Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism

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A judiciary independent of a king or executive alone, is a good thing; but independence of the will of the nation is a solecism, at least in a republican government.¹

Judicial independence is vital for litigants to obtain the justice to which they are entitled. However, some view judicial elections—and the inevitable campaign speech that accompany such elections—as a threat to that independence and have urged steps to move away from elections. Short of that, they argue that judicial elections are so different that judicial campaigns can and should be severely curtailed, particularly in areas involving speech, whether that of the candidate, that of independent supporters, or that of contributors.

Judicial elections are different but not in the way many thought before the United States Supreme Court's decision in Republican Party of Minnesota v. White.² Before White, nearly every state supreme court, the American Bar Association, and the judicial establishment believed that judicial elections were categorically different from elections for

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other public offices so that the First Amendment did not have full application to those elections. However, the United States Supreme Court settled that in *White*, when the Court held that, consistent with the First Amendment, the states cannot prohibit judicial candidates from announcing their views on disputed legal and political issues.

The breadth of the *White* opinion has been reflected in the decisions of three federal circuit courts and about a dozen federal district courts as an additional twelve judicial canons have been struck down as incompatible with the strict scrutiny that is required by the First Amendment under *White*.

However, judicial elections are different from elections for the legislative or executive branch in a very important way because, unlike other public officials, judges have a dual role. One of the roles that state court judges share with the political branches is to make law, most

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3. This is most clearly evidenced in the adoption by state supreme courts of some version of the ABA’s Code of Judicial Conduct, which substantially restricts judicial candidates from behaving like legislative or gubernatorial candidates by drawing narrow parameters around the type of speech judicial candidates can engage in and around their participation in partisan politics during their campaign.

notably in the development of the common law, but in addition, in the exercise of their discretion, they make law for the litigants before them. With respect to the development of the common law, in 1977 then-California Judge Lynn Compton explained the policy-making role for judges:

[C]ourts are policy-making bodies. The policies they set have the effect of law because of the power those courts are given by the Constitution. In short, these precedent-setting policy decisions were the product of the social, economic, and political philosophies of a majority of the justices who made up the court at any given time in history.

It is legitimate for judges to be influenced by their views on public policy in the development of the common law. However, because judges’ views can be relevant to their decision-making, it is also legitimate for the people to elect judges who reflect their values to such policy-making positions.

But, more importantly, judges are different in that they are obligated to decide cases that come before them based on the law and the facts of that particular case. Legislators and executive branch officials do not have to do that; they can remake the law by legislation or executive decree, and they can ignore the facts in so doing. Judges cannot do this, and, if they do, they illegitimately make law by imposing their own views through interpretations of statutes or constitutional provisions that are contrary to the original meaning of those laws.

Finally, legislative and gubernatorial candidates can pledge to change or abolish laws during their campaigns. It is wrong, however, for judges to do that. Judges may certainly articulate their views on an issue; indeed, doing so affords citizens the opportunity to evaluate that judge’s judicial approach to both the current law and to public policy matters. However, it is a violation of their oath, and it is a denial of one of the critical roles of a judge, to pledge or promise certain results in a


particular case or class of cases.\(^7\) Despite the fact that the Supreme Court has held that the state cannot prohibit legislative candidates from promising how they will deal with certain matters when elected,\(^8\) judges can be so forbidden, consistent with the First Amendment.\(^9\)

Despite these very limited, though significant, differences, many commentators have expressed alarm at recent criticisms of the judiciary and at efforts to make judges more accountable to the people through information gathering about judicial candidates by individuals and interest groups and thereby to limit judges’ independence. Yet criticism of the judiciary has been episodic throughout our history\(^10\) and it is hard to justify the claim that recent criticism is worse now than it has ever been. Recent criticism, and recent efforts to limit the independence of the judiciary, pale in comparison with previous instances. In the past, sitting Supreme Court Justices have been impeached by the House, though not convicted by the Senate, for their judicial opinions.\(^11\) A sitting President has defied the Court, telling the Court to enforce its opinions if it can.\(^12\) One decision of the United States Supreme Court led to the election of a President, triggering a civil war in which hundreds of thousands of American citizens died.\(^13\) Another past President proposed

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7. White, 536 U.S. at 770 ("We know that ‘announc[ing] . . . views’ on an issue covers much more than promising to decide an issue a particular way.") (alteration in original) (emphasis in original)).


