



THE WAR ON THE JUDICIARY

CAN INDEPENDENT JUDGING SURVIVE?

REPORT OF THE 2013 FORUM FOR STATE APPELLATE COURT JUDGES



**POUND
CIVIL JUSTICE
INSTITUTE**

FORUM ENDOWED BY HABUSH HABUSH & ROTTIER S.C.



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We are the guardians of this country through the constitutions of our states and the United States Constitution. If we don't do it right, even at the price of losing our jobs, then we are going to lose.

—A judge attending the 2013 Forum

The most respect that our country has comes from our rule of law. Wherever you go, people admire this country. They love it.

That's the reason they want to come here—because of the rule of law.

—A judge attending the 2013 Forum

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FOREWORD

The Pound Civil Justice Institute's twenty-first Forum for State Appellate Court Judges was held on July 20, 2013, in San Francisco, California. Like all of our past forums, it was both enjoyable and thought-provoking. In the forum setting, judges, practicing attorneys, and legal scholars were able to consider the increasingly important issue of judicial independence in the face of political challenges.

The Pound Civil Justice Institute recognizes that the state courts have the principal role in the administration of justice in the United States, and that they carry by far the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue where judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is always fruitful. Our attendees always bring with them different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Institute's Fellows. That diversity of viewpoints always emerges in our Forum Reports.

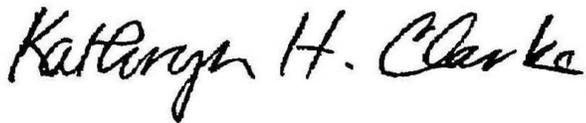
Our Forums for State Appellate Court Judges have been devoted to many cutting-edge topics ranging from the court funding crisis, to the decline of jury trial, to separation of powers and secrecy in litigation. We are proud of our Forums and are gratified by the increasing registrations we have experienced since their inception, as well as by the very positive comments we have received from judges who have attended in the past. A full listing of the prior Forums and their content is provided in an appendix to this report, and their reports—along with most of our other publications—are available for free download on our Web site: www.poundinstitute.org.

The Pound Institute is indebted to many people for the success of the 2013 Forum for State Appellate Court Judges:

- Professor Charles Gardner Geyh of the Indiana University Maurer School of Law, and Amanda Frost, of the American University Washington College of Law, who wrote the papers that started our discussions;
- the Honorable Tani Cantil-Sakauye, Chief Justice of California, for welcoming us to San Francisco and sharing her views on educating the public on the functions of the courts;
- our luncheon speaker, Oliver Diaz, formerly a justice of the Mississippi Supreme Court;
- our panelists—Praveen Fernandes, James Bopp Jr., Honorable R. Fred Lewis, Edward Zebersky, Honorable Russell Carparelli, David Biderman, Honorable David Wiggins, and Patrick Malone;
- the moderators of our small-group discussions—Jennie Lee Anderson, Sharon Arkin, Michael Brown, Simona Farisse, Bill Gaylord, Shawn McCann, Betty Morgan, Ellen Relkin, and Lanny Vickery for helping us to arrive at the essence of the Forum, which is what experienced state court judges think about the issues we discussed; and

-
- the Pound Civil Justice Institute’s efficient and dedicated staff—Jim Rooks, our executive director and forum reporter, and Mary Collishaw, our program manager—for their diligence and professionalism in organizing and administering the 2013 Judges Forum.

It goes without saying that we appreciated the attendance of the distinguished group of judges who took time from their busy schedules so that we might all learn from each other. We hope you enjoy reviewing this report of the Forum, and that you will find it useful to you in your future consideration of matters relating to judicial independence.



Kathryn H. Clarke

President, Pound Civil Justice Institute, 2011-13

INTRODUCTION

On July 20, 2013 in San Francisco, California, 148 judges, representing 40 jurisdictions, took part in the Pound Civil Justice Institute’s twenty-first annual Forum for State Appellate Court Judges. The judges examined the topic, “The War on the Judiciary: Can Independent Judging Survive?”

Their deliberations were based on original papers written for the Forum by Professor Charles Gardner Geyh of the Indiana University Maurer School of Law (“The Political Transformation of the American Judiciary”), and Amanda Frost, of the American University Washington College of Law (“Honoring Your Oath in Political Times”). The papers were distributed to participants in advance of the meeting, and the authors also made less formal oral presentations of their papers to the judges during the plenary sessions. The paper presentations were followed by discussion by distinguished commentators: Praveen Fernandes, an attorney at the Justice at Stake Campaign in Washington, D.C.; James Bopp Jr., an attorney from Terre Haute, Indiana; the Honorable R. Fred Lewis, a justice of the Florida Supreme Court; Edward Zebersky, an attorney from Ft. Lauderdale, Florida; the Honorable Russell Carparelli, of the Colorado Court of Appeals; David Biderman, an attorney from San Francisco, California; the Honorable David Wiggins, a justice of the Iowa Supreme Court; and Patrick Malone, an attorney from Washington, D.C. All provided incisive comments on the issues based on a wealth of diverse experience in the law. The judges also heard comments by the Honorable Tani Cantil-Sakauye, Chief Justice of California, on educating the public about the functions of the courts, and a lunch address by former justice Oliver Diaz of the Mississippi Supreme Court.

After each plenary session, the judges separated into small groups to discuss the issues, with Fellows of the Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded electronically and transcribed by court reporters. However, under ground rules set in advance of the discussions, comments by the judges were not made for attribution in the published report of the Forum. A selection of the judges’ comments appears in this report.

At the concluding plenary session, the Institute’s executive director, James E. Rooks, Jr., summarized points of agreement among the judges, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Geyh and Frost, and on transcripts of the Forum’s plenary sessions and group discussions.



James E. Rooks, Jr.
Forum Reporter



PAPERS, ORAL REMARKS, AND DISCUSSION

THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY

Professor Charles Gardner Geyh,¹ Indiana University Maurer School of Law

Executive Summary

In Section I, Professor Geyh reminds us that political interest in the courts is neither unusual nor new, and he cites a famous, century-old address by the founder of our Institute as evidence. Political influence-seeking has been constant, and has run in cycles, varying with which political parties have been in the ascendancy at any given time. Dean Pound was incorrect, however, in his assumption that the political pressures that existed in 1906 would resolve themselves. They have continued, spurred on by modern-day pressures on courts and judges to be more things to more people, and by the frequent referral of major social issues to the courts for “final” decision.

In Section II, the federal side of the phenomenon is examined, beginning with intervention in Supreme Court confirmations dating to the 1880s and continuing to the open warfare of more recent confirmation hearings, limitations on the availability of appeals, and changes in pleading standards that could leave many cases subject to the ideological bents of judges who are appointed by political leaders to lifetime positions of service.

In Section III, Professor Geyh discusses the different, but related, issues affecting the state courts. These include the creation of many intermediate state courts of appeal and the consequent focus of political interest on a wider segment of the judiciary, the involvement of the courts in a broad swath of consumerist issues (stemming from the state courts’ authority over the common law), pressure on state judges to “get tough” on criminal behaviors, the perception of progressive forces that state courts are now the best protectors of individual rights and liberal social policy, and the creation of judicial discipline authorities in all 50 states and the emergence of vastly greater public interest in judges’ conduct.

In Section IV, the dichotomous public policy debates and academic discussion are summarized. On the public policy front, court critics tend to caricaturize independent judges as self-serving and bent on implementing their favorite policy agendas. The legal establishment often responds with mantra-like assertions that judging must not be politicized lest the rule of law be compromised. The academic literature was once similarly divided, with law professors pointing to court decisions to demonstrate that judges look to the law, and political scientists marshaling evidence that personal ideology dominates decision making. Yet recent interdisciplinary research tends to show that law and policy are so intertwined that judges cannot help but be influenced by both. This seriously diminishes the utility of the legal establishment’s position that independent judges follow the law and nothing else, and in any event public awareness of the multiple influences on judges makes continued use of the argument dangerous.

In Section V, Professor Geyh assumes the existence of ideological influences on judges but gives three reasons why judges should nonetheless be accorded independence: judicial independence promotes the rule of law, when “law” is understood as including policy considerations; judicial independence promotes procedural justice, allowing judges to achieve fair process and earn legitimacy in the minds of litigants and the public; and judicial independence

promotes substantive justice by insulating judges from pressures outside the courtroom and leaving competing notions of correct outcomes to the adversaries' lawyers.

