are increasing voter interest and information levels enough to hold judges meaningfully accountable. In a comparison between two Ohio Supreme Court races, political scientists Laurence Baum and David Klein found that the voter roll-off rate was twice as high for the low visibility race as for the hotly contested one (although they also found that in the hotly contested race, voters acquired only a slender grasp of the issues at stake).<sup>33</sup> Melinda

31 Martin P. Wattenberg, Ian McAllister, and Anthony Salvanto, “How Voting is Like Taking an SAT Test: An Analysis of American Voter Rolloff,” *American Politics Quarterly* 28 (2000): 234; Lawrence Baum and David Klein, “Voter Responses to High-Visibility Judicial Campaigns,” in *Running for Judge*, ed. Streb, 140–141; Poll of American Voters, conducted by Greenberg, Quinlan, Rosner Research Inc. (Justice at Stake Campaign, 2001).

32 Brian Schaffner and Jennifer Segal Diascro, “Judicial Elections in the News,” in *Running for Judge*, ed. Streb, 115, 134.

33 Baum and Klein, “Voter Responses to High-Visibility Campaigns,” in *Running for Judge*, ed. Streb.

Gann Hall, a political scientist at Michigan State University, observes, "Without the excitement generated by hard-fought campaigns from contending candidates, information upon which to cast votes is poor, and voters are disinterested and unmotivated to participate."<sup>34</sup> Now that judicial elections have become noisier, nastier, and costlier, we have more challengers and more defeated incumbents, leading Hall to conclude, "When we consider tangible indicators of electoral accountability, we see that, under most situations, supreme court elections perform quite well, particularly in the last decade or so."<sup>35</sup> Rachel Paine Caulfield, a political scientist at Drake University, found that in the post-*White* era, states that have deregulated judicial speech the most "are seeing a change in how candidates promote themselves and how they attack their opponents," leading her to conclude that "it is entirely possible that judicial candidates in these states will increasingly rely on the ability to distinguish themselves from their opponents based on controversial issue positions."<sup>36</sup> Schaffner and Diascro concur that, after *White*, "candidates may be more likely to speak out on a wider array of topics during campaigns, a dynamic that would produce more news for reporters to cover," which they view as a welcome development "if judicial elections are to compel accountability in the judiciary."<sup>37</sup>

34 Melinda Gann Hall, "Competition as Accountability in State Supreme Court Elections," in *Running for Judge*, ed. Streb, 166.

35 *Ibid.*, 183.

36 Rachel Paine Caulfield, "The Changing Tone of Judicial Campaigns as a Result of *White*," in *Running for Judge*, ed. Streb, 34, 55–56.

37 Schaffner and Diascro, "Judicial Elections in the News," in *Running for Judge*, ed. Streb, 136.

Recent data thus reveal that the brave new world of expensive, high-profile, hotly contested judicial races creates greater voter interest, puts incumbents at higher risk of defeat, and to that extent promotes unvarnished, specifically political "accountability."<sup>38</sup> And since competition is the most intense in partisan races, the argument concludes, it is in partisan races that judicial accountability of this kind will be promoted most effectively.

The critical question is whether this is the kind of accountability that we want judicial elections to promote. If, as a significant segment of the political science community believes, independent judges are essentially unconstrained policymakers who decide cases by acting on their personal preferences or attitudes, then the answer would seem to be yes, because elections will produce public policies that better represent the citizenry by creating incentives for judges to pay attention to citizen preferences when deciding highly visible and publicly salient issues.

If, on the other hand, as the mainstream legal community believes, independent judges do their best to follow the law, flexibly defined (consistent with the legal model described at the beginning of this paper), then the answer is presumably no, because elections create incentives for judges to set the law to one side and pay attention to citizen preferences when deciding cases. Indeed, the judge who openly defers to the electorate's preferences when deciding cases exposes herself to discipline and removal for violating multiple rules in the Code of Judicial Conduct: the duty

38 Hall, "Competition as Accountability in State Supreme Court Elections," in *Running for Judge*, ed. Streb, 166.

not to be swayed by public clamor or fear of criticism; the duty to uphold and apply the law and perform all duties of judicial office impartially; and the duty to act at all times in a manner that promotes public confidence in the independence and impartiality of the judiciary. The attitudinal model of judicial decision-making that drives the thinking of many political scientists is only now beginning to be challenged in a serious way by scholars within the legal community,<sup>39</sup> and the implications for judicial selection are considerable.

Devotees of nonpartisan elections proceed from the assumption that judges are different from other elected officials in ways that justify a different selection process: whereas governors and legislators may follow partisan agendas, judges must follow the law. Those who favor nonpartisan elections worry that recent politicization of judicial races has made politicians of judges, whose election increasingly turns on their currying favor with contributors, interest groups, and voters by signaling in advance how they are likely to rule on hot-button legal issues that may come before their courts. They argue, however, that the worst excesses have occurred in partisan election states, where judicial candidates are, by definition, partisans and where competition for judicial office has been most intense.

Data confirm that partisan races are, on average, more heated than nonpartisan. The spending difference between partisan and nonpartisan races is stark: between 1990 and 2004, average spending in contested nonpartisan elections was \$549,160, as compared to \$885,177

in partisan races. Overall, the percentage of supreme court races in which the incumbent ran unopposed has been 16.9 percent higher in nonpartisan contests. And between 1980 and 2000 defeat rates for incumbents in nonpartisan races were 7.3 percent as compared to 23 percent in partisan races. One explanation for this data, however, may be that nonpartisan races are less politicized because they furnish voters with insufficient information to promote competitive races; partisan affiliation can serve as a rough proxy for the candidate's views on a range of issues that furnish voters with information they deem relevant to casting an informed ballot. That said, nonpartisan races have recently become much more competitive affairs. In the 1980s, 40.8 percent of nonpartisan judicial elections were contested, as compared to 62.5 percent in the 1990s. (In partisan races, the percentage of contested races increased from 58.8 percent to 83.1 percent.) And a recent study conducted by Matthew Streb found that so-called nonpartisan races may not be as nonpartisan as commonly assumed:

How involved are party organizations in nonpartisan judicial campaigns? The answer appears to be that they are quite involved. While parties are not equally active in all aspects of nonpartisan judicial elections (and not necessarily active in every election cycle), they seem to be especially important in terms of GOTV efforts and increasing name recognition, candidate recruitment, candidate endorsements, coordinating campaigns with candidates, and even raising and contributing money.<sup>40</sup>

39 Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge and New York: Cambridge University Press, 1993); Barry Friedman, "Taking Law Seriously," *Perspectives on Politics* 4 (2006): 261.

40 Streb, "Partisan Involvement in Partisan and Nonpartisan Trial Court Elections," in *Running for Judge*, ed. Streb, 96, 102.

Of greater concern, perhaps, is the impact of *White* on the future of non-partisan elections. If candidates are held to have a constitutional right to announce their partisan affiliations and engage in partisan activities in nonpartisan races, as the U.S. Court of Appeals ruled in *White* on remand, the practical differences between partisan and nonpartisan elections may gradually disappear. We have already seen, in states such as Michigan and Ohio, where a nominally nonpartisan general election is preceded by an openly partisan primary election process, that the resulting contests can be every bit as heated as in conventional partisan election states. In light of data indicating that when, in response to *White*, states relax campaign speech regulations, candidates alter their campaign speech to capitalize on the relaxed requirements, it is reasonable to predict that the same will occur if partisan activities restrictions are lifted.

Advocates of merit selection, like proponents of nonpartisan election, proceed from the premise that a judge's duty to follow the law makes judges sufficiently different from other public officials to warrant a different method of selection. The two camps part company, however, over the relative merits of contested elections. Supporters of merit selection operate on three assumptions. First, contested elections are not a good way to ensure the selection of capable and qualified judges. Second, contested elections are inimical to judicial independence because they put judges at risk of losing their jobs for making decisions that are unpopular with voters who are incapable of discerning when a judge has followed the law, committed an honest error, or made an illegitimate power grab. Third, politicization of judicial selection in hotly contested races dimin-

ishes public confidence in the courts. A system in which governors appoint judges from a pool of candidates pre-qualified by an independent commission, they maintain, is better suited to ensure that judges are selected on the basis of merit. To accommodate entrenched public preferences for judicial elections, merit selection systems typically provide for retention elections that proponents assume, by virtue of being non-competitive, are less likely to become highly politicized, independence-threatening affairs that diminish public confidence in the courts.

Available data undercut the assumption that merit selection systems produce "better" judges. A study conducted in the 1980s comparing the résumés of judges chosen in contested elections and in merit selection systems found no significant differences: they possess comparable legal and judicial experience, and elected judges were no more likely than their merit-selected counterparts to have partisan political backgrounds.<sup>41</sup> (Recent research reveals, too, that there is no meaningful difference between the systems in terms of the racial or gender diversity of the judges selected.<sup>42</sup>) That said, it is more difficult to quantify intangibles that could support the conclusion that merit-selected judges are "better" qualified, such as whether, on aver-

41 Henry Glick and Craig Emmert, "Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges," *Judicature* 70 (1987): 231–235.

42 Mark Hurwitz and Drew Noble Lanier, "Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts," *State Politics and Policy Quarterly* 3 (2003): 345. For earlier research, see Malia Reddick, "Merit Selection: A Review of the Social Scientific Literature," *Dickinson Law Review* 106 (2002): 740–741.



age, they possess a more judicial temperament, are predisposed to be more impartial and independent, or think about the judicial role in less partisan or otherwise political ways. A California study, for example, compared judges initially appointed to those initially elected and found that between 1990 and 1999, 29.8 out of every thousand judges initially appointed had been disciplined, as compared to 43.6 out of every thousand judges who had been initially elected.<sup>43</sup>

Recent data appear to corroborate the assumption that elected judges are more likely to align their decision-making with popular preferences than appointed judges, and to that extent are less independent. In their study of state supreme court review of capital cases, political scientists Paul Brace and Brent Boyea found “compelling but circumstantial evidence that state supreme court judges in capital cases may vote with an eye toward the next election,” and that “appointed judges and judges that are retiring all exhibit a higher propensity to overturn capital convictions than elective judges who are not retiring,”<sup>44</sup> leading Brace and Boyea to a conclusion worth quoting at length:

In the end, the patterns revealed here indicate that judicial elections expose judges to public sentiment and, on this very salient issue at least, they respond by adjusting their voting in a manner that is consistent with public opinion. On this particular issue too, elections serve to recruit judges who share the public’s values. Elections thus function in a manner

43 Commission on Judicial Performance, Summary of Disciplinary Statistics (State of California, 1990–1999), 13.

44 Paul Brace and Brent Boyea, “Judicial Selection Methods and Capital Punishment in the American States,” in *Running for Judge*, ed. Streb, 186, 193–194, 197.

commonly valued in some democratic theories, producing elite responsiveness to mass opinions. When it comes to judicial elections, however, our findings may give pause to those who value judicial impartiality, particularly when it comes to a matter of life and death.<sup>45</sup>

Research reveals that in merit selection systems, politics can play a role in selecting members of nominating commissions, in the deliberations of such commissions, and in the judges that governors ultimately choose from the approved candidate pool. In response, the American Bar Association has developed standards for judicial selection that underscore the importance of preserving the independent, nonpartisan character of judicial nominating commissions.<sup>46</sup> To conclude from these developments, however – as some have – that merit selection systems simply move the politics of judicial selection from the ballot box to a back room misses an important point: the primary threat to independence arises at the point of reselection, when judges are put at risk of losing their jobs for unpopular decisions that they previously made. And on that score there is ample support for the conclusion that, with notable exceptions, the prospect of an incumbent losing her seat in a retention election because of isolated, unpopular decisions is quite low. Whereas 23 percent of incumbent supreme court justices lost reelection bids in partisan elections between 1980 and 2000, and 7.4 percent lost in nonpartisan races, the failure rate in retention elections was only 1.8 percent. And between 1964 and 1998 only 52 of 4,588

45 *Ibid.*, 199.

46 Report of the Commission on State Judicial Selection Standards (American Bar Association, 2000).



candidates in retention elections were not retained.<sup>47</sup>

Finally, there is support for the conclusion that highly politicized judicial races diminish public confidence in the courts. In his Kentucky-based study, James Gibson found that “when groups with direct connections to the decision-maker give contributions, legitimacy suffers substantially.”<sup>48</sup> He likewise found that when candidates use attack ads, legitimacy is adversely affected, albeit to a lesser degree. Gibson also explored the impact of candidate positioning on public confidence and found none, adding that “even promises to decide cases in specific ways have no consequences at all for the legitimacy of the institution” – although his conclusion on this point may overgeneralize from the answers he received to a narrowly focused question.

I have argued elsewhere that the optimal system for judicial selection is one in which judges are appointed by governors from a pool of commission-approved candidates, with or without legislative confirmation, who, once appointed, are not subject to reselection (via reappointment, retention election, or contested election).<sup>49</sup> Such arguments operate from the premise that an appointive system alone promotes judicial independence by ensuring that a judge will not be put at risk of losing her job for making unpopular decisions that comport with the law as the judge

reads it. Proponents of appointive systems assume that accountability is better promoted by means other than the ballot box: appellate review, constitutional amendment, adverse publicity, intrajudicial disciplinary processes, and, of course, prospective accountability fostered by the appointment process itself.