9. See White, 536 U.S. at 813 (Ginsburg, J., dissenting) ("[T]he State may constitutionally prohibit judicial candidates from pledging or promising certain results.” (alteration added)); Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 230 (7th Cir. 1993) ("[S]ome of the statements forbidden by the rule, notably promises to rule in particular ways in particular cases or types of case[s], are within the state’s regulatory power . . . ” (alteration added)).


12. DAVID LOTH, CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE AMERICAN REPUBLIC 365 (1949) (describing President Andrew Jackson’s reaction to the Court’s decisions in the Cherokee Cases).

13. See Dred Scott v. Sandford, 60 U.S. 393 (1856) (narrowly construing the Constitution’s use of the term “citizen” to hold that a black emancipated slave was not a citizen and thus not entitled to bring suit in federal court).
packing the Supreme Court with additional members, because he disagreed with its decisions.\textsuperscript{14} Some southern Governors have stood in the schoolhouse door, defying rulings of federal courts requiring school desegregation, which resulted in the National Guard being mobilized by the President.\textsuperscript{15} Finally, current criticism of the judiciary cannot top what President Thomas Jefferson said in 1820: "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our Constitution from a coordination of a general and special government to a general and supreme one alone."\textsuperscript{16}

However, in a popular democracy, the people are entitled to criticize the judiciary, just like other branches of government. The Court held in \textit{Bridges v. California}\textsuperscript{17} that courts could not hold newspapers in civil contempt for commenting on pending state court litigation. The Court noted that stifling that criticism through "an enforced silence . . . would probably engender resentment, suspicion, and contempt [for the judiciary] much more than it would enhance respect."\textsuperscript{18} Justice Felix Frankfurter, in dissent, agreed that

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[j]udges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities . . . . [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.\textsuperscript{19}
\end{quote}

\textsuperscript{15} STEPHAN LESHER, GEORGE WALLACE: AMERICAN POPULIST 228-232 (1994).
\textsuperscript{17} 314 U.S. 252 (1941).
\textsuperscript{18} \textit{Id.} at 270-71 (alteration added).
\textsuperscript{19} \textit{Id.} at 289 (Frankfurter, J., dissenting) (alterations added).
If mere criticism alone threatens judicial independence, then it is because a judge lacks courage, or "a mind of reasonable fortitude," which no law can provide.

In light of this criticism, there have been some recent efforts to limit the independence of the judiciary through proposals for term limits and the establishment of judicial misconduct boards and through jurisdiction stripping. Judicial independence is an important element of ensuring justice for litigants. However, the judiciary receives that gift because of its limited role. Because our country is based on popular sovereignty and democracy, the Founders of our Constitution were able to describe the judiciary as the least dangerous branch: the limited role of the judiciary was understood to be interpreting and applying the law, not setting public policy for the country. Except for the development of the common law, the public policy-setting role was to reside in the legislative and executive branches. So there is a tradeoff: the judiciary is given substantial independence, which is vital to the central role of a judge to apply the law impartially, because the judicial branch is given a modest role in the development of public policy. If judges were given a predominant role in setting public policy, then it would deny popular sovereignty and democracy to make them independent of appropriate accountability to the people.

Thus, it is judicial activism that threatens judicial independence. Chief Justice John Roberts has recently explained that

"Courts should not intrude into areas of policy reserved by the Constitution to the political branches . . . . [J]udges should be constantly aware that their role, while important, is limited. They do not have a commission to solve society's problems, as they see them, but simply to decide cases before them according to the rule of law. When the other branches of government exceed their constitutionally mandated limits, the courts can act"
to confine them to the proper bounds. It is judicial restraint, however, that confines judges to their proper constitutional responsibilities.\textsuperscript{23}

Justice Scalia has also recently made the connection between judicial independence and judicial activism:

We can talk about independence as if it is unquestionably and unqualifiedly a good thing. It may not be. It depends on what your courts are doing . . . . The more your courts become policy-makers, the less sense it makes to have them entirely independent . . . . When [courts] leap into making [public policy], they make themselves politically controversial and that’s what places their independence at risk.\textsuperscript{24}

Judge Pam Rymer of the Ninth Circuit has commented on her own judicial activist colleagues:

My activist colleagues would probably say that the judge’s primary role is to protect individual rights and to achieve social justice, that social justice is the guiding principle of the judicial branch. And they would say that they should view the Constitution as a set of very broad principles to be interpreted in light of contemporary problems. In my own view, this kind of judicial philosophy leads a judge . . . . to behave more like a legislator than like a judge.\textsuperscript{25}

Since the nation was founded on the belief in popular sovereignty and democracy, the people must consent to the adoption of public policy. If judges seize power to set the public policy agenda of


the country, then judges must expect to be less independent and more accountable to the people. Indeed, it is a grave offense to popular sovereignty and democracy to interpret the Constitution to add rights that were not present in that Constitution when the people ratified it. It is also a grave offense to write out of the Constitution rights that were in that Constitution when it was consented to by the people. The people have chosen to limit the government and to guarantee rights in certain ways through the adoption of the Constitution, so it violates the principles of democracy and popular sovereignty to change that Constitution by judicial fiat.