Finally, in Section VI, the issue of judicial oversight is joined, and Professor Geyh points out that it occurs in three dimensions: procedural, ethical, and political. He argues that balance must be restored among the three dimensions, and that doing so should start with a revision of the legal establishment's past arguments and a candid acknowledgement that, in hard cases, "judges fill spaces in the law through the exercise of discretion influenced by legal and extralegal considerations," including public policy. Given independence, judges are better suited to fill those spaces than are politicians, pundits, and other self-interested observers. This message needs to reach the public, and judges need to be active in seeing that it does.

I. Cycles of Sentiment Toward Courts

In 1906, amid progressive-era attacks on state and federal courts, Roscoe Pound addressed the American Bar Association at its annual meeting, where he spoke on "the causes of popular dissatisfaction with the administration of justice."² Among the causes of dissatisfaction he enumerated was "putting courts into politics and compelling judges to become politicians," which "in many jurisdictions has almost destroyed the traditional respect for the Bench."³ Ultimately, however, he attributed politicization of the courts to "an age in transition," concluded that the problems it caused "will take care of themselves," and focused his attention on other issues he regarded as more pressing.⁴

In one respect, Pound's assessment was right: Political interest in the courts waxes and wanes with the era. When a new political regime wrests power from the old, holdover judges appointed or elected under the old regime become political targets of the new, until more politically compatible judges are selected, more politically incompatible judges retire or recede, or the attacks run their course and lose momentum. Thus, "putting courts into politics" has tended to spike after major transitions of political power: when the Jeffersonian Republicans bested the Federalists in 1802; after the Jacksonian Democrats ousted the Republicans in 1828; when the Radical Republicans gained control of Congress after the Civil War; after the populists and progressives came to power at the turn of the twentieth century; and in the 1930s, when Franklin Roosevelt squared off against aging holdover Supreme Court justices who had invalidated New Deal initiatives with his "Court packing" plan.⁵

**Political interest
in the courts
waxes and wanes
with the era.**

These cycles of anti-court sentiment have continued apace in recent generations. In the 1950s and 1960s, conservatives attacked the Warren Court for perceived liberal excesses, with proposals to impeach errant Supreme Court justices, attempts by southern states to defy Supreme Court rulings, and proposals to strip the federal courts of jurisdiction to hear school prayer cases.⁶ The cycle wound down following the election of President Richard Nixon, who pledged to appoint "strict constructionists" to the bench and realigned the Supreme Court with four new appointments in his first term.⁷ A generation later, in 1994, the Republican Party gained control of both houses of Congress for the first time in over a generation and embarked on a campaign against liberal "judicial activism."⁸ House Republican leaders threatened "activist" district and circuit judges with impeachment, introduced legislation to curtail federal court jurisdiction over controversial issues, and proposed to disestablish or cut the budgets of uncooperative courts.⁹ The cycle waned in 2006, when Republicans lost the White House and both houses of Congress.¹⁰

In another respect, however, Pound was quite wrong. For state and federal courts, the “age of transition” to which Pound referred never ended. Rather, the courts have been in a state of perpetual transition that accelerated in earnest beginning in the latter half of the twentieth century, which has heightened the political salience of their work and put them under ever more scrutiny.

More people, more cases, more litigants, and more discovery have led to more complaints about docket congestion, litigation cost, and delay.¹¹ To avoid expensive and time-consuming jury trials, judges and parties have turned increasingly to settlement, alternative dispute resolution, summary disposition, and mass consolidation of civil suits (via class actions and other joinder devices).¹² The “trial judge” has thus become an oxymoron, who looks less like an archetypal umpire than a case manager.¹³ This movement away from trials has been driven not only by a desire to reduce congestion, expense, and delay, but also by an emerging view that justice is not always best served by a judge in the role of a coldly detached umpire who declares winners and losers in a zero-sum game. Hence the advent of “problem-solving” courts, in which judges become more actively involved in addressing the substance abuse, mental health, employment, domestic relations, and other problems underlying the conduct of one or more parties in cases before them.¹⁴

Reconceptualizing the trial judge’s role in these ways highlights the enormous discretion that judges exercise. And when judges exercise discretion in ways that are sharply at odds with public policy preferences—say, in the context of criminal sentencing, bail-setting, or awarding custody—political fallout follows. It is easy to condemn holding “umpires” politically accountable to interested observers, but it is a more complicated case to make if judges are case managers, mediators, problem solvers, and policy makers.

At the appellate level, the federal and state judiciaries’ self-proclaimed authority to say what the law is, through the exercise of judicial review, has always been a political lightning rod when courts invalidate popular enactments or initiatives. And the state supreme courts’ monopoly over the development of the common law has long had the potential to create controversy. But changes in the past half-century have intensified the politics of judicial decision making and oversight in unusual, if not unprecedented, ways.

President Richard Nixon may have dismantled the Warren Court, but the newly constituted Burger Court angered Christian conservatives with decisions that recognized abortion rights, perpetuated restrictions on school prayer, and invalidated religious observances on public property. Beginning in the late 1970s, organizations such as Baptist Minister Jerry Falwell’s “Moral Majority” mobilized Christian conservatives, who agitated to overturn judicial decisions they deemed antithetical to their values,¹⁵ while liberal organizations, such as “People for the American Way,” mobilized in response.¹⁶ When congressional Republicans launched their campaign against liberal judicial activism in the mid-1990s, it was with the enthusiastic support of Christian conservatives, which prompted an equal and opposite reaction from the political left.

II. Conflict in the Federal Courts

In the federal system, the confirmation process became the battlefield of choice for newly mobilized interest groups on both sides of the emerging culture war over judicial decision making. In the federal system, partisan wrangling had always been a part of the Supreme Court confirmation process, and disputes over nominee ideology were in evidence as early as the 1880s, when the Grange interceded to oppose the Supreme Court nomination of Stanley Matthews.¹⁷ It was not until 1987, however, with the nomination of Robert Bork, that ideology became the sole basis for Senate rejection of a Supreme Court nomination.¹⁸ Political ideology has remained a primary—and sometimes the exclusive—focus of every Supreme Court confirmation in the years

since. In the early 1990s, partisan battles over nominee ideology spilled over into circuit court confirmation proceedings for a variety of reasons: an evolving political interest in the circuit courts, that began with President Jimmy Carter's diversification initiatives in the 1970s; the polarizing effects of the Bork proceedings; and the elimination of mandatory appeals from the Supreme Court's docket, which effectively rendered circuit courts the courts of last resort in all but the few cases that the Supreme Court chose to hear.¹⁹

Federal procedure has likewise become a venue for skirmishes with ideological overtones. Beginning in the 1970s, lawyers, litigants, interest groups, and scholars have squared off over procedural rules and statutes regulating litigation misconduct, class actions, summary judgment, and judicial disqualification.²⁰ Most recently, the Supreme Court has reinterpreted pleading standards in ways that have provoked political interest. Previously, district judges were authorized to dismiss a plaintiff's suit for failure to state a claim at a preliminary stage in the proceedings, only if there was "no set of facts" that could sustain the claim. More recently, the Court has instructed district judges to dismiss any claim that their "common sense" and "experience" tells them is "implausible;" insofar as a judge's "common sense" is unavoidably influenced by her ideological inclinations, it opens the door to a new politics of pleading.²¹

The federal and state judiciaries' self-proclaimed authority to say what the law is, through the exercise of judicial review, has always been a political lightning rod.