Although few judges actually lose their retention bids in merit selection states, the real issue is whether judges nonetheless fear defeat at the ballot box and act on that fear by deciding cases differently than they otherwise would. Malia Reddick, director of research and programs for the American Judicature Society, reports on a 1991 survey of judges who recently stood for retention, in which three-fifths of respondents reported that “retention elections had a pronounced effect on their behavior on the bench”; only 14 percent believed that retention elections gave them independence from the voters, while “the remaining judges perceived themselves as responding to their environment.”<sup>50</sup>

As far as other accountability-promoting mechanisms are concerned, the model codes of judicial conduct include rules directing judges to be “faithful to” or to “uphold and apply” the law.<sup>51</sup> These rules have been used more often than one might suppose to discipline and sometimes remove judicial officers who chronically or flagrantly disregard the rule of law in a range of contexts.

47 Larry Aspin, “Trends in Judicial Retention Elections, 1964 – 1998,” *Judicature* 83 (1999): 79.

48 James Gibson, “Challenges to the Impartiality of State Supreme Courts,” 17; see also, Charles Gardner Geyh, “Why Judicial Elections Stink,” *Ohio State Law Journal* 64 (2002): 54 – 55.

49 *Ibid.*; also *Justice in Jeopardy*, 70 – 74.

50 Malia Reddick, “Merit Selection,” 739 – 740, which discusses Larry Aspin and William Hall, “Retention Elections and Judicial Behavior,” *Judicature* 77 (1994): 306.

51 ABA Model Code of Judicial Conduct, Canon 3B(2) (1990); Model Code of Judicial Conduct, Rule 2.2 (2007).

Ultimately, which of the various systems for judicial selection is “best” depends upon what one is looking for. If one is looking for a system that maximizes democratic accountability, then available data suggest that partisan elections will ordinarily be optimal. Conversely, if one is looking for a system that maximizes judicial independence, simple appointment (with or without a nominating commission) that does not subject incumbents to a reselection process, will usually be the best bet. Nonpartisan election and merit selection/retention election systems seek to strike a balance between these relative extremes, with nonpartisan election systems placing somewhat greater emphasis on democratic accountability and merit selection/retention elections opting for somewhat greater independence.

Arguments over the relative merits of democratic accountability and judicial independence may be deeply normative, but turn in large part on an unresolved empirical question of considerable importance: whether independent judges follow the law and, if so, how and to what extent. If the answer is no, as many political scientists believe, then the primary justification for judicial independence disappears. If law does not constrain judges in any meaningful way – if independent judges are essentially rogue policy-makers – the norms of a democratic republic dictate that judges be brought under greater popular control, so that the preferences judges act upon are better aligned with their “constituents.” Conversely, if, as most judges and lawyers believe, the answer is to some significant extent yes – if independent judges do indeed take law seriously – then judicial independence is back in the game. To study this question demands a more serious interdisciplinary effort than has occurred to date – and

that is no mean feat. Too many political scientists and lawyers look at each other and shake their heads, so captured by the predispositions of their respective disciplines that they are unable or unwilling to take the other seriously.<sup>52</sup> For those who have been struggling to preserve and promote an independent judiciary, however, the time has come to confirm the empirical foundations upon which their case rests, or rethink their premises.

I share New York University law professor Barry Friedman’s impressionistic sense that, outside the political science subfield of attitudinal model scholars, “most likely there is agreement that attitudes and law both play a role – the question is how much, and more particularly, how much law can constrain. To state it differently, the question is not so much whether law plays a role, as what role it plays.”<sup>53</sup> If so, then judicial independence remains a value worth preserving. But the operative question continues to be how much independence in relation to democratic accountability is optimal? Put another way, when (if ever) does the cost of enabling judges to act upon their political preferences or attitudes by insulating them from democratic accountability exceed the benefits of protecting them from threats to their tenure that compromise their capacity to adhere to the rule of law?

These are big questions that call for big choices between selection systems. Constitutional reform culminating in changes on this order of magnitude is a rare event. It can be a worthy goal and

52 For an excellent discussion of the divide that separates academic lawyers and political scientists, see Friedman, “Taking Law Seriously.”

53 *Ibid.*, 264.

one well worth pursuing (as I have argued elsewhere), but not at the expense of ignoring shorter-term remedies that can make a bad system better in the interim. For those seeking to promote an independent judiciary in the teeth of recent developments, more modest reforms proposed by scholars and organizations include:

- Increasing the length of judicial terms, to reduce the frequency with which judicial tenure is put at risk;<sup>54</sup>
- Encouraging candidates to adopt voluntary campaign standards, to reduce negative campaigning and thwart the impact of *White*;<sup>55</sup>
- Continuing to defend existing ethical restrictions on judicial campaign conduct against constitutional challenge, at least until the Supreme Court clarifies the limits of *White*;<sup>56</sup>
- Developing more comprehensive judicial evaluation programs to provide voters in retention elections with more

meaningful information about incumbents that reorient voter focus toward behavioral, rather than decisional, accountability;<sup>57</sup>

- Increasing public knowledge about the role of the judiciary in American government, which has been shown to increase public support for judicial independence;<sup>58</sup>
- Taking judicial discipline seriously, as a means to underscore an important way in which judges who behave badly are properly held accountable;<sup>59</sup>
- Public financing of judicial campaigns at the appellate level, to reduce the influence of money on judicial races;<sup>60</sup>
- Expanding use of voter guides as a means to inform voters better about the candidates.<sup>61</sup>

54 Roy A. Schotland, "The Crocodile in the Bathtub . . . and Other Arguments to Extend Terms for Trial Judges," *California Courts Review* 10 (Fall 2005); "Call to Action: Statement of the National Summit on Improving Judicial Selection," *Loyola of Los Angeles Law Review* 34 (2001): 1355.

55 Charles Gardner Geyh, "Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism," in *Bench Press: The Collision of the Courts, Politics, and the Media*, ed. Keith Bybee (Stanford: Stanford Law and Politics, 2007). See also, The Constitution Project, Higher Ground Standards of Conduct for Judicial Candidates; at [http://www.constitutionproject.org/pdf/The\\_Higher\\_Ground\\_Standards\\_of\\_Conduct\\_for\\_Judicial\\_Candidates.pdf](http://www.constitutionproject.org/pdf/The_Higher_Ground_Standards_of_Conduct_for_Judicial_Candidates.pdf).

56 Geyh, "Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism," in *Bench Press*, ed. Bybee.

57 Seth Andersen, "Judicial Retention Evaluation Programs," *Loyola of Los Angeles Law Review* 34 (2001): 1375.

58 James Gibson and Gregory Caldeira, "Knowing About Courts," Paper for the 2nd Annual Conference on Empirical Legal Studies; on file.

59 *Justice in Jeopardy*, 58 – 59.

60 The Report of the Commission on Public Financing of Judicial Campaigns (American Bar Association, 2002); but see Michael Malbin and Thomas Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* (Albany, N.Y.: Rockefeller Institute Press, 1998), which questions the viability of public financing.

61 "Call to Action," 1357.

# Bert Brandenburg & Roy A. Schotland

## *Keeping courts impartial amid changing judicial elections*

That's obscene for a judicial race....

What does it gain people? How can people have faith in the system?

– Justice Lloyd Karmeier, Illinois Supreme Court, Election Night 2004<sup>1</sup>

More than 89 percent of America's state judges must stand for election to sit on the bench or retain office.<sup>2</sup> Judicial contests have traditionally been different from other elections because judges historically haven't had to raise huge war chests, cater to interest groups, make sound-bite promises, or respond to hardball attacks. Judicial election politics have stayed cooler in part because Americans don't want courtroom decisions to be influenced by political pressure.

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But Justice Karmeier's race encapsulates a troubling transformation. He issued his warning after winning the most expensive contested judicial election in American history. In a rural district, the two candidates raised more than \$9.3 million – more than was raised in eighteen out of thirty-four U.S. Senate races that year. Trial lawyers wrote six-figure checks to the state Democratic Party and teamed up with labor leaders to funnel money into the race through a political action committee. On the other side, the U.S. Chamber of Commerce and the American Tort Reform Association poured in millions more through the state Republicans, the state Chamber, and a friendly political action committee.<sup>3</sup>

1 Ryan Keith, "Republican Lloyd Karmeier Wins Supreme Court Seat," Associated Press, November 3, 2004.

2 The ideas in this essay were first presented at the 2007 conference on The Debate over Judicial Elections and State Court Judicial Selection, convened by the Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center. A modified version of this essay appears in *The Georgetown Journal of Legal Ethics* 21 (4) (Fall 2008).

3 See Jesse Rutledge, Deborah Goldberg, Sarah Samis, Edwin Bender, and Rachel Weiss, *The*

Costly and corrosive court campaigns have fast become the new norm. Across America, attorneys, partisans, and special interests with cases in court are pouring millions into judicial contests, mostly for high-court but increasingly for appellate- and even district-court contests. Broadcast television ads seek to push wedge-issue politics into our courts of law. Aggressive questionnaires from special-interest groups seek to pressure judges to take stands on controversial issues. As Justice Sandra Day O'Connor recently warned, "In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution."<sup>4</sup> The new politics of judicial elections is dangerous because it seeks to promote ideology and special-interest agendas over accountability to the law.

Considered nationally, judicial election systems are a patchwork. Our states have three main types of judicial election systems: partisan, nonpartisan, and retention elections, in which incumbents stand for reelection without an opponent. Taking into account different jurisdictions and levels of courts, there are no fewer than sixteen different combinations of these types of elections.

Unlike other political contests, judicial elections must strike a balance between assuring that judges are accountable and protecting their ability to be fair and independent. This ongoing tension has led to widespread, long-standing disagreement on what method can best meet that challenge. As one Texas chief justice

is reported to have said years ago, "No method of judicial selection is worth a damn." (Indeed, elections for judges occur *only* in America, except for a few small cantons in Switzerland and retention elections for Japan's high-court judges.<sup>5</sup>)

Several attributes of judicial elections combine to diminish media coverage and voter interest. Candidates for the bench are constrained by canons of campaign conduct and by professional tradition from campaigning with claims to pursue a particular policy. They cannot offer favors, or do constituent casework. They are often unknown since they are rarely active in groups that are engaged politically. Judicial races are typically relegated to the bottom of the ballot, encouraging many reliable voters to skip over them. Judicial elections sometimes occur at times bound to produce low turnout, like April in Wisconsin, August in Tennessee, or in odd-numbered years, as is the case with Pennsylvania's spring primaries. Puzzled voters are often left to parse political party cues or make their choice based on name familiarity or ethnic identity. This information vacuum also heightens the role of purchased advertising – which in turn fuels the race for campaign funds.

The breakthrough year for big-money court campaigns was 2000, when supreme court candidates raised a record \$45.6 million – a 61 percent increase over the previous election cycle – and political parties and interest groups spent at least \$10 – \$16 million more on independent TV ads.<sup>6</sup> Although the growth in to-

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*New Politics of Judicial Elections 2004* (Washington, D.C.: Justice at Stake, 2005), 18, 26 – 27.

4 Justice at Stake Press Release, May 17, 2007.

5 Herbert M. Kritzer, "Is the Rule of Law Waning in America?" *DePaul Law Review* 56 (2007): 423, 431.

6 See Deborah Goldberg, Craig Holman, and Samantha Sanchez, *The New Politics of Judicial*



tal spending was sudden and dramatic, at that point the problem seemed confined to battleground states like Alabama, Illinois, Michigan, Mississippi, and Ohio. But since 1999 candidates for America's state high courts have raised over \$157 million, more than double the amount raised by candidates in the four cycles prior.<sup>7</sup>

Fund-raising records in at least fifteen states have been broken. In 2006, for example, high-court candidates in Alabama combined to raise \$13.4 million, smashing the previous state record by more than a million dollars. Supreme court candidates in Alabama, Ohio, Oregon, and Washington broke the million-dollar mark before Labor Day.<sup>8</sup> Meanwhile, two candidates for an Illinois Court of Appeals seat raised more than \$3.3 million, quadrupling the state record. Candidates in an Illinois circuit court campaign raised more than \$750,000.<sup>9</sup> In 2002, Florida trial judges raised \$16 million for their nonpartisan elections; two years earlier they raised over \$8 million.<sup>10</sup>

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*Elections* (Washington, D.C.: Justice at Stake, 2002), 7; also, John C. Green, ed., *Financing the 1996 Election* (Armonk, N.Y.: M. E. Sharpe, 1999), 13.

7 Jesse Rutledge, James Sample, Lauren Jones, and Rachel Weiss, *The New Politics of Judicial Elections 2006* (Washington, D.C.: Justice at Stake, 2007), 15.

8 Thomas J. Moyer and Bert Brandenburg, "No Way to Choose: Big Money and Special Interests are Warping Judicial Elections," *Legal Times*, October 9, 2006.

9 Data supplied upon request by the Illinois Campaign for Political Reform.

10 Roy A. Schotland, "Judicial Elections: Change and Challenge," unpublished white paper (California Judicial Council, 2005), 14.