This nation, however, has experienced numerous instances of judicial activism. *Dred Scott v. Sandford*,26 *Plessy v. Ferguson*,27 *Wickard v. Filburn*,28 *Kelo v. City of New London*,29 and *McConnell v. FEC*30 are just a few examples of the Court undermining rights or other provisions in the Constitution. *Eisenstadt v. Baird*,31 *Roe v. Wade*,32 and *Lawrence v. Texas*33 are examples of the Court adding rights. For example, political speech is at the core of the First Amendment’s mandate that Congress should “make no law,”34 and nude dancing is at

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26. 60 U.S. 393 (1856).
27. 163 U.S. 537 (1896) (narrowly interpreting the Fourteenth Amendment’s interest in equality to exclude social distinctions and upholding state-imposed racial segregation on railway carriages as constitutional).
28. 317 U.S. 111 (1942) (asserting a broad scope to the Commerce Clause to hold that a farmer’s wheat production could be constitutionally regulated and penalized).
29. 545 U.S. 469 (2005) (broadly construing the Takings Clause to hold that private property could be constitutionally taken away from citizens so long as doing so served a public purpose).
31. 405 U.S. 438 (1972) (extending the right to contraception to unmarried persons based on an implied right to privacy).
32. 410 U.S. 113 (1973) (recognizing a woman’s right to an abortion under a generalized notion of privacy implicit in the Constitution).
33. 539 U.S. 558 (2003) (extending the Constitution’s implied right to privacy to include sexual orientation and striking down as unconstitutional a law criminalizing homosexual sodomy).
34. Williams v. Rhodes, 393 U.S. 23, 32 (1968) (holding that Ohio election laws violated the Equal Protection clause of the Fourteenth Amendment because
best at its periphery, but the Court has given much greater protection to nude dancing than it does political speech. Political candidates are required by law to run under their real names but nude dancers are not. Political contributions can be limited, but “contributions” to nude dancers are not. Political candidates can be prohibited from giving any quid pro quos for their contributions, but nude dancers are in many ways free from such restrictions. Political candidates must put a disclaimer on their advertising, but it took a 5-4 Supreme Court decision to allow a state to require pasties and a G-string on a nude dancer. So some people have come to the conclusion, in surveying the Court’s decisions on abortion, pornography, sodomy, and sexual conduct generally, that the courts are infected with “a virulent judicial activism” that “has force-fed a new culture and new definition of virtue, all in the name of a Constitution that neither commands nor permits such results.” Even if one does not accept this rather apocalyptic view, it is troubling that the majority of the people of the United States believe that judges base their decisions on their own personal beliefs rather than on the application of the law. Thus, judicial activism undermines public support for an independent judiciary and gives rise to efforts, some ridiculous and misbegotten, others firmly in the Constitution and in our tradition, to make judges more accountable and less independent.

35. City of Erie v. Pap’s A.M., 529 U.S. 277, 278 (2000) (concluding that the city’s ordinance prohibiting all public nudity was content-neutral and that it satisfied the Court’s test for analyzing symbolic speech restrictions).
36. Nixon v. Shrink MO Gov’t PAC, 528 U.S. 377 (2000). But see Randall v. Sorrell, 126 S. Ct. 2479 (2006) (deciding that Vermont political expenditure limits were unconstitutional because they were too restrictive and not narrowly tailored to the state’s interest of preventing both the appearance and practice of corruption).
41. Maxwell Poll, Judges and the American Public’s View of Them, October 2005, available at http://www.maxwell.syr.edu/news/releases/051017_poll.asp (finding that 56 percent agree that “in many cases judges are really basing their decisions on their own personal beliefs”).
The response by some has been to deny that there is judicial activism or to say that we do not know what it is. There is just no question that there is judicial activism. Judicial activism is marked by an attitude or disposition that the judiciary can solve legal problems in ways reserved to the executive or legislative branches. It can also be evidenced by the substitution of personal preference through creative interpretation as to what the law should be over current case precedent establishing that law. Most notably, this is recognized in decisions upholding a “living constitution” to justify the decision rendered.