III. Developments in the State Courts

State courts have experienced a related series of developments. First, beginning in the 1950s, docket congestion on supreme courts led to the establishment of intermediate appellate courts across the states.²² Thus, in the state and federal systems, supreme court review became confined to fewer, often more controversial and politically charged cases, while intermediate appellate courts increasingly became courts of last resort, elevating the political profile of their work.²³

Second, in the latter half of the twentieth century, state courts enabled a consumer-friendly revolution in the torts arena that transformed the substantive law of products liability and punitive damages.²⁴ Toward the end of the twentieth century, the Chamber of Commerce began pouring unprecedented sums into supreme court races, hoping to elect more business-friendly judges. The plaintiff's trial bar responded in kind, throwing its financial support behind pro-consumer candidates. So began the "new politics of judicial elections."²⁵

Third, President Ronald Reagan's campaign to "get tough" on crime and drugs resonated with the general public and created ripple effects throughout the state and federal governments. In state judicial races, incumbents' votes in criminal cases became a campaign issue with the retention election of California Chief Justice Rose Byrd in 1986, who (together with two of her colleagues) was defeated for her perceived refusal to uphold the death penalty.²⁶ In 1996, Tennessee Justice Penny White lost her retention election because of her vote to reverse and remand a death sentence, and the "soft on crime" mantra has been a potent campaign issue in the years since—so much so, that groups concerned primarily about tort reform have sometimes targeted disfavored incumbents with advertising campaigns focused on their voting records in criminal cases.²⁷

Fourth, growing interest in judges' political ideology has not been confined to the federal bench. By the late 1970s, progressives, frustrated by the conservative turn of the Burger Court, began urging lawyers representing liberal causes to wage their campaigns in state courts.²⁸ By the 1990s, candidate ideology had become a common issue in judicial elections, as reflected in supreme court campaigns focused on an incumbent's vote on single issues ranging from abortion and same-sex marriage to school funding and water rights.²⁹

Fifth, judges became subject to systems of judicial discipline. When the 1960s began, no states had enforceable codes of conduct or permanent judicial conduct commissions in place. Between 1969 and 1970, Justice Abe Fortas resigned, the Senate rejected President Nixon's nomination of Judge Clement Haynsworth to the Supreme Court, and the House initiated an impeachment inquiry into the conduct of Justice William O. Douglas, for reasons relating in part to alleged ethical transgressions of the judges involved.³⁰ The American Bar Association responded by promulgating a Model Code of Judicial Conduct in 1972.³¹ States began to adopt versions of the Model Code and established judicial conduct commissions to enforce standards of conduct that their codes created. By 1981, all fifty states had disciplinary processes in place, and by 2008, all fifty states had adopted codes of judicial conduct.³² The federal judiciary followed suit: In 1973, the Judicial Conference of the United States adopted a "Code of Judicial Conduct for United States Judges," based on the 1972 ABA Model, which governed federal judges below the Supreme Court; and in 1980, Congress created a disciplinary process for federal judges, albeit one that did not link discipline to violation of the Code.³³

Because they are administered by and for judges, state and federal codes of conduct and disciplinary processes have not become sites for politicized battles over the ideology of judicial decision making. But they have created another venue for the scrutiny of judicial conduct of interest to policymakers and the media. Congress, which oversees the federal disciplinary process, periodically seeks to invigorate that process by showcasing episodes of under-regulation in oversight hearings and by proposing reforms, such as to establish an inspector general within the judicial branch.³⁴ Interest groups have agitated for the Supreme Court to bind itself to a Code of Conduct, and the Chief Justice has resisted those proposals as unnecessary.³⁵ Reporters publicize allegations of judicial misconduct. But the "reporters" now include not only trained journalists, but also cable news pundits and interest groups, who convey their spin on judicial misconduct—including what they regard as high-handed decision making—via the twenty-four-hour news cycle and Internet to every point on the globe in a matter of seconds.

IV. The "Perfect Storm": Intensified Scrutiny of Judges as the New Normal

In this age of perpetual transition, intensified scrutiny of judicial ideology, selection, conduct, and administration is the new normal. And when this new normal is combined with post-Watergate skepticism of government motives, post-Reagan revolution skepticism of government spending, and post-2008 recession-era budgetary shortfalls, it has created a perfect storm of factors, the eye of which has settled over judicial budgets and salaries. Judges have no natural constituency to lobby for their budgetary needs, except the bar, whose track record in defending the judiciary is mixed, and whose influence may be diminished by a declining percentage of lawyers in legislatures. When judges lobby for themselves, they appear self-interested; when they do not, they are ignored; when they exploit their inherent powers to order adequate funding, they provoke constitutional crises;³⁶ and because legislatures understand that budgets and salaries are the judiciary's Achilles heel, it is not unusual for legislators to exploit the budgetary process as a means to retaliate against unpopular judicial decisions.³⁷

The public policy debate accompanying the developments described here has tended to be dichotomous. On one side are court critics, who complain that independent judges are self-serving, disregard the rule of law, and implement their own policy agendas. For them, frequently proposed solutions include holding judges politically accountable to the people in contested elections, and to the people’s representatives in more aggressive legislative oversight of judicial appointments, operations, and appropriations. On the other side is the legal establishment—comprising the bench, bar, and organizations that share their concerns—which argues that independent judges uphold the rule of law and that a judge’s capacity to follow the law is compromised by political interference with her decision making. For the legal establishment, the solution lies in “depoliticizing” the judiciary and opposing proposals that court critics advocate.³⁸

For generations, academic literature was comparably dichotomous. Law professors devoted themselves to doctrinal scholarship that proceeded from the premise that understanding why judges do what they do was a matter of parsing legal doctrine—that the decisions judges make should be understood and critiqued with exclusive reference to applicable law. Meanwhile, many political scientists long posited that judges decide cases by following their ideological predilections, and that applicable law has little, if anything, to do with the choices judges make.³⁹ Beginning in the 1990s, a cadre of interdisciplinary scholars began to bridge this divide with a flurry of empirical projects demonstrating that judicial decision making is subject to a complex array of influences, including law, ideology, and others.⁴⁰ Such findings have led these scholars to conclude that the dichotomy itself is false: law and policy are so inextricably intertwined that to say judges are influenced by one but not the other is to misunderstand both.⁴¹

For experienced lawyers and judges, these conclusions are intuitive. When the law and facts are clear, so too is the outcome, and judges often allude to cases in which they have ruled contrary to their policy preferences because the law required them to do so. But the adversarial process proceeds on the assumption that there are two or more ways to look at the applicable facts and law, and when the “correct” answer is unclear, judges have discretion to exercise in deciding which answer is “right” or “best.” That discretion is informed by the judge’s background, education, and life experience that frame her policy perspective on the world—in other words, her ideology. Far from a bad thing, exercising discretion within the boundaries of applicable law to the end of achieving fair results may be the very definition of justice.

Law and policy are so inextricably intertwined that to say judges are influenced by one but not the other is to misunderstand both.

If, however, one acknowledges that independent judges are subject to legal *and* extralegal influences, it complicates life for the legal establishment in the public policy debate. It is no longer possible to defend the judiciary’s independence with simplistic, unqualified platitudes that independent judges follow the facts and law, because the discretion judges exercise

in divining the applicable law and dispositive facts is informed by their legal and public policy preferences. Why should judges be free (code that: “independent”) to impose their policy preferences on the people they serve, when other public officials are not?

One option for the legal establishment is to ignore this conundrum and cling tenaciously to its half of the binary public policy argument: independent judges do not make law—they follow it; ideological and other extralegal influences on judicial decision making are too inconsequential to take seriously, social science data

to the contrary notwithstanding. Emblematic of this approach is the position that Chief Justice Roberts took during his confirmation proceedings: “Judges are like umpires,” he testified. “Umpires don’t make the rules; they apply them.”⁴² The judiciary’s public approval ratings remain high enough that such an approach just might work. But it is a perilous tack. The recent developments recounted here have heightened public awareness of judicial politics, to a point where the vast majority now believes that judges are influenced by their personal feelings and policy preferences. If the legal establishment persists in making arguments the public regards as counter-factual, it could erode public support for an independent judiciary over the long term.

V. Why Judges Need—and Deserve—Independence

On the other hand, if judges begin to speak more candidly about the discretion they exercise and the complex interplay between law and policy, it returns us to the critical question: Should the discretion that judges wield—and the policy choices they make—be insulated from political pressure? There are at least three reasons why judges, whose decisions are subject to ideological influence, are nonetheless deserving of judicial independence.

First, judicial independence still promotes the rule of law, but in more qualified ways.⁴³ In easy cases, where the law and facts are so clear they leave little room for judicial discretion, independence insulates judges from political pressure to contort the rule of law, traditionally understood. In difficult cases, where outcomes are subject to ideological influence, law still limits the range of acceptable outcomes and methods of analysis, and independence helps to ensure that judges are not pressured by interested participants or observers to exceed those limits. Moreover, one can define “law” more flexibly to accommodate ideological and other influences. As previously noted, few lawyers would argue that there is but one “correct” answer to hotly disputed legal questions; most would freely acknowledge that the “rule of law” tolerates a range of acceptable answers in close cases. While conservatives and liberals may answer such questions differently, the answers nonetheless fall within the ambit of law, broadly construed. In this way, independence from external interference with their decision making enables judges to offer their best judgment of what the law—flexibly understood—requires.

The discretion judges exercise in divining the applicable law and dispositive facts is informed by their legal and public policy preferences.