Most of this money comes from attorneys and political interests who view campaign spending as a litigation investment. Of the \$157 million raised by judges from 1999 to 2006, more than a third came from businesses and business groups, more than a quarter from attorneys (plaintiff and defense), 11 percent from political parties, and 7 percent from the candidates themselves.<sup>11</sup>

Because of the complicated nature of judicial decision-making, there are little clear data available examining potential linkages between campaign contributions and decisions from the bench. A 2006 *New York Times* review of twelve years of decisions made by the Ohio Supreme Court – which has experienced a series of costly and brutal campaigns – found that "its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time."<sup>12</sup>

Once independent expenditures are factored in, these dollar figures climb much higher. Since 1999, third-party, interest-group spending for television airtime and other expenses totaled anywhere from \$17 – \$25 million.<sup>13</sup> Indeed, since third-party groups face few requirements to disclose their campaign spending, these estimates are almost certainly low.

11 Tabulations provided by the National Institute on Money in State Politics.

12 Adam Liptak and Janet Roberts, "Tilting The Scales?: The Ohio Experience," *The New York Times*, October 1, 2006.

13 See *The New Politics of Judicial Elections 2000, 2002, 2004, 2006*; also, Roy A. Schotland, "Financing Judicial Elections," in *Financing the 2000 Election*, ed. David B. Magelby (Washington, D.C.: Brookings Institution Press, 2002).

The escalating race for cash has left many judges feeling trapped in a bad system, forced to raise money from the attorneys and parties appearing before them and constantly looking over their shoulders at interest groups and those groups' demands. This worries the public: a number of opinion surveys have shown that three in four Americans think that campaign contributions to judges affect the outcome of cases in the courtroom.<sup>14</sup> Even more chilling is a poll showing that one in four state judges agreed.<sup>15</sup> "You cannot forget the fact that you have a crocodile in your bathtub," said former California Justice Otto Kaus, referring to controversial cases at election time. "You keep wondering whether you're letting yourself be influenced, and you do not know. You do not know yourself that well."<sup>16</sup>

What triggered the rise in contests and spending? The evidence suggests a combination of factors: changes in elections generally (like the spread of television and consultants in major races), combined with increased public awareness of the impact of court decisions; growing interest-group focus on courts and their makeup; and unusual events in particular states. As an Ohio AFL-CIO official put it in 1990, "We figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators."<sup>17</sup>

14 See <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf>.

15 See <http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf>.

16 D. Morain, "Kaus to Retire from State Supreme Court," *Los Angeles Times*, July 2, 1985.

17 Quoted by J. Christopher Heagarty, "The Changing Face of Judicial Elections," *North Carolina State Bar Journal* 19 (2002): 20–21.

Much of this new money is spent on expensive television advertising, which has quickly become prominent in the vast majority of state supreme court elections. In 2000, television advertisements ran in fewer than one quarter of states with contested supreme court elections, compared to more than 90 percent in 2006. Candidates have spent more than \$35 million on these ads since 1999. Special interests have spent at least \$16 million more, typically on battles between rival camps: business against labor, plaintiffs against business, pro-development against pro-conservation.<sup>18</sup>

Altogether, candidates, special-interest groups, and political parties combined to spend more than \$51 million on TV advertising in high-court campaigns from 1999–2006. In 2006 almost \$16.1 million was spent, with Alabama, Georgia, and Ohio breaking the \$2-million mark. The TV ads in the primaries of 2006 amounted to one-third of all judicial ads in high-court campaigns and cost \$4.6 million—almost forty-eight times the \$96,000 spent airing TV ads for primaries in 2002.

Too few of these ads focus on the traditional themes of qualifications, experience, and integrity. Far more often, judicial campaign ads misrepresent facts and scare voters. Complicated decisions are reduced to slogans, and fealty to the law is subordinated to sound bites. Consider an ad from the 2006 Alabama Republican Primary, featuring a hand holding a knife and a voiceover that said:

Convicted of rape and murder, Renaldo Adams was sentenced to death, but now Adams is off death row thanks to Chief Justice Drayton Nabers and the Alabama Supreme Court using a 5 to 4 decision

18 See *The New Politics of Judicial Elections 2000, 2002, 2004, 2006*.

based on foreign law and unratified UN treaties.<sup>19</sup>

In 2004, in Illinois, the Justice For All Political Action Committee, a trial lawyer and labor group, ran an ad criticizing Republican Judge Lloyd Karmeier as “lenient” because he “gave probation to kidnappers who tortured and nearly beat a 92-year-old grandmother to death.”<sup>20</sup>

In the wake of the Supreme Court’s 2002 decision in *Republican Party of Minnesota v. White*,<sup>21</sup> and subsequent lower-court decisions striking down more regulation of judicial campaign speech, more candidates have been feeling pressured to run ads featuring nearly promissory language about how they will rule on the bench:

- In Illinois, Judge Lloyd Karmeier stated that he was “tackling the medical malpractice crisis.”
- In New Mexico, Justice Edward Chavez said: “Violent criminals don’t belong on our streets. To stop violent crime punishment must be swift and certain. . . . That’s the kind of justice I believe in.”
- In Mississippi, Judge Samac Richardson said that he stands for “traditional Mississippi values,” including the belief that “the words ‘under God’ belong in our Pledge of Allegiance” and

19 *The New Politics of Judicial Elections* 2006, 8–9.

20 *The New Politics of Judicial Elections* 2004, 10.

21 536 U.S. 765 (2002). By a 5–4 vote, the Court struck down Minnesota’s Announce Clause, which prohibited a candidate for judicial office from “announc[ing] his or her views on disputed legal or political issues.” Since *White*, thirteen lower federal courts have stricken other limits on judicial campaign conduct.

that “the rights of victims are just as important as the rights of defendants.”<sup>22</sup>

- In Alabama, Chief Justice Nabers said, “Abortion on demand is a tragedy. And the liberal judicial decisions that support it are wrong. I believe in traditional marriage and I will always support it.”<sup>23</sup>

The judicial ad wars are likely to grow only worse in the near-term, as lower-court decisions further loosen judicial ethics codes and the psychology of the arms race takes hold. This will fuel the vicious circle of ever-more campaign fund-raising and edgier ads, making judicial campaigns more and more like other campaigns. When candidates were restrained to issues like qualifications and docket management, TV didn’t fit. For better or worse, that day is gone.

Questionnaires are an increasingly popular tool for interest groups seeking to pressure candidates into making statements about issues before they land in court. Many give only a passing glance to a candidate’s legal experience, education, or approach to the administration of justice – information that could be highly valuable to voters trying to pick a candidate. Instead, they seek to box in candidates on hot-button legal and political issues. They usually call on judicial candidates to distill complex legal issues down to a simple check in a box, and rarely seek a narrative response from the candidates. Would-be judges know that their answers could trigger significant money, political ads, and grassroots campaigns for or against their candidacy.

22 *The New Politics of Judicial Elections* 2004, 9.

23 *The New Politics of Judicial Elections* 2006, 35.

For example, interest-group questionnaires in 2006 pressed more judicial candidates than ever to “announce” their position on issues, such as abortion, school choice, and same-sex marriage. North Carolina Right to Life and Kentucky Right to Life both asked judicial candidates to agree or disagree with the following statement: “I believe that *Roe v. Wade* was wrongly decided.” The Independent Voters of Illinois-Independent Precinct Organization circulated a questionnaire insisting that judicial candidates announce their positions on the death penalty, “the right of a woman to have an abortion,” mandatory minimum sentences, and other hot-button social issues.<sup>24</sup>

As questionnaires become increasingly aggressive, a growing number of judges are being advised to treat them warily.<sup>25</sup> Some candidates are refusing to play along, either by ignoring the questionnaires or responding with letters written on their own terms. It’s worth quoting from a response written by Florida Judge Peter D. Webster to the Florida Family Policy Council:

I have spent a good portion of my life thinking about issues related to the judiciary. My experiences lead me to conclude without reservation that questionnaires such as that which I have received from your organization are ill-conceived. Over the long term, their impact cannot be anything but bad – bad for the judiciary as an institution; bad for the rule of

law; and bad for the people of Florida. I say this because such questionnaires create the impression in the minds of voters that judges are no different from politicians – that they decide cases based on their personal biases and prejudices. Of course, nothing could be further from the truth.<sup>26</sup>

What can be done to insulate our state courts better from interest-group pressure? As the judicial elections have increased, more state legislators and civic groups are championing reforms. Fortunately, there is a good-sized menu to choose from.

Organizations like the American Judicature Society have long advocated “Missouri Plan” systems, adopted by more than thirty states in some fashion. Under these systems, sometimes called merit selection or merit-based selection, a judicial nominating commission screens potential candidates and recommends a short list of potential nominees. The governor consults this list in deciding whom to nominate; in some states he or she must pick from the list. After serving an initial term, the appointee must thereafter stand for reelection in an uncontested retention election, in which she or he must win at least a majority of the votes to stay in office.

Merit selection/retention systems result in dramatically less expensive campaigns than nonpartisan or partisan contestable elections. But merit selection is the most difficult judicial selection reform to achieve, although rising judicial election woes appear to be winning it new converts. It’s also interesting to note a countertrend: partisan and special interests have been pushing to dismantle merit/retention systems in sev-

24 See *The New Politics of Judicial Elections 2006*, 30–34.

25 See “How should judicial candidates respond to questionnaires?” Advisory memorandum issued by the Ad Hoc Committee on Judicial Campaign Conduct, August 28, 2006; available at [http://www.judicialcampaignconduct.org/Advice\\_on\\_Questionnaires-Final.pdf](http://www.judicialcampaignconduct.org/Advice_on_Questionnaires-Final.pdf).

26 *The New Politics of Judicial Elections 2006*, 33.

eral states, including Arizona, Kansas, Indiana, Missouri, Tennessee, and Utah.

Other structural reforms worth considering are the use of merit commissions for filling interim appointments, longer terms of office, timing of elections, judicial qualification commissions, and candidate training. Longer terms directly reduce campaign finance problems by reducing the frequency of campaigns.

The full panoply of campaign reforms from other kinds of contests is also worth considering in judicial elections: contribution limits, speedy and meaningful disclosure of contributions and expenditures, regulation of electioneering communications, stronger enforcement and noncompliance penalties, and even adjustments to the timing of judicial elections. Public funding has drawn considerable attention, deservedly. It reduces dependence on private funding, helps level the playing field for candidates, and supports the emergence of candidates who otherwise would either not even try or would be unable to gain viability.<sup>27</sup>

Another reform gaining increasing attention – as campaign fund-raising explodes and constraints on campaign conduct shrink – is to assure, for cases in which a sitting judge’s fairness is reasonably in question, that judges be recused or disqualified where appropriate (and that recusal requests be independently adjudicated).<sup>28</sup>

27 For additional and sometimes differing views on public funding, see Bert Brandenburg and Roy A. Schotland, “Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns,” *The Georgetown Journal of Legal Ethics* 21 (4) (Fall 2008).

28 James Sample, David Pozen, and Michael Young, *Fair Courts: Setting Recusal Standards* (New York: Brennan Center for Justice, 2008); Thomas R. Phillips and Karlene Dunn Poll,

Because turnout in judicial elections is so low, allowing interest groups to dominate them by turning out their base, serious reform should include measures to boost voter participation. Exit polls consistently show that voters rank voter pamphlets as their favorite source of information. State and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters before any judicial election (without charging an entry fee to judicial candidates). Indeed, Congress ought to provide a free federal mailing frank to any voters’ guide sponsored by a state or local government.

Another important reform is the establishment of state and local judicial campaign conduct committees to monitor and comment on judicial campaign conduct. The ideal committee is composed of well-respected civic, political, and legal leaders, balanced and diverse. Conduct committees can educate candidates regarding appropriate campaign conduct, advise candidates on the appropriateness of specific advertisements, help candidates reach agreement about campaign behavior, and criticize inappropriate conduct by candidates.

Above all, the public needs to be better engaged in efforts to protect the courts that protect their rights. In 2006, voters across America signaled that they will vote to keep courts insulated from political pressure when they understand the stakes. They rejected several measures designed to make courts accountable to partisans instead of the law and the Constitution. In South Dakota, a measure called JAIL for Judges, which would have exposed judges to lawsuits and even dis-

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“Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World,” *Drake Law Review* 55 (2007): 101.



missal for unpopular decisions, was rejected 9 – 1 by South Dakota voters. A Colorado ballot proposal to impose retroactive term limits on judges failed. Oregon voters rejected a measure to oust Portland-area judges for their political views by switching from statewide to district-based supreme court elections. In Hawaii, voters rejected an effort to repeal the mandatory retirement age for judges, after it was attacked as an effort by the Democratic legislature to deny judicial appointments to a Republican governor. And Missouri voters empowered a commission to set salaries for judges. As Chief Justice Roberts has said, the severe erosion of judges' pay is a "direct threat to judicial independence." Missouri's voters may have been casting their vote for good government, but in so doing they stood up for the role of America's courts.

Finding the appropriate balance between electoral accountability and the demands of impartial justice will never be easy. But the threat to fair courts is growing too rapidly to ignore. Every state in which judges face elections needs to consider how it will meet the challenges.

Ronald M. George

*Why state courts – and  
state-court elections –  
matter*

The vast majority of law cases in our nation are filed, heard, and determined in the courts of the various states.<sup>1</sup> Yet the attention paid to the role of state courts in our society – and threats to that role – often has lagged behind that accorded the federal courts in both public and scholarly notice. The study of state tribunals is complicated because the judicial systems in the fifty states often are structured very differently from one another. The division of labor among the courts of any given state, the scope of a particular court's jurisdiction, the manner of selection and retention of judges or justices, and even the names of analogous courts, to cite a few significant areas, are far from uniform and often reflect unique aspects of the history and development of the individual state.