Some commentators more broadly define judicial activism as just a decision with which one does not agree, and others define it as any striking down of a law or reversing of a precedent, so all one needs to do is add up how many laws a judge has struck down or precedents he has voted to reverse to determine whether he or she is an activist. But these redefinitions assume that the Constitution has no real ascertainable meaning, which limits government or protects rights by imposing standards on the judiciary on how it should decide cases. But of course, that is not so; the Constitution is considerably more than that.

So the people have chosen judicial elections in order to hold judges accountable to the people for the exercise of their power and to ensure that judges stay within their proper bounds. Seventy-five percent of those surveyed agreed that “judges who are elected are more fair and impartial than those who are appointed.” (Only 18 percent thought that if judges were appointed, they would be more fair and impartial.) Forty-seven percent want more judges to be elected, while only 15 percent think that fewer should be. The people want fair and impartial judges, and elections are how they believe that they can get them.


45. Poll, supra note 41 (finding that 46.7 percent answered “more” to the question: “Do you think that more judges should be elected, that the number of judges that are elected is about right, or that fewer judges should be elected?”).
Elections have been used successfully to weed out judges who were biased or activist. Texas District Judge Jack Hampton gave an unusually light sentence to a defendant convicted of killing two gay men. Judge Hampton explained that

[t]hese homosexuals, by running around on weekends picking up teen-age boys, they’re asking for trouble . . . . I don’t care much for queers cruising the streets picking up teen-age boys . . . . I put prostitutes and gays at about the same level. And I’d be hard put to give somebody life for killing a prostitute.47

Hampton was censured but not removed from office.48 In 1992, his remarks were a major campaign issue in his unsuccessful bid for a seat on the Texas Court of Appeals.49

In the 2006 election for a seat on the Wisconsin Supreme Court, substantial resources were expended in an election that was clearly focused upon choosing between judicial activist judge Linda Clifford, who was willing to “let the [state] constitution breathe,” and her opponent Annette Ziegler, because the balance and direction of the Supreme Court would be established as a result of the election.50 Wisconsin voters clearly voiced their opposition to judicial activism by awarding the seat to Ms. Ziegler, who ran her campaign on the premise

46. By “impartial judges,” the people mean judges who will follow the law., see National Center for State Courts, How the Public Views the State Courts: A 1999 National Survey, at 33 Fig. 20, available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtspub.pdf (finding that 68 percent disagreed or disagreed strongly with the question: “I would prefer that a judge ignore the law to ensure that a defendant is convicted.”), “without regard to considerations of popularity.” Williams v. United States, 535 U.S. 911, 919 (2002) (Breyer, Scalia, Kennedy, JJ., dissenting from cert. denial).


that she would be a better-suited replacement for the retiring conservative justice, whose seat both Clifford and Ziegler were seeking.

Furthermore, the retention election of California Chief Justice Rose Bird in 1986 is an example of a judge who was perceived as imposing her own personal views in her decisions contrary to the law. In every one of more than sixty cases where the death penalty had been imposed, she voted to reverse.\(^5\) In her campaign, Chief Justice Bird repeatedly emphasized that judicial independence requires judges to set aside their personal views concerning the issues before the court. However, “there is no evidence to indicate that voters disagreed with Bird’s view. To the contrary, they clearly felt that Bird and her two colleagues had interjected her personal views into her decisions regarding the litigation and court administration.”\(^5\) As a result, they were turned out of office.\(^5\)

Judicial activism is at the core of the attacks on judicial independence. Judicial elections are the means by which the people seek to ensure that judges stay within their proper bounds and to ensure that judges develop the common law in a manner consistent with the values of the people. Judicial restraint is the key to maintaining judicial independence. Those who are genuinely concerned about maintaining judicial independence should focus on whether judges are restrained and what it means to restrain the exercise of their power.\(^5\) Without judicial restraint, calls for judicial independence may just be viewed as a way to protect judges who want to impose their own personal views contrary to the law. The only way to protect judicial independence is to exercise judicial restraint.

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53. Such results are rare. Of the 3912 retention elections in ten states between 1964 and 1994, only fifty judges were defeated (approximately 1 percent). Larry Aspin & William K. Hall, *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 3, 8 (2000).