Second, judicial independence promotes procedural justice. Buffering judges from political pressure to reach preferred results by any means necessary better enables judges to respect the dictates of fair process required by rules of procedure, rules of evidence, and the state and federal constitutions. That, in turn, enhances the judiciary’s legitimacy in the eyes of litigants regardless of whether the conclusions of law judges reach are subject to ideological influences.⁴⁴

Third, judicial independence promotes substantive justice. The adversarial process familiarizes judges with the unique circumstances of each case and regulates the manner in which the facts giving rise to those circumstances are presented. That equips judges with a more complete and balanced presentation of the case than is available to outside observers. Independence encourages a pragmatic form of justice by limiting external interference with a judge’s capacity to make fact-sensitive decisions she regards as best in the cases before her, regardless of whether ideology may affect the judge’s assessment of what “best” means.⁴⁵

A measure of accountability is needed to ensure that independence furthers, rather than thwarts, the purposes it serves.

In short, one can defend the independence of a judiciary that is subject to ideological—and to that extent “political”—influences, on the grounds that it promotes the rule of law (more flexibly construed), procedural justice, and substantive justice. By the same token, unchecked independence can liberate judges to pursue political agendas at the expense of these same objectives. Hence, a measure of accountability is needed to ensure that independence furthers, rather than thwarts, the purposes it serves. For over a century, the mantra of the legal establishment has been to “depoliticize,” the courts. If, however, we concede the inevitability that judges are subject to certain kinds of “political” influences, then the time has come for the legal establishment to abandon its crusade to “depoliticize” the judiciary and seek instead to manage judicial politics.

VI. Three Dimensions of Judicial Oversight

Managing judicial politics is a line-drawing exercise: the goal is to delineate where independence should end and accountability begin, to optimize the objectives judicial independence serves. Where that line should be drawn will vary, depending on whom one asks and why they care. That is because oversight of the judiciary—and regulation of its independence and accountability—occurs in three distinct dimensions: procedural, ethical, and political.⁴⁶ In the procedural dimension we seek to assure litigants a fair hearing before an impartial judge—an objective that is undermined if judges lack either the independence to be fair or the accountability to constrain their biases. In the political dimension, we seek to assure the public a judiciary deserving of its confidence and support—an objective that is compromised if judges are seen as dependent puppets of interested observers or unaccountable, renegade politicians in robes. In the ethical dimension, we seek to promote the ideal of a good judge who is committed to upholding the rule of law impartially—a goal that is thwarted if judges are subject to reprisals for following the law or suffer no consequences for flouting it.

In other words, the goal is to craft an independence/accountability cocktail that manages judicial politics to best promote the rule of law, procedural justice, and substantive justice, but the optimal mix can vary by dimension. The independence-accountability blend needed to ensure parties a fair hearing in the procedural dimension may differ from that needed to provide the public with judges it trusts in the political dimension, which may differ from that needed to ensure that judges behave honorably in the ethical dimension.

Two examples will illustrate the point. First, in the political dimension, holding judges accountable to the electorate in contested elections may be just the thing to reassure the public that judges will pursue justice and the rule of law in ways the public understands and approves. But in the procedural dimension, parties with unpopular causes may reasonably worry that judges whose continuation in office depends on voter support lack the requisite independence to decide their case fairly, according to law. Similarly, in the ethical dimension, electoral accountability may strain a judge’s duty to honor her oath in situations where following the law as she understands it to be written could jeopardize her tenure.

Second, consider ethics rules that prohibit judges and judicial candidates from pre-committing themselves to reach specified results in future cases, and corresponding disqualification rules that direct judges to disqualify themselves if they make such commitments. In the procedural dimension, constraining the independence of

judges to decide cases where such commitments were made by holding them accountable to disqualification processes protects parties from judges who have locked themselves into ruling a specified way before the case is heard, to the detriment of procedural justice, if not substantive justice and the rule of law. And in the ethical dimension, holding judges accountable to a disciplinary process for making pre-commitments implements the ancient principle that good judges should withhold judgment until the cause is heard. But in the political dimension, such a rule may be unnecessary, if not counterproductive, because knowing how candidates will decide important issues can reassure the public that the judges so selected will uphold the law and administer justice in politically acceptable ways.

Looking at judicial independence and accountability in the ways described here illuminates long-term trends and possible paths to reform. With respect to trends, one can reconceptualize amorphous claims that the judiciary is increasingly “politicized,” in terms of a movement from the procedural and ethical dimensions of judicial oversight to the political. Cyclical attacks on judges that come and go with transitions of political power, judicial selection battles, interest group mobilization over judicial decisions, the new politics of judicial campaign finance, the elevated policy-making profile of supreme courts, and strategic manipulations of judicial budgets and salaries are developments with common roots. They reflect a shared recognition that the choices judges make have policy implications, and that public confidence in the courts is promoted by holding judges accountable to the people and their elected representatives to ensure that the decisions judges make are politically acceptable. To the extent that such tactics enhance public confidence in the political dimension of judicial oversight, however, they do so by constraining judicial independence in ways that arguably compromise fair hearings for parties and jeopardize judicial integrity in the procedural and ethical dimensions, respectively. In the procedural dimension, a fair hearing is put at risk if judges must look past achieving just results consistent with the facts and law as they interpret them, and make choices aimed at mollifying the public or their elected representatives. And in the ethical dimension, making judges responsive to public preferences is in tension with the so-called “three-I’s” of the Code of Judicial Conduct—*independence, impartiality, and integrity*—as manifested in an ethical directive (in place since the Canons of Judicial Ethics were promulgated in 1924) that judges disregard “public clamor.”⁴⁷ The path to reform lies in restoring balance among the three dimensions. To date, the public has received two messages. One message, from court critics, is that judges are politicians in robes who will disregard the law and make public policy if left to their own devices, and so must be controlled like other politicians. The other message, from the legal establishment, is that judges are umpires who do not make rules but follow them, and will uphold the rule of law if afforded independence. For a public that has been steeping in judicial politics for over a century, the legal establishment’s message has become increasingly antiquated and counterfactual, and recent developments recounted here suggest that the legal establishment is slowly losing the public policy debate.

The time has come for the legal establishment to revise its message: In difficult cases, judges fill spaces in the law through the exercise of discretion influenced by legal and extralegal considerations—including considerations of public policy. By virtue of their training, experience, and familiarity with the facts presented in carefully controlled settings, judges are better positioned than pundits, politicians, or other self-interested observers to exercise informed discretion that will mete out justice under law—provided that judges enjoy a measure of independence from result-oriented kibitzers.

The argument that judges need breathing room to exercise discretion, informed by their common sense (which includes their policy predilections), must allow for the possibility that such independence can be abused in ways that compromise the values independence seeks to promote—hence the need for accountability. But

The time has come for the legal establishment to revise its message: In difficult cases, judges fill spaces in the law through the exercise of discretion influenced by legal and extralegal considerations—including considerations of public policy.

speeches to citizens groups, communications with jurors, and conversations with legislators, to the end of making judges a more candid and visible presence in the political dimension. Instead of disavowing the impact of extralegal influences on their decision making, judges should explain the role those influences play, and why affording judicial discretion a measure of independence remains critical to upholding the rule of law and administering substantive and procedural justice. The paradoxical challenge is for judges to more fully engage themselves in the political process, armed with a message that more candidly acknowledges the limited ways in which their work is “political,” to the ultimate end of more convincingly distinguishing their roles from those of public officials in the “political” branches and better buffering themselves from the very political process that they are engaging.

Key to the judiciary’s success in delivering this message is inspiring confidence in the myriad ways judges already manage and constrain extralegal influences on judicial decision making in the procedural and ethical dimensions of judicial oversight: appellate review, oaths of office, institutional culture, judicial education, codes of judicial conduct, procedural rules limiting discretion to issue dispositive rulings prematurely, disciplinary processes, and disqualification. Several of these mechanisms have recently become more politicized because public confidence in their effectiveness has been questioned: The United States Supreme Court—the public relations flagship for the American judiciary—has not bound itself to a code of conduct and has been dismissive of calls for it to do so, which only politicizes the issue further. Procedural rules have become a target for congressional scrutiny after the Supreme Court relaxed dismissal standards in civil litigation, directing judges to rule against claims prior to discovery if they deemed such claims “implausible” in light of their “common sense.” And judges have been called to task for resisting proposals to reform judicial disqualification processes in the teeth of widely criticized and highly publicized episodes of non-disqualification.