This lack of uniformity at the state level, and the attendant difficulties in tracking and comparing court cases, should not, however, mask the substantial role of state courts in advancing our nation's interest in providing fair and impartial adjudication to the public. The steadily

increasing focus over the past few years on the impartiality of state courts, as well as on the improper pressures that have been applied to courts on both the state and federal level, reflects a growing awareness that the fate of state courts and the public's respect for their rulings have significant implications for our democratic system, both locally and nationally. At risk is not only the judicial process, but also the basic political structure of our nation. And the word *political* is used here in both its broadest and its most partisan senses.

The issues revolving around our third branch of government are varied and complex. Even the shared meaning of common catchphrases no longer may be taken for granted. A few years ago, for example, Judge Mary Schroeder, former

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<sup>1</sup> This paper is taken from a talk given at the 225th Annual Meeting and 1902nd Stated Meeting of the American Academy of Arts and Sciences held on May 10, 2006. Upon reviewing those remarks for inclusion in this volume, I concluded that the growing interest and body of material relating to judicial elections in state courts required that substantial revisions be made, and I have done so. The result is a continuation of some of the themes contained in that initial address. I deeply appreciate the invaluable assistance of my Principal Attorney Beth J. Jay in preparing this article.

chief judge of the U.S. Court of Appeals for the Ninth Circuit, described how, in her home state of Arizona, the longstanding and seemingly unobjectionable concept of “independence of the judiciary” was being employed with new caution. Some members of the public had construed the phrase as an invitation for courts to act in disregard of popular preferences – not only independent of, but without “accountability” to, the public. Today, growing segments of the public likewise seem to have concluded that greater accountability is needed because, in their view, judges presently may do whatever they wish, untethered from popular opinion. What once may have seemed an unexceptionable axiom of good government may now be under scrutiny, or may have taken on new and unfamiliar connotations.

This essay focuses on a few key developments in a very dynamic area. My purpose is to whet the reader’s appetite for further exploration of the role state courts should be expected to play, of the impact of increasing numbers of expensive and hard-fought campaigns for individual judicial positions, and of the consequences of overt political and other pressures on state courts. It is apparent that what happens in state courts will profoundly affect the public’s respect for the rule of law in our nation, and thus the fundamental stability of our democratic system.

Several recent developments – two involving judicial selection and a third involving the Terri Schiavo case – provide context. The U.S. Supreme Court’s 2002 decision in *Republican Party of Minnesota v. White*<sup>2</sup> casts a strong – and sometimes harsh – light on judicial elec-

tions in several states. In *White*, the high court held that Minnesota’s Code of Judicial Conduct, which barred candidates for judicial office from “announcing” their views, violated the First Amendment right to free speech. The court majority rejected the notion that there is any substantial difference between judicial and legislative elections, asserting that judges too have the power to make law – not only by developing the common law, but by shaping each state’s constitution.<sup>3</sup>

Some thirty-nine states presently elect at least some of their judges.<sup>4</sup> Some hold contested partisan elections, others nonpartisan contests, and yet others retention elections. Many states have systems combining a variety of selection mechanisms. The length of the term of office at issue varies.<sup>5</sup> Regardless of the selection method, however, where previously

3 Ibid., 784.

4 American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts, [http://www.ajs.org/selection/sel\\_stateselect.asp](http://www.ajs.org/selection/sel_stateselect.asp); Dorothy Samuels, “The Selling of the Judiciary: Campaign Cash ‘in the Courtroom,’” *The New York Times*, April 15, 2008.

5 In California, for example, most judges and justices initially are appointed by the governor to a vacant seat; California Constitution, article VI, section 16, subdivisions (c), (d)(2). Open seats, in which there is no incumbent at the superior-court level (the trial-court level in California), and seats in which a challenger has filed to run against a sitting judge seeking a new six-year term, are listed as nonpartisan positions on the ballot; *ibid.*, section 16, subdivisions (b), (c). Uncontested seats in which the judge has filed to retain his or her position do not appear on the ballot. Appellate and supreme court justices serve for twelve-year terms and appear on the ballot (without the possibility of any challenger) solely for a vote on whether they should be retained once appointed by the governor and at the end of the applicable

2 *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); hereafter *White*.

judicial selection was seen in many jurisdictions as removed from everyday political activities, partisan pressures and the growing influence of special-interest groups recently appear to have assumed a new importance in many of these contests.

The impact on the state and federal judiciaries often takes different forms. The senatorial confirmation hearings for Chief Justice John Roberts in 2005 and for Associate Justice Samuel Alito in 2006 generated widespread discussion concerning the relevance of a judicial candidate's political beliefs to the Senate's exercise of its constitutional obligation to render advice to the president and consent concerning such appointments. The year before, the tragic case involving Terri Schiavo and her husband's suit to permit the removal of her feeding tube illuminated some of the tensions existing between executive, legislative, and judicial power at the state level. The Schiavo case also provided a lively display of the varieties of interaction between federal and state government, including the uniform rejection of Congress's eleventh-hour attempted intervention by every court to have considered the issue, including the U.S. Supreme Court.

House Majority Leader Tom DeLay then called for an investigation to determine whether the judges who had participated in the series of decisions rejecting the various challenges to the order allowing removal of Schiavo's feeding tube should be investigated with the possible objective of impeachment. He asserted, "The time will come for the men responsible for this to answer for their behavior." He later moderated

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term; *ibid.*, article VI, section 16, subdivisions (a), (d).

some of his statements that had been construed as potentially threatening, and instead referred to Congress's "power of the purse" – suggesting that if impeachment or even more direct methods were not invoked, then cutting off court funding was a perfectly acceptable alternative.<sup>6</sup>

While those events played out on a national stage and generated widespread media coverage and strong responses, local developments recently have demonstrated that conflicting views about the role of the judicial branch in our government continue to clash in ways that once may have garnered only local concern, but that cumulatively give grave and widespread cause for alarm.

The judicial branch, at both the federal and the state level, occupies a place in government distinct from that of its sister branches – not only because the judicial branch lacks the power of the purse, but also because the judicial function obliges courts to interpret the federal and state constitutions and review, apply, and (in some instances) invalidate provisions enacted by the other branches. To the extent judges are expected to speak through their opinions, the role of a judge for the past century traditionally has been removed from the political arena in most jurisdictions. Indeed, the chorus of commentators, politicians, and academics who assert that the role of the judge is simply a variation on the familiar political theme played in the legislative and executive branches con-

6 Associated Press, "Reid Pokes DeLay Over Ethics," CBSNews.com, April 9, 2005, <http://www.cbsnews.com/stories/2005/04/09.politics/main687008.shtml>; Associated Press, "DeLay Apologizes for Schiavo Rhetoric," Msnbc.com, April 14, 2005, <http://www.msnbc.msn.com/id/7500988>.

trasts with some of the fundamental assumptions that guided this nation’s founders.<sup>7</sup>

Although afforded lifetime tenure, federal judges obviously are not guaranteed complete insulation from political pressure. Nevertheless, the available option of impeachment has been used only rarely in the past century. As noted, other means to affect or even punish federal judges have surfaced recently. Members of Congress and others have denounced particular decisions by individual courts or judges and have threatened legislatively to restrict the jurisdiction of the federal district courts (the federal trial courts). Some see the creation of sentencing guidelines and statutory limitations on certain types of lawsuits as methods to curb judicial “overreaching.” Others have embarked upon case-by-case oversight of individual judges, with the intent of taking some action if the judge in some manner “strays” from the approach considered proper by the monitoring group.

Thus far, at the federal level the realization of these threats has been limited. Nevertheless, the contentiousness between the federal system’s executive and legislative branches over the appointment and confirmation of judges – and the portrayal of the judicial selection process as an extension of the political process – increasingly has dominated the

federal judicial selection process and has had consequences for state judicial selection as well.

In state settings, where few judges have the protection of lifetime appointment, direct challenges to court authority and individual judges increasingly are being mounted. The history of judicial elections in the states is instructive: when first instituted in the mid-nineteenth century, judicial elections were viewed as a method to avoid the influence of special interests on appointments made by the executive or legislative branch. This shifted influence to the political parties and special interests, and the next wave of reform – seeking to insulate judicial officers from improper influences – resulted in a switch to non-partisan or retention elections in the early part of the twentieth century. Efforts to abandon judicial elections completely have not met with great success.<sup>8</sup>

8 California’s history reflects the national trends. A report on judicial selection prepared for the California Judicial Council briefly tracks this history; Judicial Council’s Working Group on Judicial Selection, *Report on ACA 1 (Nation): Superior Court Elections*, June 7, 2001, which discusses a proposed constitutional amendment. California’s first constitution in 1849 adopted a system of popular elections to fixed terms for judges. As concerns grew about the increasing control by partisan interests over governmental institutions and positions, including courts and judges, the trend changed toward nonpartisan elections. This “progressive” change, occurring early last century, coincided with Dean Roscoe Pound’s delivery to the American Bar Association in 1906 of his very influential address, “The Causes of Popular Dissatisfaction with the Administration of Justice,” *ABA Reporter* 29 (1906): 395. Pound observed that the politicization of the courts, and the requirement that judges be politicians, had “almost destroyed traditional respect for the bench.” His thoughtful comments on the state of the system of justice still hold relevance for today’s discussions.

As part of California’s progressive movement to revise much of its constitutional structure,

7 Alexander Hamilton observed: “This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppression of the minor party in the community”; *The Federalist* No. 78.



The 2002 decision by the U.S. Supreme Court in *White* – holding that candidates in state judicial elections cannot be prohibited from announcing their views on legal and political issues – has served as an important catalyst in the growing movement that purports to hold state judges “accountable” and asserts that knowing a judge’s individual and personal views on disputed questions is appropriate, if not essential, to informed voting. James Bopp, Jr., lawyer for the Republican Party in the *White* case and general counsel of both the James Madison Center for Free Speech and the National Right to Life Committee,<sup>9</sup> described this approach succinctly when discussing legal proceedings he had brought in four states on behalf of conservative and anti-abortion organizations challenging limitations on the speech and activities of judicial candidates: “The litigation is meant to pressure judicial candidates, said Bopp. ‘No more hiding,’ he said. ‘You have views and we know they influence you. Voters have . . . the power to select you. It’s time for you to let them in on the secret.’”<sup>10</sup>

A number of federal cases at the trial and appellate levels have expanded the reach of *White* to canons of judicial ethics, such as those prohibiting personal solicitation of campaign contributions, misrepresentation, and participation in

political activities.<sup>11</sup> And the U.S. Supreme Court’s action in declining to accept review in *Dimick v. Republican Party* left standing the decision by the U.S. Court of Appeals for the Eighth Circuit, sitting *en banc* on remand from the Supreme Court from its decision in *White*.<sup>12</sup> That court held unconstitutional under the First Amendment a judicial canon that prohibited judicial candidates from personally soliciting contributions for campaigns, as well as another canon that prohibited judicial candidates from identifying themselves as members of “political organization[s],” attending political gatherings, or seeking political endorsements.

In the wake of these decisions, challenges to limitations on speech in the context of judicial elections have been launched in several states, with varying success. These challenges often come in the form of attacks on a judicial disciplinary body’s enforcement of canons of ethics that preclude judicial candidates from responding to questionnaires seeking their views on specific issues or that otherwise attempt to limit their speech or engagement in political activities.

Initially, the impact of the *White* decision and its like-minded progeny did not seem to attract widespread attention. As an increasing number of state judicial elections have been transformed into high-cost quasi-political contests, however, a growing number of individuals and organizations have begun tracking contested state judicial elections and

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including reserving the initiative power to the people, in 1911 its electorate enacted measures to change judicial elections from partisan to nonpartisan. In 1934, another ballot measure was passed providing that court of appeal and supreme court justices run only for retention, not for election; *Report on ACA 1 (Nation)*, 5–7.

9 <http://www.jamesmadisoncenter.org>.

10 Emily Heller, “Judicial Races Get Meaner,” *The National Law Journal* (October 25, 2004).

11 See, for example, *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005).

12 416 F.3d 738, cert. denied sub nom. *Dimick v. Republican Party of Minnesota*, 546 U.S. 1157 (2006).

court challenges to provisions in codes of judicial conduct, discussing both the adverse impact of such elections and rulings on the judicial process and possible means to mitigate these trends. For example, the Brennan Center for Justice at New York University School of Law<sup>13</sup> focuses on helping states maintain effective canons of judicial conduct that balance the free-speech rights discussed in *White*, judicial independence, and the due-process rights of litigants to a fair tribunal. Its website provides useful updates on issues arising out of campaign conduct, as well as links to papers and studies addressing developing trends. The nonpartisan Justice at Stake Campaign<sup>14</sup> focuses on public education about the importance of fair and impartial courts, and works with local partners across the nation on a variety of related projects. Its website also provides access to a variety of resource material online.