The judiciary can blunt potential threats to its independence by reacting constructively, rather than defensively, to calls for reform of processes within its control. For example, in 2006, Congress, dissatisfied with the judiciary’s failure to discipline judges in high-profile cases, proposed to create an office of inspector general within the federal judiciary and initiated an impeachment inquiry into the conduct of a judge whose disciplinary proceeding was pending.⁴⁸ The Judicial Conference objected to the inspector-general proposal as a threat to its independence⁴⁹ but revamped its disciplinary process,⁵⁰ and the bill was never adopted.⁵¹ In

accountability can be ensured and public confidence in the courts maintained without the procedural and ethical dimensions of judicial oversight ceding so much turf to the political. Unlike the political dimension of judicial oversight, which is controlled by the public and elected officials, the ethical and procedural dimensions are largely within the control of the courts themselves. By ramping up their oversight in the procedural and ethical dimensions—and advertising those efforts in the political dimension—judges can restore some of the balance lost.

Judges should embrace the new message and sell it in their outreach to school children,

roughly the same period, bills were introduced in Congress to prohibit judges from participating in educational seminars sponsored by corporations with business before the courts.⁵² Federal judges and the Judicial Conference opposed such legislation as an affront to the separation of powers, their freedom of speech, and their independence—but ultimately revised an ethical ruling to impose significant restrictions on judicial attendance at expense-paid seminars.⁵³ As a result, the bills were withdrawn.

CONCLUSION

There is an understandable tendency for the reform-minded to focus their energies on the metaphorical alligator in the bathtub, judicial elections, which I have not done here. If one acknowledges that preserving public confidence in the courts is critical to the judiciary's legitimacy, then one must concede the relevance of a political dimension to judicial oversight. Public support for judicial elections remains strong and data show that elections promote the judiciary's legitimacy in the public's mind,⁵⁴ which suggests that in many jurisdictions (particularly where judiciaries have been highly politicized), the public better trusts judges to uphold the law and administer procedural and substantive justice if they are subject to electoral accountability. I am no friend of judicial elections, but in states where the public balances independence and accountability in this way, proposals to move to appointive systems will be fruitless. Rather, the first step down the road to reform is for the judiciary to reassert greater control over its own accountability in the procedural and ethical dimensions of oversight. If and when such efforts gain traction with the public and reassure it that the judiciary can be trusted to regulate its own independence without the public's intervention in periodic elections, then—and only then—will it be receptive to proposals to change selection systems.

Elections promote the judiciary's legitimacy in the public's mind.

Notes

¹ John F. Kimberling Professor, Indiana University Maurer School of Law. I would like to thank Amita Foss for her research assistance, which was excellent as always.

² Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

³ *Id.* at 734.

⁴ *Id.* at 749.

⁵ CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 51-108 (2006).

⁶ *Id.* at 109-110.

⁷ Charles Gardner Geyh, *The Choreography of Courts-Congress Conflicts*, in THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS AND THE PUBLIC 19, 21 (2011).

⁸ *Id.* at 20-21.

⁹ *Id.*

¹⁰ *Id.* at 41.

¹¹ RICHARD POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 53-86, 125-29 (1996).

¹² Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

¹³ *Id.*

¹⁴ GREG BERMAN, JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE (2005).

¹⁵ John Jeffries, James Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 341 (2001).

¹⁶ Stephen Gottlieb, *The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 509 n. 52 (1987).

¹⁷ GEYH, *supra* note 5 at 198-200, 202.

¹⁸ *Id.* at 203-06.

¹⁹ *Id.* at 209-22.

²⁰ Paul Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L. J. 597 (2010).

²¹ Arthur Miller, *From Conley, to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 18 (2010).

- ²² PAUL CARRINGTON, DANIEL MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 150 (1976).
- ²³ Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 751 (2001); G. Alan Tarr, *State Judicial Selection and Judicial Independence*, in JUSTICE IN JEOPARDY, App. D at 6-7 (2003).
- ²⁴ Michael L. Rustad and Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground for Social Theory*, 68 BROOKLYN L. REV. 1 (2002).
- ²⁵ This is the title of a periodically updated publication of the Justice at Stake Campaign. See <http://newpoliticsreport.org>.
- ²⁶ James Sample, *Retention Elections 2.010*, 46 U.S.F. L. REV. 383, 402-05 (2011).
- ²⁷ Heller E. and M. Ballard, *Hard-Fought, Big Money Judicial Races: U.S. Chamber of Commerce Enters Fray with Ad Money*, NATIONAL JOURNAL at 42 (2000).
- ²⁸ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).
- ²⁹ See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OH. ST. L. J. 43, 49-50 (2003).
- ³⁰ Whitney North Seymour, *The Code of Judicial Conduct from the Point of View of a Member of the Bar*, 1972 UTAH L. REV. 352, 352.
- ³¹ *Id.*
- ³² CHARLES GARDNER GEYH, JAMES ALFINI, JEFFREY SHAMAN & STEVEN LUBET, JUDICIAL CONDUCT AND ETHICS §§1.03, 1.05 (5th ed. 2013).
- ³³ 28 U.S.C. § 351, et seq.
- ³⁴ Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219, 109th Cong., sec. 2(a), § 1021 (2006) (proposing the creation of an inspector general for the judiciary to investigate judicial misconduct).
- ³⁵ 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at: <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.
- ³⁶ Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Powers*, 78 JUDICATURE 12, 12 (1994).
- ³⁷ James W. Douglas & Roger E. Hartley, *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?*, 63 PUB. ADMIN. REV. 441, 446, 449-50 (2003).
- ³⁸ Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 Corn. L. Rev. 191, 214-20.
- ³⁹ *Id.* at 192-93.
- ⁴⁰ *Id.* at 197-214.
- ⁴¹ Introduction: So What Does Law Have to Do with it?, in WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE? 3-6 (Charles Gardner Geyh ed. 2011).
- ⁴² David G. Savage, *Roberts Sees Role as Judicial 'Umpire'*, L.A. TIMES, Sept. 13, 2005, at 1.
- ⁴³ Geyh, *supra* note 38 at 208-09; Segal also references (and rejects) this conception. Jeffrey A. Segal, *What's Law Got to Do with It: Thoughts from "the Realm of Political Science,"* in WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 19 (Charles Gardner Geyh ed., 2011).
- ⁴⁴ Edward L. Rubin, *Independence as a Governance Mechanism*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS 56, 70-71 (Stephen B. Burbank & Barry Friedman eds., 2002); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 708 (1995); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluation of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 70 (1984).
- ⁴⁵ Geyh, *supra* note 38 at 242-43 (2012); see also RICHARD A. POSNER, HOW JUDGES THINK 230 (2008).
- ⁴⁶ Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 509-13 (2013).
- ⁴⁷ American Bar Association, Model Code of Judicial Conduct, Rule 2.4(A) (2007).
- ⁴⁸ Judicial Transparency and Ethics Enhancement Act of 2006, H.R. 5219, 109th Cong., sec. 2(a), § 1021 (2006) (proposing the creation of an inspector general for the judiciary to investigate judicial misconduct); *Impeaching Manuel L. Real, a Judge of the United States District Court for the Central District of California, for High Crimes and Misdemeanors: Hearing on H.R. Res. 916 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 2-4 (2006), available at http://commdocs.house.gov/committees/judiciary/hju29969.000/hju29969_of.htm; *Judicial Transparency and Ethics Enhancement Act of 2006: Hearing on H.R. 5219 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 1-4 (2006) [hereinafter *Hearing on H.R. 5219*].
- ⁴⁹ See *Hearing on H.R. 5219*, at 61.
- ⁵⁰ See Tony Mauro, *Binding National Rules Adopted for Handling Judicial Misconduct Complaints*, LAW.COM (Mar. 12, 2008), <http://www.law.com/jsp/article.jsp?id=1205232267963&hbx&slreturn=20130511113006>; see also JUDICIAL CONFERENCE OF THE UNITED STATES, RULES FOR JUDICIAL CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008), available at http://www.flmd.uscourts.gov/2008-Judicial_Conduct_and_Disability_Act.pdf.
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- ⁵² Press Release, Admin. Office of the U.S. Courts, *Judicial Conference Opposes Sweeping Restrictions on Educational Programs* (Sept. 19, 2000), http://www.uscourts.gov/News/NewsView/00-09-19/Judicial_Conference_Opposes_Sweeping_Restrictions_on_Educational_Programs.aspx.
- ⁵³ *Id.* Compare U.S. Judicial Conference Comm. on Codes of Conduct, Advisory Opinion No. 67: Attendance at Independent Educational Seminars (revised June 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/SeminarDisclosure/Vol02B-Ch02-Advisory67.pdf> (setting forth the factors a judge must consider when deciding whether to attend an expenses-paid seminar), with Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L.J. 941, 954-60 (2002) (quoting extensively from the 1998 version of Advisory Opinion No. 67).
- ⁵⁴ JAMES GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY (2012).

ORAL REMARKS OF PROFESSOR GEYH¹

A century ago, the namesake of this organization went to the ABA annual meeting and he addressed what he called “The Causes of Popular Dissatisfaction with the Administration of Justice.”² He had a bunch of them. He taxonomized the daylight out of it. And his last cause was “putting courts into politics and compelling judges to become politicians,” which in his view had “almost destroyed traditional respect for the bench.”

He ended by saying about that one, though, that it’s attributable to “an age in transition,” and that the problems it caused will “take care of themselves.” In some ways I think he’s right, but in some ways he’s flat dead wrong.

The way in which he’s right is that it is true to say that attacks on courts escalate during periods of transition, and we’ve seen it throughout American history. You get a new sheriff in town, a new political regime, and you get holdover judges who get in the way, and they wind up getting attacked. That happened beginning with the first transition of political power in American history, when Thomas Jefferson took over from the Federalists and went on a rampage against Federalist judges. It happened later when Andrew Jackson took on the Whigs and John Marshall, when the Radical Republicans took on the Democrats in the aftermath of the Civil War, a generation later when the Progressives went after the *Lochner*-era Supreme Court, which was the time when Dean Pound was speaking.

Yet another generation went by, and Franklin Roosevelt was mud wrestling with the Court over court-packing and its reactions to the New Deal. A generation later President Nixon came to power, in part on the strength of attacks on the Warren Court, which he promptly dismantled in a couple of years with several new appointments to the Court. And most recently, in the 1990s, when the Republicans gained control of Congress for the first time in a generation, part of their program was to embark on a campaign against “liberal judicial activism” that lasted a decade. So you see that over and again.

Attacks on courts escalate during periods of transition, and we’ve seen it throughout American history.

But to some extent Pound was quite wrong, in the sense that we have been in a perpetual state of transition for a century. We are in a world that is changing, and it keeps changing, and I think the politics of the judiciary have continued to sort of ramp-up with a plottable trajectory. And you see it in a variety of ways that I identify in my paper.

You look at the federal level for a moment, at the land of judicial appointments, where the ideology of Supreme Court nominees started to become an issue at the turn of the twentieth century, and has escalated ever since. Ideology of circuit court nominations really didn’t become an issue until the late 1980s, but that has escalated ever since.

State judicial selection issues have become, in the words of Roy Schotland, “noisier, nastier, and costlier.”³ Single-issue campaigns in judicial elections have become a thing. Dealing with same-sex marriage, abortion, claims that judges are “soft on crime”—you know those drills. You also know that money has started pouring

into these campaigns, and that signals another change, which is the business of mobilized interest groups. In the tort reform arena it's the Chamber of Commerce versus the trial lawyers. At the federal level it's conservative and liberal interest groups trying to put their thumbs on the scales of the appointments process. You see those changes happening, and they're happening at a relatively steady state.

There are also seemingly innocuous developments that have political implications. One example is changes in appellate structure. Beginning in the 1950s, intermediate appellate courts for the most part didn't exist outside of the federal system. As they began sweeping the nation, one side effect of that was that the state supreme courts were able to develop discretionary dockets limited to fewer, often higher-profile, politically

Increasingly politicized courts are coming hat in hand to state legislatures that are indifferent to their needs.

charged cases that made those courts targets. Meanwhile, intermediate appellate courts became courts of last resort in all but a handful of cases, which makes them a target in some instances as well.

There were also developments in ethics and discipline. When the 1960s began, no state in the United States had an enforceable code of judicial conduct—now they all do. And that is just another avenue of scrutiny. Sometimes it has acquired

political overtones, for example, where the First Amendment is implicated by judicial conduct restrictions, culminating in *Republican Party of Minnesota v. White*,⁴ and its ripple effect.

The final example—and I think this is where all of this comes home to roost—is the court budget battles. Increasingly politicized courts are coming hat in hand to state legislatures that are indifferent to their needs. This is partly because, over the course of the last generation, the percentage of lawyers in legislatures has declined pretty significantly. Some are openly hostile to judges, so that you see as many as a third of court administrators reporting that their budgets have been cut in retaliation for judicial decisions.

These developments have occurred against the backdrop of what we “ivory tower” people are doing in the back room, which is studying judicial decision making. That includes political scientists, showing the ways in which these suspicions that judges are political are true. And political scientists, by virtue of not being lawyers, don't always get it. But they're out there advertising the impact that ideology plays on judicial decision making. And of course they're using the U.S. Supreme Court as the primary example, and that's tarring the entire judiciary with its brush.

So what has the bench and bar's response been? “Independent judges uphold the law, nothing more, nothing less.”

So what has the bench and bar's response been? It's been a short, sweet message, which is a “rule of law” paradigm: “Independent judges uphold the law, nothing more, nothing less. Political attacks on judges and their independence undermine the rule of law. Therefore, the remedy is to depoliticize the courts.” The rejoinder, coming back, is: “No, you people are a bunch of politicians and rogues. You disregard the law and impose your own ideological predilections.” The conversation isn't getting anywhere.

One thing I worry about, an inchoing suspicion that has sort of crept along for the last few years for me, is that the judiciary is gradually losing this debate. And that's part of the reason we're seeing the trajectory that we're seeing. The reality of it is that judges do exercise discretion. Frankly, it's what makes the job fun. If you were a bunch of automatons, there's an app for that. But you are in fact exercising discretion.

And what informs your discretion? Your common sense, your education, your life experience, your world view. And to some extent, that is your policy perspective. It has become a dirty word, but it's what informs your discretion. When you're sentencing a defendant, when you're setting bail for a defendant, when you're deciding whether to certify a class action, when you're deciding whether to award custody, all of these choices involve discretion that implicates policy preferences. And for the representatives of the judiciary to be out there saying essentially, "We just follow the law," when 80 percent of the public think judges let their personal feelings influence their decisions, it is a hard sell.

An increasingly skeptical public is looking at the judiciary in that debate and saying, "Your nose is growing a little bit. It just doesn't seem true to us." So it raises the ultimate question that I think is at issue here, which is, "Why should judges enjoy the independence to impose their own preferences (in the sense of their own discretion) on the parties before them without fear of consequence, when other elected officials don't?" The result is a kind of bleeding together of judges and legislators as if there's no difference between them. And because the only defense the judiciary has had has been, "We're all about the law," and there's skepticism of that argument, there's a risk of eroding respect for the rule of law down the road.

You should feel free to say, "We do more and less than follow the law in cases where the law is unclear."

The better tack, it seems to me, is to step back and start thinking about how we can defend an independent judiciary that doesn't require a commitment to a formulaic nineteenth century view of the law. In other words, there may be a way to say, "Judges do exercise discretion, but it's damned well important that they have independence to exercise that discretion wisely."

I think there are at least three justifications for why judges—who do, in some ways, apply both legal and extralegal considerations to their decisions—deserve a measure of independence. You should feel free to say, "We do more *and* less than follow the law in cases where the law is unclear.

To begin with, let's revisit the rule-of-law justification and say, "Look, when you hear about the Supreme Court and their perennial five-to-four splits, you get the impression that every case is a same-sex marriage case. Bologna. We're basically grinding it out, day in and day out, with cases in which the law is often relatively clear. And when it is, independence ensures that we follow the law and that we aren't essentially corrupted by pressure into doing something differently. Even when the law is unclear and you have to have some discretion to exercise, the discretion you get with independence is "my best guess as to what the law is, my best judgment. Even if a liberal and a conservative may come to a slightly different conclusion about that, that's okay, it's still the law. It's not any less the law because reasonable people can disagree at the margins." That's better than having some interest group force you into a decision that isn't anyone's perception of the law. So there is a value in independence, even in situations where there are ideological influences at the margins.

The second justification, is the notion that independence permits and facilitates due process. The idea is that judges, by virtue of their independence, are essentially in a position to respect the due process that they've been

acculturated to respect since law school. There is data that supports the proposition that parties are much more willing to accept adverse results if they think they're being treated fairly; if they think they've been given due process; if the rules of evidence have been followed; if the rules of procedure have been followed. Even if, at the end of the day, the judge has to exercise best judgment that's influenced by legal and extralegal consideration, by God, independence buys you your ability to be fair in the process. So the parties walk away saying, "I didn't like the outcome, but I was treated fairly. The judge wasn't pressured by outsiders, by politicians or the electorate, into doing something he or she didn't want to do."