The American Judicature Society<sup>15</sup> also has been a strong and consistent voice for the independence and integrity of the courts, and has provided educational and other material for the benefit of judges, lawmakers, and the public. Among its activities are collecting information concerning judicial disciplinary systems, judicial ethics, and judicial independence. The society has created a website dedicated to judicial elections that compiles information on the selection practices in the fifty states, reform efforts, and polls reflecting public and judicial attitudes.<sup>16</sup>

The Sandra Day O'Connor Project on the State of the Judiciary at Georgetown

University Law Center<sup>17</sup> was launched in February 2007, reflecting the leadership role played by the former associate justice of the Supreme Court in efforts to preserve a fair and impartial judiciary. Since leaving the court, Justice O'Connor has been a strong voice for judicial independence and impartiality on both the state and federal levels, holding national conferences, sometimes in conjunction with her former colleague, Justice Stephen Breyer, to explore recent developments and address ways to maintain strong and effective judicial systems.

In California, I appointed the Commission on Impartial Courts last fall.<sup>18</sup> Its four task forces are engaged in studying judicial selection and retention, campaign conduct, campaign finance, and public information and education. Drawing from lessons learned from other jurisdictions, the Commission's goal is to develop a comprehensive plan to avoid some of the problems caused by increased partisan participation in judicial selection and retention. California has seen attempts to affect judicial conduct and judicial elections, ranging from legislative threats to decrease court funding because of a decision unpopular with our sister branches, to attempts to recall individual judges based on individual cases. As some may recall, in 1986 a retention election for supreme court justices resulted in three incumbents losing their seats on the bench. California presents some unique issues because of its size and the cost of media and other efforts, but we are aware our judiciary is not immune from the challenges arising in other jurisdictions.

13 See <http://www.brennancenter.org>.

14 See <http://www.justiceatstake.org>.

15 See <http://www.ajs.org>.

16 See <http://www.judicialselection.us>.

17 See <http://www.conferenceonthejudiciary.org>.

18 See <http://www.courtinfo.ca.gov/jc/tflists/commimpart.htm>.

The American Bar Association's Model Code of Judicial Conduct has served as the basis for codes of judicial conduct in all the states. Indeed, the canon discussed in the *White* case was based on a superseded provision of the Model Code. In response to the *White* decision, in which the majority observed that the term *impartiality*, although frequently used, had not been defined in the lower court's opinion, in the Minnesota Code of Judicial Conduct, or in the briefs, the ABA Model Code has been amended. It now defines *impartiality* as an "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."<sup>19</sup>

In addition, the news media and, in consequence, the public have become more aware of the increase in partisan and special-interest participation in judicial elections, as well as the growing incidence of well-funded campaigns fueled by business interests, trial lawyers, and others. Some commentators have focused on what happens once a judge elected with substantial campaign contributions from a particular source assumes office and must decide cases in which the interests of those contributors are in dispute.<sup>20</sup> A recent *Wall*

*Street Journal* opinion piece described three such contests in Illinois, Wisconsin, and West Virginia.<sup>21</sup> In Illinois, a state supreme court justice cast a vote ending legal action on a multimillion-dollar claim against an insurer who, directly or through employees and others closely associated with it, had contributed \$350,000 to the justice's campaign for a seat on the court. The insurer also was a member of organizations and groups that had added another \$1 million to the justice's campaign. In Wisconsin, a supreme court justice declined to recuse herself from a case involving a group that had spent more on outside advertisements favoring her than had been spent by that justice's own campaign. In West Virginia, the chief justice cast the deciding vote overturning a \$76-million judgment against companies owned by a coal industry executive who had contributed between \$3 – \$4 million to the justice's campaign three years earlier, and with whom the justice had vacationed while the appeal was pending.

In each of those cases, there was public and media scrutiny of the judge's actions. In Wisconsin, the Wisconsin ethics board initiated an investigation that result in substantial fines; a three-judge panel was convened to examine violations of the code of judicial conduct, and editorial boards throughout the state commented on the nexus between campaign activities and judicial decision-making. Significantly, the Wisconsin Supreme Court sent a letter to the

19 "Terminology," ABA Model Code of Judicial Conduct (American Bar Association, 2007), 4.

20 See, for example, Adam Liptak, "Looking Anew at Campaign Cash and Elected Judges," *The New York Times*, January 29, 2008, which describes a recent study of Louisiana Supreme Court and statistical correlation between contributions to high-court justices' campaigns and the justices' later decisions; Adam Liptak and Janet Roberts, "Campaign Cash Mirrors a High Court's Rulings," *The New York Times*, October 1, 2006, which reports on the results of a study of statistical correlation between contributions

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to high-court justices' campaigns in Ohio and the justices' later decisions.

21 James Sample, "Justice for Sale," *The Wall Street Journal*, March 22, 2008; at [http://online.wsj.com/article/SB120614225489456227.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB120614225489456227.html?mod=googlenews_wsj).

governor unanimously supporting the concept of public financing for judicial elections. In West Virginia, the chief justice recused himself after photographs and details of his vacation with the coal industry executive were circulated, and in the ensuing weeks at least two more justices recused themselves. A bill was introduced in the West Virginia legislature to govern requests for recusal.<sup>22</sup> (On May 13, 2008, the chief justice lost his bid for reelection.)

The high price of judicial elections nonetheless shows no sign of abating. Recently, “[a] little-known county judge . . . narrowly defeated a Wisconsin Supreme Court justice with a law-and-order message and a barrage of third-party ads in a race that will go down as one of the state’s nastiest.”<sup>23</sup> The contentiousness of some judicial elections continues to increase, while determining when recusal is appropriate after such an election has become increasingly urgent.

**H**aving once professed a specific view on an issue, will a judge be considered “unaccountable” to the public if he or she later decides cases in a manner not in accord with that view – because the law requires otherwise? Should judges be measured solely by the end result of the vote they cast – as legislators generally are evaluated – or should the legal analysis leading to that result be considered? What are the implications of applying a political yardstick to measure the judicial process? If judges are expected to decide cases in accordance with the law and precedent, what is

the relevance of their personal beliefs? What are the consequences to the administration of justice if the public expects judicial decisions to reflect those stated personal beliefs?

Expecting judges to profess their views may, as a practical matter, undercut the orderly processing of cases. The increased politicization of judicial decision-making may profoundly affect the ability of judges, once they have assumed office, to hear cases that come before their courts. The present ethical constraints leading to recusal – the self-disqualification of a judge – require a judge to step down from hearing a case if he or she previously has announced a view favoring or opposing the claims that are before the judge for resolution. What should be inferred about the effect of substantial contributions and connections made during a judicial election campaign?<sup>24</sup> When is recusal necessary? The majority opinion in the *White* case, and the actions of some U.S. Supreme Court justices subsequent to that decision, seem to suggest that generally, unless the judge publicly has expressed bias relating to the outcome of an individual lawsuit or to the specific

24 The American Judicature Society’s website on judicial selection contains a list of opinion polls and surveys in the various states on judicial campaigns and selection methods. These polls and surveys consistently reflect belief by a significant segment of the public that campaign contributions influence the decisions of judges. Perhaps most troubling, in some states polls revealed that a substantial percentage of *judges* had a similar belief. For example, in Florida, 30 percent of the judges who responded to a 2001 survey stated they believed contributions had at least some influence on their decisions. In a poll conducted in Texas in 2001 by the Justice at Stake Campaign, 28 percent of the responding Texas judges shared the view of their Florida colleagues; [www.judicialselection.us/judicial\\_selection/reform\\_efforts/opinion\\_polls\\_surveys.cfm?state=](http://www.judicialselection.us/judicial_selection/reform_efforts/opinion_polls_surveys.cfm?state=)

22 *Ibid.*

23 Scott Bauer, “Wisconsin Justice Ousted in Nasty Race,” Associated Press, April 2, 2008; at [http://www.boston.com/news/nation/articles/2008/04/02/Wisconsin\\_justice\\_ousted\\_in\\_nasty\\_race](http://www.boston.com/news/nation/articles/2008/04/02/Wisconsin_justice_ousted_in_nasty_race).

parties involved in the pending case, recusal is unnecessary. (It is of interest in this context that there is no formal code of judicial conduct governing federal judges, nor a judicial disciplinary body to oversee them, as there is for most state judiciaries.) State judicial disciplinary bodies may take a different approach. The newly amended ABA Model Code of Judicial Conduct reflects carefully crafted restrictions on the conduct of judicial candidates, while affording appropriate free-speech protections – and added commentary expressly distinguishes the role of judges from that of legislators and officers of the executive branch.<sup>25</sup>

The relevance of the dispute over recusal becomes even greater when one considers the types of interests promoted by the principal participants in increasingly partisan state judicial contests. Political partisanship, as embodied by Democrats and Republicans, is only one part of the equation. One commentator has characterized interest groups as falling into “two broad categories. The first involves cultural and social issues – the ‘God, gays and guns’ groups . . . pressuring judicial candidates to commit themselves on issues such as abortion and capital punishment. . . . The other interest-group battle centers around tort liability.”<sup>26</sup> According to that writer, the U.S. Chamber of Commerce reportedly spent approximately \$120 million over the previous four years on judicial elections nationwide, and in 2004, the winner of every judicial election in which the Chamber

of Commerce participated was the candidate supported by the Chamber.

The cost of judicial elections has been skyrocketing, suggesting that an effort is being made to cultivate a politically responsive judiciary along the lines of the other two branches of government – the political branches. This is not to say that the efforts have been aimed solely at partisan political issues, rather that the special interests often found actively involved in partisan political campaigns are participating with increasing regularity, and apparent effect, in judicial elections as well.

A study by James Sample and Lauren Jones outlined some of these trends.<sup>27</sup> In 2006, television advertisements were used in ten out of eleven state elections for supreme court seats, as compared to four out of eleven in 2000. Donors from the business community contributed \$15.3 million to high-court candidates, as opposed to \$7.4 million only six years earlier. Third-party interest groups spent an additional \$8.5 million on such campaigns. In states in which there were contests that were entirely privately financed, five out of ten campaigns set spending records. Nor is this trend limited to state high courts. The spending record for the intermediate appellate court in Michigan quadrupled when business interests and trial lawyers spent a total of \$3.3 million on two candidates for a seat on that court.

At a time of increasing concern about the impact of these changes in judicial campaign practices, it has become apparent that recusal as it exists will not serve as a simple curative solution. Stan-

25 ABA Model Code of Judicial Conduct, Canon 4 cmt., 2007.

26 Zach Patton, “Robe Warriors,” *Governing.com*, March 2006, <http://www.governing.com/articles/0703judges.htm>.

27 James Sample, Lauren Jones, and Rachel Weiss, *The New Politics of Judicial Elections 2006* (Washington, D.C.: Justice at Stake, 2007); [www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf](http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf).



dards vary, and the mechanisms for determining whether recusal is appropriate are not always clear. In the U.S. Supreme Court, such a determination is solely up to the individual justice, and there is no requirement that the reason for a particular recusal be announced.

In the California Supreme Court, each justice maintains a list of potential bases for recusal, relating typically to investments and familial relationships. Additional grounds may give rise to a decision not to sit on an individual case. The justices alone determine whether recusal is appropriate, guided by the California Code of Judicial Ethics.<sup>28</sup> Trial-court judges may be disqualified “peremptorily” under defined circumstances<sup>29</sup> or may disqualify themselves voluntarily.<sup>30</sup> A mechanism also exists under which, if a challenged judge does not agree that recusal is necessary or appropriate, another judge, either agreed upon by the parties or selected by California’s chief justice in his or her role as chair of the Judicial Council, shall hear the matter.<sup>31</sup>

A recent publication by the Brennan Center for Justice describes some of the difficulties caused by uncertain recusal procedures and standards and provides a list of proposed reforms. Only time will tell whether new and effective reforms will be implemented – and what effect they will have on the administration of justice. The interrelationship between contested elections and recusal procedures is complex and merits close examination. It is argued that voters should be

entitled to learn about a judicial candidate’s views so that the electorate may anticipate how he or she will vote on issues of interest to the voter. Individuals and institutions who share the views of a judge on certain issues, such as tort law or abortion, are more likely to be among those who will make contributions to a judicial campaign supporting that judge. Those contributions, based upon shared values, ultimately and necessarily may result in the disqualification of the judge whose views the contributor wishes to advance. At the same time, what is the impact on the judge of anticipating the next electoral contest and the need to engage in fund-raising? It is time to reinforce the notion – imperfect though it may be – that although judges bring their predispositions and their experience and history with them when they join the bench, they should aspire to employ an open mind that decides cases based on the law and the facts presented to them in the matter at hand.

There may be some promising signs among the negative developments described above. In November 2006, a measure entitled the Judicial Accountability Initiative Law<sup>32</sup> on the South Dakota ballot was defeated. The initials, of course, spelled out the not-too-subtle acronym JAIL, and the measure was referred to as “jail for judges.” This measure would have imposed civil and criminal penalties on judges for broadly defined judicial “misconduct.” Although the campaign for the proposal started with a strong showing in the polls, a concerted effort by both political parties in the legislature, government and

28 See California Constitution, article VI, section 18, subdivision (m).

29 California Civil Procedure Code, section 170.6.

30 *Ibid.*, section 170.1.

31 *Ibid.*, section 170.1, subdivision (c).

32 Proposed South Dakota Judicial Accountability Act, section 2; at [http://www.calbar.ca.gov/calbar/pdfs/sections/litigation/callitvol19n3\\_south-dakota\\_constitutional-amendment-e.pdf](http://www.calbar.ca.gov/calbar/pdfs/sections/litigation/callitvol19n3_south-dakota_constitutional-amendment-e.pdf).

community leaders, and leading news sources contributed to its overwhelming defeat.

This development offers hope that efforts to educate the public about the role of the courts may be successful. Other recent events suggest that the search for methods to ensure fair and impartial courts also may not be in vain. For example, in May 2008 the U.S. Court of Appeals for the Fourth Circuit upheld a North Carolina system of public financing for elections to seats on the state court of appeals and supreme court.<sup>33</sup> In April 2007, New Mexico also began a fully publicly funded system for judicial elections.

But challenges remain. As a jurist for more than half my life, I function within the reality of a judicial community in which there exists a true reverence toward, and commitment to, the judicial process. Scholars may argue about the true influences affecting judicial decision-making (including a judge's background and education) but in my experience, on a day-to-day basis, with markedly few exceptions, judges do their best to be fair, to bring objectivity to their application of the law, and to abide by the precepts of the law. It also is apparent that no matter how long and how well one has served as a judge, a single decision – or lack of decision – disliked by a segment of the population willing to make enough noise, can threaten to terminate the career of a jurist.

Glimpses into some of the challenges currently facing judges can leave one with a disorienting sense of “damned if you do and damned if you don’t.” In the course of judicial election campaigns, sitting judges have been accused

of breaking the law, improperly making law, and even failing to prevent a law from being enacted, all based upon the bottom line of their decisions, no matter how compelled those decisions may have been by applicable law. But perhaps most significantly, there seems to be a growing disconnect between two irreconcilable currents. On the one hand is the aspiration for a judicial system free of partisan or otherwise inappropriate pressures – a system revered by most of those serving in the judicial branch and the bar, and a fundamental precept of the founding fathers of our nation. On the other is a desire by a segment of the public for a system in which judges mirror the current (and sometimes shifting) views of the population.

There have been complaints about the decisions and the role of judges for as long as I have served on the bench – and for many years before. Court decisions are criticized as too deferential to our sister branches, to the governor who initially appointed us, or to the legislature that provides our budget. Others assert that courts are in the pocket of business interests, social engineers, trial lawyers, or any group on the side they oppose.

Criticism is part of the process. But it should be a matter of concern to everyone that the recent conduct of many judicial campaigns can only heighten the perception that state courts function as no more than just another political arm of our three-pronged system of government; that state judges will come to be viewed, like legislators and elected state executive officers, through the lens of the political party to which they belong; and that in deciding cases, courts will be expected to look not to the constitution, to the laws, and to precedent, but instead to pay heed to the public will of the moment. More than 95 percent of court cases are filed in the state courts.

33 *North Carolina Right to Life v. Leake*, No. 07-1454, 2008 U.S. App. Lexis 9413 (4th Cir. May 1, 2008).

The entire notion of a fair, impartial system of adjudication available to all those who need its services – whether for a marital dissolution, to settle a parking ticket, to determine rights under a contract, to protect one’s civil rights, or to award compensation for injuries caused by the wrongs of another – will be diminished if election to judicial positions becomes no different from election to legislative or executive branch positions.

The perception of political influence on state judiciaries will affect not only the state courts, but the administration of justice on the federal level as well. Once the public becomes accustomed to viewing state judges and their decisions in the context of public campaign rhetoric or the identity of the political forces and special-interest groups backing particular jurists, it is inevitable that public confidence in the impartiality of its judges – state and federal – will decline. In short, state-court elections matter – not simply to individual candidates, courts, and states. They matter to all of us who are interested in the rule of law and in the importance of impartial courts.

As new procedures evolve to guide judicial candidates and to govern judicial elections, recusal, and disqualification, it is vital that we engage the public at large in the discussion of these topics. In doing so, we must reinforce the principle that a partisan judiciary will not serve the interests of our nation – and that we are all best served by a strong, impartial judicial branch.

# Ruth V. McGregor

## *State courts & judicial outreach*

State-court judges are no strangers to community outreach.<sup>1</sup> Because most come from and remain an integral part of the communities in which they sit, state-court judges have long played an active role in interacting with those whom they serve. During the last decade, however, state courts have redefined their role in reaching out to communities and, almost without exception, have significantly expanded their outreach efforts.

The increased attention to community outreach programs parallels, and no doubt largely resulted from, attacks on judicial independence that developed during the last ten years. For better or worse, we have a “long and distinguished” tradition of “[b]ashing judges” in the United States.<sup>2</sup> Our history is filled with attacks that have threatened both decisional and institutional judicial independence.<sup>3</sup> The most recent sequence of attacks seems to have begun with a series of events that occurred in the mid-1990s. In 1996, three in-

cidents arguably signified the beginning of a new era of judicial criticism. First, congressional leaders and the president harshly criticized U.S. District Court Judge Harold Baer for granting a suppression motion in a politically charged drug case, eventually urging his resignation and threatening impeachment.<sup>4</sup> Shortly thereafter, Tennessee Supreme Court Justice Penny White was defeated in a retention election that centered around her concurrence in an opinion that remanded a death penalty case for resentencing.<sup>5</sup> And on June 4, 1996, U.S. Circuit Court of Appeals Judge H.

1 The ideas in this essay were first presented at the 2007 conference on The Debate over Judicial Elections and State Court Judicial Selection, convened by the Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center. A modified version of this essay appears in *The Georgetown Journal of Legal Ethics* 21 (4) (Fall 2008).

2 Archibald Cox, “The Independence of the Judiciary: History and Purposes,” *University of Dayton Law Review* 21 (1996): 574.

3 *Ibid.*, 574 – 575.

4 Kahn Zemans, “The Accountable Judge: Guardian of Judicial Independence,” *Southern California Law Review* 72 (1999): 626 – 627.

5 *Ibid.*, 627.

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Lee Sarokin retired because he found himself contemplating whether and how opinions he was preparing would be used politically in light of persistent political criticism aimed at his work on the bench.<sup>6</sup>

These and similar incidents, followed by broad, general criticisms of judges and the judicial system, triggered a torrent of responses from the academy, the bar, and the bench. Several law reviews held symposia on judicial independence in the late 1990s, and on July 4, 1997, the ABA Commission on the Separation of Powers and Judicial Independence, formed in part as a response to these attacks, released its final report, which provided a historical overview of judicial independence and outlined several recommendations designed to ensure its preservation.<sup>7</sup>

State-court judges quickly put aside their frustration at being the target of attacks many perceived as unfounded and unfair and began developing initiatives designed to bolster judicial independence, foster a better public understanding of the judiciary, and identify areas in which the courts need to improve. The courts received direction and assistance from organizations such as the National Center for State Courts,

6 Louis H. Pollak, "Criticizing Judges," *Judicature* 79 (1996): 301–302.

7 Zemans, "The Accountable Judge," 627. Memorandum from Colleen P. Danos to the National Center for State Courts, Re: Fostering Judicial Independence in State and Federal Courts, February 27, 1998, 5; at [http://www.ncsconline.org/WC/Publications/KIS\\_JudInd\\_S98-0281\\_Pub.pdf](http://www.ncsconline.org/WC/Publications/KIS_JudInd_S98-0281_Pub.pdf). See also Memorandum from Colleen P. Danos to the National Center for State Courts, Re: Responding to the Unwarranted Criticism of Judges, May 19, 1997, 2–4; at [http://www.ncsconline.org/WC/Publications/KIS\\_JudInd\\_S97-0693\\_Pub.pdf](http://www.ncsconline.org/WC/Publications/KIS_JudInd_S97-0693_Pub.pdf). This memo discusses the various responses of numerous state bar associations.

the American Judicature Society, Justice at Stake, the American Bar Association, the Committee for Economic Development, and the Denver Institute for the Advancement of the American Legal System.

In order to identify and discuss contemporary trends in court-community outreach programs, however briefly, in this paper, I contacted the chief justice of each state and asked the justice to describe the two or three community outreach programs that have proved most effective in that state.<sup>8</sup> The diversity of programs developed in the various states, some of which are described below, reflects the unique challenges facing each state and the considerable disparity of resources available for outreach programs. Despite those differences, the programs share many similarities. Perhaps most striking is the degree to which the programs reflect a new approach to community outreach; these programs are not just more of the same. Instead, state courts have fundamentally changed their approach to developing outreach efforts. The information I received reveals several clear trends in the efforts undertaken by state-court systems.

Most of the programs the chief justices identified as successful began after 2000, although some of these programs built upon prior experience. That fact, I think, emphasizes that the courts recognized the serious nature of the attacks on the justice system and took seriously the need to respond effectively. Another major change between these new programs and prior programs involves the degree to which the new programs resulted from central planning efforts, which

8 I express my thanks to my colleagues for their assistance in preparing this paper. Although I have drawn heavily from the information they sent, any errors in description are, of course, mine alone.



usually included public input and encouraged a responsive and interactive discussion between courts and the public. The programs also often involve collaborations with community, education, and justice partner groups. As a result of planning and collaborative efforts, the programs tend to focus on specific areas of need rather than on general goals, upon which earlier programs relied. This planning and collaboration also tended to result in approaches that increase educational opportunities for community partners and encourage ongoing participation by the groups involved. Many of the outreach programs make full use of the expanded technology available to our courts. And, finally, state courts have recognized the need to adopt more robust public information programs, often headed by professional communications directors.<sup>9</sup>

State-court outreach programs no longer depend upon isolated efforts by individual judges, unrelated to the efforts of other justice-system participants. Instead, state courts increasingly rely upon organized planning, characterized by efforts to define specific problems to be addressed, to focus attention on defined goals, and to encourage public participation.

These central planning efforts rely upon various groups to assure that community outreach takes place. Some courts designate community outreach as a goal of a strategic agenda or plan and identify initiatives to be completed. Other courts have established task forces, centers, or committees charged with express responsibility for enhancing community

outreach. In 2006, for example, New York established the Center for Courts and the Community and directed the Center to enhance court involvement in community outreach and engagement; to build upon efforts and develop and implement community outreach, education, and engagement programs across the state; and to develop new programs, tools, and resources for youth education. Utah's Standing Committee on Judicial Outreach, acting through its Education Subcommittee, oversees the courts' outreach activities and plans programs designed to educate students and teachers.

Planning efforts often begin with public surveys designed to define those areas in which our courts do well and those in which we must improve. In addition to surveys developed by individual states, courts use assessments such as CourTools, developed by the National Center for State Courts, to identify issues that should be addressed by judges and other court staff.

A number of courts use not only surveys but also community forums to identify areas of greatest interest to members of the public. Alaska, for instance, instituted its OPEN COURT program in February 2007. The goal of OPEN COURT is twofold: to identify practical solutions to the challenges facing the justice system by providing a forum for discussion and consensus-building and to foster greater public understanding of the justice system and the role of courts in addressing community problems. Discussions, scheduled in four Alaskan cities, involve justice professionals, policy-makers, and public representatives, who jointly define the best practices to follow in resolving problems. Other courts also use community forums to define and address specific issues. In Montgomery County, Maryland, public fo-

<sup>9</sup> More information about state-court outreach programs is available from the National Center for State Courts at its website, <http://www.ncsconline.org>.

rum held in local high schools drew more than five hundred people to focus on issues related to domestic violence. The court used information gained there, coupled with input from other justice-system sources, to develop a film about domestic violence for broadcast on cable television.

Citizen groups convened by the courts to assess judicial systems have provided some states the information needed to develop an outreach plan. In 2005, the New Hampshire Supreme Court convened the Citizens Commission on the State Courts, made up of one hundred volunteer citizens, which assessed the state judicial system and adopted recommendations for improving its operations.<sup>10</sup> The Court used the recommendations to establish priorities in its budget request.

State courts, not surprisingly, also have drawn on the expertise of judicial leaders to plan outreach programs. California convened a summit of judicial leaders in 2006 to consider how best to safeguard the right of Californians to a highly qualified, impartial, and accountable judiciary.<sup>11</sup> The judicial leaders considered, among other topics, how best to improve public understanding of the role and decision-making process of the judiciary.

These few examples of planning programs demonstrate the degree to which state courts have accepted responsibility for developing and implementing effective community outreach programs. The

planning process also has made it clear that courts can implement outreach programs more effectively if they collaborate with other interested groups.

Court-operated outreach programs from ten years ago not only reflected less planning than do those in effect today but also relied almost entirely upon court resources and ideas. One of the noticeable changes in today's outreach programs is their reliance on collaborative efforts with other groups.

Several state courts have instituted educational programs that involve members of the educational community and the broader community. Utah formed the Coalition for Civic, Character and Academic Service Learning, which is chaired by Chief Justice Christine Durham. The Coalition brings together participants from all three branches of government to work with students and teachers to improve civic education in the classroom.<sup>12</sup> Through the work of the Coalition, thirty-five secondary school teachers participated in a three-day civics workshop, with one day devoted to learning about each branch of government. The Superior Court of California, San Joaquin County, has sponsored a similar institute since 2000. The Court-Community Leadership and Liaison Academy,<sup>13</sup> which itself resulted from lessons learned from court-community focus groups, invites participants from community-based organizations that serve ethnic, immigrant, and disabled communities to take part in a

10 New Hampshire Citizens Commission on the State Courts home page, <http://www.courts.state.nh.us/aoc/budget0809/citcom072507.htm>.

11 *Justice in Focus: The Strategic Plan for California's Judicial Branch, 2006 - 2012* (The Judicial Council of California, 2007); at [http://fetcher.fw-notify.net/00000001871715364160/strategic\\_plan\\_2006-2012-full.pdf](http://fetcher.fw-notify.net/00000001871715364160/strategic_plan_2006-2012-full.pdf).