The third justification really has to do with just core notions of justice. One of the things that bothers me about talking about judges as legislators in robes is it implies that they make policy in the same way that legislators do. But judges are deciding cases that are fact-driven. And what independence buys you in that sense is an ability to look closely at the facts of the case that you're dealing with and come up with the best result under law given that context, immune or hopefully buffered from the pressure that would cause you to contort that understanding. And you as the judge are better situated than anyone else to decide those cases, because of the way the information is presented to you. So even if you exercise discretion, independence furthers the administration of justice in that way.

Now, having just said all of that, it's also fair to say that independence can do exactly the opposite. If it can facilitate your ability to uphold the law as I've described it, it could also liberate you to do the opposite, which is why we need some kind of accountability. And so you end up having this independence-versus-accountability debate that has become utterly intractable.

They want judges independent and impartial enough to give them a fair shake.

I'm dating myself here, but for those of you in your forties and beyond, you remember the old Miller Lite beer commercials where "tastes great" and "less filling" would collide over the silly question of why people like light beer. I think the same thing is true here with independence and accountability. Why is it intractable? I think it's intractable because to try to come up with the perfect independence-versus-accountability cocktail is a matter of perspective. In other words, there are three different

perspectives, each of which have fundamentally different ways of looking at the independence/accountability cocktail. And in some ways it matters who you are and why you care about these things.

The first is the public's perspective on independence and accountability in what I call the political dimension of judicial oversight. The public wants to have confidence in its courts, it wants to trust them, and it wants courts to be publicly acceptable to the people. It wants independence and accountability to serve that end. The second perspective is the perspective of the parties, a procedural dimension of independence and accountability and oversight. What they want is a fair shake. They want judges independent and impartial enough to give them a fair shake. And then the third is really from the perspective of the "good" judge in an ethical dimension. You are part of a tradition that dates back 1,000 years, and there's this core notion of what an impartial, good judge should be, that requires a measure of independence and accountability to ensure an honorable judiciary. My point is that how much independence and how much accountability you need varies depending on which dimension you're in.

For example, take judicial selection. The data suggests that from the public's perspective and the political dimension, contested elections promote public confidence in the courts. It assures the voters that they have

a politically acceptable judiciary. And it furthers the political dimension. But those same elections can, in a procedural dimension, cause parties to say, “I’m at risk of losing my case because this judge could lose his job if he votes my way.” And in the procedural dimension, that means “not independent enough.” And I think that creates the perpetual loggerhead we’re in.

Well, where to from here? The implications of this three-dimensional analysis are, first, that you can re-conceptualize the transformation I’m talking about. Conceptualize—that’s what we academics do. You know what you’re doing, I just talk about what you’re doing, and my job is to conceptualize. So you can re-conceptualize the transformation that’s been going on in terms of a movement from the procedural and ethical dimensions of impartiality, which, by the way, you guys control.

Remember, practice and procedure, that’s your gig. Ethics and discipline, that’s your gig. Those are the procedural and ethical dimensions of regulating independence and impartiality to the political dimension, which is within

the bailiwick of the electorate in some cases, and their elected representatives in others. One of the chronic problems, I think, is that when judges see this happening, they stand up, point their finger, and say, “You’re a bunch of idiots. You don’t know what you’re doing. If only you were better educated, you would do better.” But that doesn’t win arguments, as true as it sometimes may be.

I think we need to recognize that the political dimension, the role that the public and their representatives play, is a legitimate one, and we need to recognize that the politics of the judiciary is here to stay. It’s not going to go away. Depoliticizing the courts has become an impossibility. We need to *manage* judicial politics in a way that preserves the best of judicial independence and accountability.

The point I’m making is that by saying that the politics of judicial decision making is here to stay as an issue, what we’re seeing is a skepticism manifested by the public toward judicial independence: “The judges aren’t using their independence wisely, they are using it in ways that abuse the purposes it is intended to serve, which is often unfair.” And anyone who has paid any attention to what I’ve done in the past, I have spent a lot of time working for organizations designed to show just that.

But the key to me is for the judiciary to mount a campaign that allays the suspicion that independence is being misused, and to essentially take back some of the turf that’s been ceded to the political dimension, recapturing it in the ethical and procedural dimensions.

What do I mean by that? First, it’s a matter of engagement.

Most of you are out there talking to jurors, talking to kids who come through the court house, talking to citizen groups. Some of you are talking with legislatures. I think the time has come to be a little more candid about talking about the discretion judges exercise and why independence is relevant to exercising that discretion, rather than downplaying the discretion as though it doesn’t exist.

At the same time, it is possible to highlight the ways in which that discretion is managed quite effectively in the procedural and ethical dimensions. How does that happen? Through appellate review, through the oaths of

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office, through an institutional culture that respects the rule of law, through ongoing judicial education, through codes of judicial conduct and systems of judicial discipline, through procedural rules that constrain judicial discretion in meaningful ways, and through judicial disqualification.

Finally, in closing, let me say that it's possible to go a step further and to really engage the process in a more meaningful way by anticipating the kinds of problems that are driving public reaction and responding to them in the procedural and ethical dimensions. In other words, when some legislator comes up with a half-assed proposal, rather than just basically dismissing it as half-assed, recognize that it sometimes reflects a sentiment that is a-brewing in the public. It has a constituency. And coming up with a constructive response within the judiciary's control can often defuse and avoid the problem.

Let me give you two examples from the federal side, and one from the state: In the first example, in about 2006, members of Congress were concerned that the judiciary was not using its disciplinary mechanism sufficiently. They started pursuing impeachment investigations more aggressively. They started proposing the creation of an inspector general within the judiciary to manage its discipline. The judiciary opposed it, but they also told Justice Breyer, "Go out, take a comprehensive look at the judicial disciplinary process, and recommend reforms." They took Congress's concern seriously. The reforms were made within the judicial branch, and the inspector general proposal has never advanced.

The second example from the federal side is junkets for judges: the idea that judges are getting expense-paid trips courtesy of corporations that have an interest in the cases judges decide. Congress jumped in and started trying to ban the practice outright. The federal judiciary stepped in and developed ethics rules providing guidelines for how to manage those situations more effectively. The net effect was that the proposal was withdrawn. And in the state systems you've got nine states responding to the *Caperton* case⁵ with new anticipatory regulations governing money and judicial disqualification.

And on the state side, there is a program in California that I was privileged to be a part of—the California Commission on Impartial Courts—that said, "We aren't in a crisis situation, but we're anticipating all of these political problems down the road. Let's get together and come up with a formula to deal with them now." I think it's a proactive measure that ended up letting the judiciary take control of its own destiny, through its procedural and ethical responsibilities, and forestall some of the worst political responses that it could have felt.

So at the end of the day I'm a little uneasy with the title of the program being "The War on the Judiciary." Certainly judges are sometimes attacked very unfairly and need to respond accordingly. But I think there should be more constructive engagement with judicial independence. I'm more comfortable with that.

COMMENTS BY PANELISTS

Praveen Fernandes

It's a great pleasure to be responding to Professor Geyh's paper. If I start with sort of an overarching theme, it's that Professor Geyh's paper left me relieved and nervous in equal measure. I'll start with the relief part. I say "relieved" because it compels us to abandon slogans that on some level we know don't really capture the truth. And I say "nervous" because the candor is going to require a considerable paradigm shift, and it's also going to involve the sort of education and public engagement campaign that I think the judiciary isn't always comfortable

with on some level. So again, let's start with the relief part. Professor Geyh takes on the notion that judges do not make the law, they follow it. And I have to admit I've always been uncomfortable when I hear those kinds of simplistic notions of what judging involves.

This view of the law, as Professor Geyh says, reduces discretion to an almost nonexistent status, and presents the act of judging as if it were purely mathematical or ministerial. I think that's to the detriment of the public's understanding of what it involves. It's also to the detriment of the critical work that you do on a daily basis and all the complexity that it involves.

In a messaging workshop once, I was instructed to say, "Judges uphold the law." I was also instructed to avoid saying such things as "Judges interpret the law." Now, on one level, I certainly understand that. I understand what is behind the public discomfort with the second, and what is behind the public's embrace of the first. On the other hand, I felt like, huh? For a judge, doesn't upholding the law involve interpreting the law? So already we see this weird, false dichotomy that's set up that, again, makes me feel uncomfortable. Certainly there are places where the text gets us everywhere.