12 Utah Coalition for Civic, Character and Academic Service Learning home page, <http://www.schools.utah.gov/curr/lifeskills/uccsl/uccsl.htm>.

13 Court-Community Leadership and Liaison Program, <http://www.stocktoncourt.org/courts/comfocus5.htm>.

twenty-one-week program that allows them to gain the knowledge and skills needed to serve as court liaisons. Graduates receive accurate information about the justice system and, in turn, serve as an informational resource to their communities and to the court system. Massachusetts also provides training to members of the public through the Norfolk County Criminal Justice Citizens Academy.<sup>14</sup> There instructors, including judges and justice-system partners, educate participants about the criminal justice system and the operations of Massachusetts courts during an eight-week course. More than two hundred people have completed the course since it began in 1997.

The Arizona Supreme Court, partnering with the Arizona Foundation for Legal Services & Education and the Center for Civic Education, supports an annual We the People Summer Institute for teachers in upper-elementary through high-school grade levels.<sup>15</sup> During this weeklong training session, teachers work with constitutional scholars as they learn to implement the We the People curriculum in their classrooms. In a similar vein, the North Dakota Supreme Court partners with the North Dakota Division of Independent Study to present the Justices' Teaching Institute.<sup>16</sup>

14 Press Release from the Massachusetts Court System, Re: Public Invited to Attend Norfolk County Criminal Justice Citizens Academy in Dedham, August 6, 2000; at <http://www.mass.gov/courts/press/pro80601.html>.

15 Arizona Foundation for Legal Services & Education home page, We the People Summer Institute, <http://www.azflse.org/wethepeople/professionaldev.cfm>.

16 Press Release from the North Dakota Court System, Re: Justices' Teaching Institute, October 11, 2006; at <http://www.court.state.nd.us/court/news/institute.htm>.

Participating high school teachers, in classes taught by justices, study the nature, history, structure, function, and processes of federal and state courts. When classes end, each teacher is assigned a lawyer-mentor who has agreed to assist in the classroom. Collectively, the eighteen teachers who take part in the Institute each year reach 2,500 students.

Many courts collaborate with local schools to provide civic education to students. The Puerto Rico Supreme Court, for example, has joined in a cooperative effort with schools that brings fourth to ninth graders to the court to attend a drug-court orientation program.<sup>17</sup> Students and teachers observe the court and receive educational materials about the justice system.

Collaboration involves organizations other than educational bodies. Aided by the Indiana Historical Bureau, the Indiana State Archives, the Leora Brown School, and the Indiana State Bar Foundation, the Indiana Supreme Court's Courts in the Classroom project<sup>18</sup> created curriculum materials and now hosts courtroom events related to a series of slavery-related decisions handed down by the Indiana Supreme Court from 1820 to 1860. And, partnering with the Historic Landmarks Foundation of Indiana, the Court made available from its website virtual tours of all ninety-two county courthouses in Indiana. The Massachusetts Supreme Judicial Court also entered into a partnership to expand its ability to provide civic education. Working with Discovering Justice, a nonprofit organization dedicated to education about the role of the justice system in

17 Puerto Rico Drug Court home page, <http://www.tribunalpr.org/drugcourt/index-2.htm>.

18 Courts in the Classroom Project, <http://www.in.gov/judiciary/citc>.

American democracy, the Court created interactive education programs that include mock trials, historic performances, and courthouse tours in the newly renovated John Adams courthouse.

State courts also rely on collaborative efforts to provide information to the public about the importance of judicial impartiality and independence. Community and service organizations, bar associations, and justice partners joined with the Arizona Supreme Court under an umbrella organization, Justice for All, to respond to attacks on the independence of the judiciary.

As evidenced by these and similar activities, state courts have learned that we can more effectively reach our communities by partnering with other organizations that share our interest in and concerns about the need to retain a fair and impartial justice system. Through these collaborations, the courts have learned at least as much as we have taught about serving our constituencies well.

In addition to collaborative projects, state courts have initiated many civic education projects designed to inform young people about the importance of the justice system in our system of government. State courts have made effective use of court facilities and state history to encourage civic education. Ohio completed its Visitor Education Center, located in the Ohio Judicial Center, in 2005. The Center, designed to appeal to both children and adults, includes interactive exhibits and other displays that foster an understanding and appreciation of the history, role, and responsibilities of the Ohio court system.<sup>19</sup> Utah

19 The Ohio Judicial Center home page, Visitor Education Center, [http://www.ohiojudicialcenter.gov/visitor\\_ed\\_center.asp](http://www.ohiojudicialcenter.gov/visitor_ed_center.asp).

also encourages students to come to the court, where they can tour the facility and observe a court proceeding.<sup>20</sup> During a break in the proceeding, the judge talks with the students and answers their questions. Young students visiting courts in Maryland leave with a coloring book featuring a friendly crab, Chester, that helps them learn about the law and the state justice system.<sup>21</sup> Older students can attend traffic offense trials, where they learn about the consequences of drunk driving.<sup>22</sup>

Wisconsin goes a step further, taking exhibits to the community. In 2003, to celebrate the Wisconsin Supreme Court's sesquicentennial, the Court developed a traveling exhibit about the Court's history, based upon five cases of importance. Since that time, the Court has taken the exhibit to ten counties, where a member of the Court speaks about the exhibit at a local event.<sup>23</sup>

Supreme courts in several states have adopted programs under which the court leaves the confines of its own courtroom and travels to other parts of the state to hear oral arguments. Given various titles such as "On the Road,"

20 Utah State Courts, Education Resources: Request a Tour, <http://www.utcourts.gov/general/edresources/>.

21 Press Release from the Maryland Court System, Re: New Coloring Book Helps Children with Learning the Law, November 18, 2005; at <http://www.courts.state.md.us/press/2005/pr11-18-05a.html>.

22 Educational Outreach: Schools in the Courts Program, <http://www.courts.state.md.us/education.html>.

23 Press Release from the Wisconsin Court System, Re: Exhibit to be Unveiled in Winnebago County Courthouse, May 30, 2003; at <http://www.wicourts.gov/news/archives/2003/exhibit053003.htm>.

“Off-Site Court Program,” or “Justice on Wheels,” the programs share several characteristics.<sup>24</sup> The goal of these programs is to interact with people in communities throughout the state and to provide an opportunity to explain the role and responsibilities of the courts. The local bench and bar usually work with the courts to plan events surrounding oral arguments, which may include meetings with community leaders and with justice partners. All the programs urge high school students to attend, and many courts send synopses of the factual background and legal issues raised in the cases that will be argued. Before arguments, a judge or lawyer explains the procedure the court will follow and, often, describes how the justice system works. After arguments, the justices typically conduct a question-and-answer session, open to all questions unrelated to pending cases. Cumulatively, “on the road” programs have reached hundreds of thousands of students and adults and, by all reports, have significantly improved court relationships with the communities visited.

Ten years ago, state courts made relatively limited use of the Internet and varying media to convey their message. Courts conveyed information about the justice system primarily through written

documents. Judges’ teaching attempts, whether to adults or to children, tended to rely primarily upon lectures. If programs were recorded at all for later distribution, the recording often used audio only or, at most, videotape. Today, state courts use court websites, Internet-based programs, streaming video, televised court proceedings, DVDs, and radio and cable television shows to augment or replace written materials. Without advances like these, many of the courts’ current outreach programs simply would not be possible.

Judicial websites provide a rich source of information about the courts. Throughout this paper, I have referred to various court websites. A visit to any of them, or to the hundreds of other websites maintained by state courts, makes evident the time and effort taken by courts to make their sites valuable to court users. Through websites, courts make available a host of information, ranging from teaching units for civic education to theatrical performances involving famous cases; from information about pending and past cases to an opportunity to schedule jury service; from forms for pro per litigants to tapes or live broadcasts of courts in action.

State courts have proved themselves willing to explore the use of technology and to expand programs as new technology – or receiving funds sufficient to use existing technology – makes more activities possible. Indiana has seen growing interest that began with a decision in 2001 to launch Courts in the Classroom by webcasting supreme court oral arguments live on the Internet. It quickly became apparent to the Indiana Supreme Court that students’ experience would be enriched if the webcasts were accompanied by online lesson plans, scripted trials, museum exhibits, searchable databases, virtual tours of courthouses, and

24 For examples, see Supreme Court of Arizona home page, Oral Arguments Calendar, <http://www.supreme.state.az.us/clerk/calendar.htm>; Supreme Court of California home page, Locations and Contact Information, <http://www.courtinfo.ca.gov/courts/supreme/branch.htm>; New Hampshire Judicial Branch home page, Supreme Court on the Road, <http://www.nh.gov/judiciary/student/ontheroad.htm>; Off-Site Court Program home page, [http://www.sconet.state.oh.us/introduction/offsite\\_court/default.asp](http://www.sconet.state.oh.us/introduction/offsite_court/default.asp); Justice on Wheels, <http://www.wicourts.gov/news/archives/2004/justwheels032504.htm>.



other resources for teachers.<sup>25</sup> This outreach programming permits the Court to play a key role in educating its citizens, both children and adults.

Courts also have combined existing technology with new technology. Wisconsin, like many states, had produced a videotape to orient jurors. The tape, while serviceable, did not fully convey the message the courts wanted to send the jurors. So, two years ago, Wisconsin not only produced a new video that features actual jurors and emphasizes the diversity of those who serve, but also made the video available online. As a result, the tape informs not only those who come to the court as jurors but also those who watch the tape online.<sup>26</sup>

State courts are keenly aware that students expect educational programs to involve more than printed materials. To meet that need, courts have reached out to students through Internet-based programs. Arizona, for example, provides its LawforKids website to answer juveniles' questions about their rights and responsibilities under the law. Those visiting online have access to videos, interactive experiences, teaching tools, and a site for submitting questions that volunteer lawyers answer. The success of the website, which receives more than one million hits each month, led Arizona to develop a similar site for its senior citizens. LawforSeniors answers questions faced by mature citizens and provides links to additional community, state, and federal resources.<sup>27</sup> It, too, allows visitors to

ask questions to which volunteer lawyers post answers. Perhaps indicating the need to adapt the medium to the audience, Arizona has found that its seniors are more comfortable using its LawforSeniors written publication, while its young people prefer using the website.

Maryland has combined its use of films about the court system with television broadcasting. Under the auspices of the Maryland Court of Appeals, the court system produced a film about domestic violence to explain, to frightened and often poorly educated litigants, how cases go through the court system. The court then arranged to broadcast the film on cable television, assuring that it could reach a broad audience.<sup>28</sup>

Our state-court systems provide numerous other examples of the use of technology to improve outreach programs. The increased use of technology by the courts provides ample evidence of the courts' commitment to fulfilling their obligation to find the most effective means to reach out to all those who use or have an interest in the judicial system.

Another trend among state courts reflects the courts' determination to find better ways to reach the public. A decade ago, few courts assigned an organization or person primary responsibility for outreach programs or public communication generally. As state courts recognized the need for better and more frequent outreach, they also recognized the value that professional communication officers could bring. As a result, an increasing number of courts assign responsibility for education and outreach to desig-

25 Courts in the Classroom home page, <http://www.in.gov/judiciary/citc/>.

26 Wisconsin Court System home page, Jury Service in Wisconsin Video, <http://www.wicourts.gov/services/juror/index.htm>.

27 LawforKids home page, <http://www.lawforkids.org/>; LawforSeniors home page, <http://www.lawforseniors.org>.

28 Maryland Judiciary, Court Information Office, <http://www.courts.state.md.us/cio/mediaresource.html>.

nated committees or employees. At the same time, courts have accelerated efforts to establish relationships with and provide education for the journalists who cover the court system.

In 1995, Massachusetts established an early committee to strengthen communication between the judiciary and the media and to improve understanding and appreciation of one another's professional roles and functions.<sup>29</sup> The Supreme Judicial Court's Judiciary-Media Committee, cochaired by a justice and a major newspaper publisher, meets several times each year to discuss areas of interest and to resolve conflicts or tensions. The Committee established a Response Team, which is "on call" to help answer questions. The Committee also oversees the Law School for Journalists, organized to help journalists understand the system about which they write. New Hampshire followed a similar path, launching its Committee on the Judiciary and the Media in 2002,<sup>30</sup> to provide a forum for judges to meet with editors and reporters to discuss issues of mutual interest, including public access to the courts. The Committee also instituted a Law School for Journalists, which presents a daylong program designed to improve the media's understanding of the courts and the courts' understanding of the media. Other states, including Maryland, using the combined efforts of the bench, bar, and media, have prepared publications describing the legal system for journalists.

29 Massachusetts Supreme Judicial Court Judiciary-Media Committee, <http://www.mass.gov/courts/courtsandjudges/courts/supremecourt/judmeddescription.html>.

30 Judicial Branch, State of New Hampshire, Court Information Office, Committee on the Judiciary and the Media, <http://www.courts.state.nh.us/cio/specialevent.htm>.

State courts' increased attention to planning for outreach programs also is reflected in the courts' formation of entities charged with responsibility for education and outreach. New York's Center for Courts and the Community is charged with, among other responsibilities, communicating with the media and the public. Puerto Rico established its Office of Press and Community Relations of the Office of the Courts Administration to provide information about judicial proceedings and to offer and coordinate educational programs.

Most of these efforts had not been considered ten years ago. Responsibility for developing educational programs, for communicating with the media, and for reaching out to the public rested with individual judges. As a result, some groups were well-served by the court systems and some heard little from the courts.

The attacks on judicial independence have negatively impacted some areas of our judicial systems. Perhaps surprisingly, the attacks also have fostered positive results. The attacks on the courts, coupled with the lack of knowledge about the roles and responsibilities of judges and judicial systems that many attacks revealed, forced judges to take a fresh look at our contacts with and relationship to the communities and people we serve. When we took that fresh look, we discovered that we could and should do much more to listen to and speak with the communities. As a result, state courts developed new, exciting, effective plans for community outreach.

The outreach programs developed by state courts, only a few of which are referenced above, did not come about without much effort and commitment from all those involved in the judicial system. Although the programs have accom-

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plished much, much remains to be done. The programs developed to date thus represent not the end of the effort, but the beginning. The response made by state courts during the last ten years, however, makes it clear that courts and judges have accepted responsibility for increasing community outreach and are committed to ensuring that these efforts will continue, to the benefit of both the public and the courts.

# Stephen Breyer

## *Serving America's best interests*

A poll was conducted in 2001 that asked people whether they believed that judges decide cases impartially and according to law or whether they believe that judges do whatever they wish as soon as they put on a judicial robe.<sup>1</sup> When that poll was initially conducted, two-thirds of the respondents believed that judges decided cases impartially and one-third thought that judges simply decided cases according to their own preferences. When that same poll was conducted in 2005, however, close to half of the respondents indicated that judges' votes are driven by their personal predilections. This trend is alarming. The skeptical view of judging is not shared by the judges. We believe when we decide a case that we exercise not subjective preference but our judgment based on law. We try to find the correct legal answers to difficult legal questions.

A serious discrepancy between our own view of our own efforts and the

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view of a large segment of the public is cause for concern in a democracy. That is because the judicial system, in a sense, floats on a sea of public opinion. Do not misunderstand that statement. The Supreme Court does not reach an outcome in a particular case because doing so would be popular; nor does it shrink from issuing a decision that it suspects may prove unpopular, if that decision is what the law requires. I believe that it is impossible to be a conscientious judge with one eye on the *U.S. Reports* and the other eye on the latest Gallup poll. Nonetheless, the judiciary is, in at least some measure, dependent on the public's fundamental acceptance of its legitimacy. And when a large segment of the population believes that judges are not deciding cases according to the rule of law, much is at stake. As Chief Justice John Marshall warned, "The people have made the Constitution, and they can unmake it." And the society around us can undermine the judicial independence that is the rock upon which the judicial institution rests.

1 This essay is taken from remarks given at Fair and Independent Courts: A Conference on the State of the Judiciary, convened by the Georgetown University Law Center in September 2006.

For that reason, I think judges must do more than simply undertake our own jobs as best we can. We must also, in this day of speedy communication, try to explain or to teach why that institution and independence are important, not simply to the judges or to the lawyers, but to ordinary Americans whom ultimately our institution seeks to serve.

In my own view, independence is a state of mind. It reflects an indifference to improper pressure and a determination to decide each case according to the law. Ultimately, only the judge, not third parties, can understand his or her own thought processes. And perhaps, as my colleague Justice Kennedy once pointed out to a group of Russian judges, only other judges can fully understand the loneliness of a judge confronted with the task of independently deciding a truly difficult case.

Constitutional guarantees of tenure and compensation may well help secure judicial independence, but they can by no means assure it. Ultimately independence is a matter of custom, habit, and institutional expectation. To build those customs, habits, and expectations requires time and support – not only from the bench and bar but from the communities where the judges serve. Unfortunately, it may prove easier to dismantle that independence than to attain it. And that, as I have said, is why I think it is important that we explain, not just to lawyers or other judges, but to our fellow citizens, why that independence, which is so important to us as members of the legal community, should be important to them as well.

But how can we quickly and easily explain that concept and its necessity to an ordinary man, with his own concerns, often pressed for time, say as he makes his way into the Star Market at

the end of a busy day? Our typical shopper might not be interested in an abstract explanation of a highly abstract concept. He might want to know just what that notion means, how it helps him or her, in daily life.

It would be easiest for me to begin to explain judicial independence by pointing to the negative, its very opposite. Here, I think of my visit to a convention of Russian judges in 1993 when I was a judge on the U.S. Court of Appeals for the First Circuit. This event occurred not long after Boris Yeltsin was elected president of Russia, and I remember him announcing to the assembled judges that he intended to institute a large judicial pay raise. Not surprisingly, the Russian judges greeted this announcement with enormous cheers. I also distinctly remember Yeltsin decrying the Russian practice of something that he referred to as “telephone justice.” And, loud as the cheers for the pay raise were, the applause that greeted this announcement was absolutely deafening.

Telephone justice, I subsequently learned, occurred when the party boss called judges and told them how to decide the outcome of a particular case. And the assembled judges spoke about the practice very frankly. When the judges were asked why they would pay attention to the wishes of the party boss or even take his call, the judges explained that they needed apartments and that they wanted to put their kids in good schools. The Russian judges, in turn, asked me whether telephone justice exists in the United States. When I told them that we do not have such a practice, the Russian judges looked at me incredulously. What happens, the judges asked, when the politicians who helped you obtain your judgeship call in a favor regarding a pending case? Again, I told them that no such call would be placed.



It eventually became clear that they thought that I was merely being discreet in an effort to protect my supporters. And as I spoke further with the Russian judges, it became evident that, much as they disdained telephone justice, they had difficulty conceiving of a real-world legal system that operated without telephone justice. I hope, however, that eventually I convinced them that telephone justice plays no part in our legal system.

This example may help our Star Market shopper understand that telephone justice – the absence of independence – amounts to no kind of justice at all. But that shopper may still wonder what concrete benefits the presence of judicial independence confers. I might point out to our shopper that he still must pay for his groceries. And I could add that I once heard Alan Greenspan, former chairman of the Federal Reserve, speak about economic development in foreign countries. Chairman Greenspan said that if he could wave a magic wand and establish a single institution that is necessary for the growth of underdeveloped nations, he would create a judiciary that would decide contract cases in a manner that was neither corrupt nor dishonest. That is to say that he would create an impartial judiciary that possessed the independence to dispose of financial cases fairly and consistently. Without impartial judges deciding contract cases, Greenspan noted, citizens in developing nations will not make investments because those investments would be insecure and subject to the vagaries of an arbitrary judiciary. And without investment, of course, there can be no economic prosperity. It is perfectly reasonable to see a connection between judicial independence in America and the enormous array of goods spread out before us in

the store as well as the unprecedented financial security that permits Americans to buy them.

But much more than our wallets are at stake. Alexander Hamilton argued that the Constitution itself would work only if there were some fundamental protections for this fragile entity that we call judicial independence: “The independence of the judges, once destroyed, the constitution is gone; it is a dead letter, it is a vapor which the breath of faction in a moment may dissipate.” Indeed, Hamilton, who fought for this nation when it won its independence from Britain, placed judicial independence at the very top of the list of reasons that provoked him to take up arms. “There is no motive which induced me to put my life at hazard through our revolutionary war, that would not now as powerfully operate on me, to put it again in jeopardy in defense of the independence of the judiciary,” Hamilton said. “[I]f the laws are not suffered to control the passions of individuals, through the organs of an extended, firm and independent judiciary, the bayonet must.”

Hamilton knew that our Constitution establishes a democracy, but it does not establish a pure democracy. Rather, it establishes a democracy of a certain kind. It divides power, vertically between states and the federal government and horizontally among three federal branches so that no individuals or single branch of government can amass too much power. It understands that the majority can oppress the minority. And it offers protection to minorities in the form of guarantees of fundamental rights. The concept of a minority is not limited to racial minorities. Indeed, during the course of our lifetimes, we are all minorities in one respect or another. Our shopper will understand that. He will understand that our Constitution

guarantees a fair trial even to the most unpopular individual in the United States. And he will also understand that, without an independent judiciary, such basic constitutional protections for the minority can become merely empty rhetoric.

Finally, I might tell my new friend about three Supreme Court cases that, taken together, encapsulate this nation's lengthy and hard-fought struggle for judicial independence and the rule of law. The first case, *Worcester v. Georgia*, involved a dispute over land in northern Georgia that arose during the 1830s. White Georgians found gold on land that was owned by Cherokee Indians and the Georgians attempted to appropriate that land. The Cherokees sought to retain the land and filed a lawsuit asserting their ownership. Eventually, after the case made its way to the Supreme Court, Chief Justice John Marshall wrote an opinion for the Court that validated the Cherokees' ownership claim. President Andrew Jackson received word of the decision and dispatched federal troops to Georgia, not to enforce the Court's order, but to evict the Indians. As a result of their eviction, the Cherokees were forced to march along what is known as the Trail of Tears because so many of them died as they made their way from Georgia to Oklahoma. This case is familiar to many because it supposedly spurred Jackson to say: "John Marshall has made his decision; now let him enforce it." In the early nineteenth century, then, it seems fair to conclude that an independent judiciary was on occasion more an aspiration than a reality.

Slightly more than 120 years after *Worcester*, the Court handed down a second case, *Cooper v. Aaron*, that offers insight into the nation's evolving accept-

ance of judicial independence. In response to the Court's decision in *Brown v. Board of Education*, Arkansas Governor Orval Faubus vowed that the schools in his state would never be integrated. Faubus flouted desegregation orders and instead deployed the Arkansas state militia to Little Rock's Central High School to fulfill his pledge to Jim Crow. In *Cooper v. Aaron*, however, all nine justices of the Supreme Court signed an opinion reaffirming the impermissibility of segregated public schools. While it is certainly admirable that all nine justices signed the opinion, nine thousand judges could have signed the opinion and they still would have been powerless to integrate Little Rock's schools in the face of the state militia. As in *Worcester*, then, the ability of the Court to render unpopular decisions was again implicated. And, once again, the president dispatched federal troops to address the situation. This time, however, President Dwight Eisenhower sent in paratroopers not to subvert the rule of law, but to enforce it. I can distinctly remember seeing images of those paratroopers taking those black children by the hand and walking them through that white schoolhouse door. That moment represented a tremendous victory for integration and equality. But it also represented a tremendous (and far from inevitable) victory for the rule of law in America. That President Eisenhower dispatched the troops even though his feelings about *Brown* were ambivalent only heightens the extent to which sentiments about the judiciary's independence had changed since the days of President Jackson.

The third and final case that completes the nation's journey toward judicial independence is any recent highly controversial case you choose. Take, for example, *Bush v. Gore*. That case, as many of you know, inspired rather strong feelings

from those who disagreed with the majority's reasoning. It is no secret that I disagreed with the majority's reasoning, given that I wrote a long dissent in that case. But while many people disagreed with the Court's decision, I have yet to read about the need for sending in the paratroopers either to enforce or oppose the decision. Indeed, *Bush v. Gore*'s mandate was followed without paratroopers being dispatched, without bullets being fired, without rocks being hurled, and even without punches being thrown. To be sure, people were angry with the decision and they continue to disagree with it. But they have also agreed to follow the decision because that is what occurs in countries that have judicial independence and are ruled according to law.

Reflect for a moment upon how long it has taken for our nation to learn the importance of the rule of law. Think of our ups and downs. Think of slavery. Think of a civil war. Think of eighty years of segregation. Out of those trying experiences and the many others that this nation has endured, we have emerged with at least one substantial attainment: while we may not agree with the outcome of a particular case, we will follow the rule of law. And it is this fundamental belief that binds together our nation of over three hundred million people. Without the independence of thought and spirit that judges exhibit daily in their work in courtrooms throughout the United States, the public would not, for it should not, respect their decisions, and we Americans would lose that hard-won rule of law.

So, judicial independence is a part of my life. It is a part of your life. And, most important, it is a part of the life of our friend, the shopper, whom I detained for ten minutes on his way

to the grocery store. Judicial independence does have a profound impact on that shopper's life. It may improve his life materially. It certainly offers protection when he is in the minority. It offers meaningful protection for the fundamental political rights that every American enjoys. And it offers to that shopper, along with the rest of us, the best hope for continued respect for and obedience to law, even when we disagree about the merits of a particular decision.

In a word, judicial independence is an essential component of a rule of law, one that is necessary to tie together our nation of over three hundred million people of every race, every religion, and every viewpoint imaginable. That independence is a national treasure. Other generations created it; we benefit from their work. As long as judges can both meet the demands of independence in our own work and help to teach its value to others, I am confident that our generation shall maintain the independence so necessary for us in our work and for Americans who need independent judicial institutions.

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*Inside back cover:* Young boys play near a court-  
house in Monrovia, Liberia (2006). See Mar-  
garet H. Marshall on *Threats to the rule of law: state courts, public expectations & political attitudes*, pages 122 – 128: “The United States has given the world much. But unquestionably this country’s most enduring contribution to human progress is the structure of government in which a foundational, written charter appor-  
tions public power, guarantees fundamental rights, and entrusts the ultimate protection of those rights to an impartial judiciary. . . . For two centuries America stood in splendid isolation in its chosen form of government. Today our form of constitutional democracy has become the world’s gold standard of government. Countries as diverse as India, Lithuania, South Africa, and Canada have staked their future on the promise of constitutional democracy.”  
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