And I hate to collapse to the federal level, but that's a level in which I'm most familiar and the level that I deal with most often. So for instance, if we look at the Constitution, obviously you have to be twenty-five years old to be a member of the U.S. House of Representatives; you have to be thirty to be a U.S. senator; and you have to be thirty-five years old to be the president of the United States. No one seriously contests the meaning of these phrases. But in the late 1700s all of those ages meant a different thing, one could argue, because the average life expectancy was profoundly different. So despite these changed circumstances, nobody seriously contests the meaning of these phrases.

For a judge, doesn't upholding the law involve interpreting the law?

So we're textually bound in lots of different places. However, in the same document, drafted by people who were incredibly precise in one place, there are textually open phrases like "equal protection," "due process," and "cruel and unusual." And in coming to the wide array of decisions that the Supreme Court has had on these terms, they have given meaning to phrases in which the text doesn't get us everywhere. And so, surely no one can say that the text gets us everywhere in these instances. So here's the truth that Professor Geyh makes us face. There are interstitial spaces in the law, and in doing their work judges fill these spaces regularly.

So the paper takes on this notion, and then of course doesn't back away from its defense of judicial independence. It says that, regardless of this more complicated understanding of the role that personal experiences play—the political ideology of a judge—regardless of this more nuanced notion of what goes into judging, we can still defend judicial independence on the ground that it preserves the rule of law, procedural justice, and substantive justice.

Now this gets me to the point where it makes me a little nervous. The messaging workshop that gave the advice to say "uphold the law," not "interpret the law" said it was the result of a huge amount of polling that my organization, Justice at Stake, did. And so, even as we discuss what goes into judging, we have to say that was based on polling. So when the polling messaging workshop comes back and says, "Say 'uphold the law,' don't say 'interpret the law,'" regardless of whether we find that notion to be problematic, it's clearly resonant and meaningful for the public. So in order to move to this second place, this more nuanced, richer understanding,

which I think is absolutely the place where we should be, it's going to involve a huge education and public engagement campaign.

I think that the problem here in crafting the independence/accountability cocktail is going to involve the kinds of education that judges sometimes have been naturally averse to in the past. I think if you look at judicial norms, if you look at sort of the culture and ethos of the judiciary, it has been to step away, at least a little bit, from direct public engagement.

Certainly the code of conduct discourages most political activity, even though it makes clear exceptions, such as Canon 4's clear encouragement for law-related activities. But I think if you really were to search within, there's a natural aversion to getting involved with the kinds of public education and engagement campaigns that I think would be necessary to truly effectuate this change of understanding.

As part of the same polling project that Justice at Stake did, we asked people to react to statements about political influence. And when asked to respond to the statement "We need courts that are free from political influence," 84 percent of the respondents said they "strongly agree"; 10 percent said they "somewhat agree"; only two percent said they "somewhat disagree"; and 3 percent said they "strongly disagree." That means, even with my rudimentary math, that 94 percent either "somewhat agree" or "agree" with the statement that they want courts to be completely free from political influence.

Now, I think if they were pushed they might explain this statement away. If we had focus groups that fully push them to flesh out their understanding of this, they might say, "What we really meant is free from political stakeholders who are meddling with the process. They might not say "entirely free from politics," and we might get towards a more nuanced understanding.

We're going to need more year-round efforts, a rededication to civic education, and honest conversations.

But I think the more likely explanation is that they've been fed a steady diet of statements that "judges are umpires calling balls and strikes," and their understanding of the judicial process reflects that. So they respond well to these processes.

The last thing I'd like to say is that if this education campaign happens, and I think it should, we're going to have to think about the timing. Unfortunately, I think the public engages with conversations around what judicial decision making involves at the very worst times to have a really rational conversation. So you see the kinds of conversation happening at confirmation hearings. You see these conversations happening during elections, whether they're at the initial elections or retention elections.

And to me that's a greatly unfortunate thing. This is sort of like trying to engage conversations about healthy eating and portion control, but choosing Halloween and Thanksgiving as the times to have those kinds of conversations. It's a good conversation, but I wish we wouldn't start those conversations at those times. At those moments the cacophony is so loud that I think it's hard to have the kinds of honest grappling with the issues that the subject requires.

So we're going to need more year-round efforts, a rededication to civic education, and honest conversations along the lines that I think Professor Geyh mentions towards the end of his paper.

James Bopp, Jr.

Thank you very much, and it is indeed an honor and a pleasure to be able to address so many judges, and it is a rare privilege to do so, to be able to speak for just a few moments without being interrupted by questions. And I trust that that is the procedure here, even though I always do enjoy the questions that judges ask in oral argument.

I'm in the unusual position I think, of really agreeing, by and large, with both Professor Geyh and Praveen on the areas that they address, the comments that they had made, the observations they had made. I certainly agree that the justice system and judges specifically would be better served by a more candid explanation of their role, and I think that would place the judiciary in a better position to defend the independence that is a critically important aspect of the judiciary in order for the judiciary to serve justice.

But while I agree with so much of what Professor Geyh said, I do think he painted with somewhat of a broad brush, and the discussion would be further served by three specific considerations that I think help elucidate the concerns and the dimensions of the problem that we are addressing. The first is the context. The context is democratic self-government—government by the people through a representative system. This does, in large measure, define the role of judges and their limitations.

Because any violation of the rule of democratic self-government—in other words, the adoption of law without the consent of the governed, i.e., the people, specifically or through their representatives—is a serious violation of the essential governing principle of the American nation.

So judges therefore have as a principal role (not an exclusive role, as I'll discuss), the application of the law and the facts to a particular case. Thus they are, by and large, applying public policy preferences that have been made by other people—the legislature or the people through the adoption of the constitution—rather than their own. And I do think that the vast majority of judges seek to honor that commitment, that oath of office that they take. And unbiased application of the law to each individual that is subject to the judicial system, through an independent judiciary, is a critical element to providing justice to those people.

It is also true, though, as has been explained by the previous speakers, that there is a dual role for judges. The most robust, at least historically robust, role has been the development of the common law. Forty-nine state judiciaries are empowered to make law boldly and legitimately through the development of the common law. Some of that, of course, has receded because the development of the common law is subject to legislative enactment, and legislatures tend to do that, limiting the role of judges in that area. But it is still in many areas a robust role. Furthermore, the judges make law for particular parties through the application of discretion. And so there are legitimate and robust ways in which judges are authorized to make law, and certainly since the Jacksonian revolution in our country, where popular sovereignty became the watchword. Popular approval of what judges do as they make law has resulted in every state adopting popular elections as a mechanism of vindicating popular sovereignty.

Any violation of the rule of democratic self-government is a serious violation of the essential governing principle of the American nation.

The second role for judges involves a distinction, and that is a distinction between independence and accountability. This is most importantly discussed in the *Republican Party of Minnesota v. White* case,⁶ which I had the privilege to argue successfully in the U.S. Supreme Court. It was argued that the “announce clause” (that is, the clause in Minnesota’s code of judicial ethics that prohibits judicial candidates or judges from announcing their views on disputed legal and political issues) was justified by the interest in an independent judiciary. The Court said, “No, independence is both institutional and personal, and we have all those things. We have a separate branch of government, which is the judiciary, so we have institutional independence. We have protections for individual judges. Their salaries cannot be reduced, they have fixed terms, etc. So we have a whole panoply of things that guarantee both institutional and personal independence of judges.”

But this is about impartiality. That is, impartiality is the interest, a very important one, as defined by the court as not being biased against particular parties, thereby applying the same law regardless of the persons that come before you. What was the proper interest to consider, whether or not it justified the Announce Clause? The issue, by and large, here I think is not independence, but accountability.

In other words, what degree of accountability will judges have when they exercise their discretion, as Professor Geyh says, or make law as I’ve described; and to what extent is that legitimate—in contradistinction,

Independence is a necessary precondition for judges to do justice.

I think, of their principal obligation, which is to apply the law and the facts to an individual case. So in that context, we were really talking about selection and retention of judges, which are the principal mechanism that the people have found to exercise their right to hold judges accountable to their responsibilities.

Now, I would say independence is a necessary precondition for judges to do justice. I would call accountability a mechanism to ensure that judges properly contain themselves within their role. And as I mention, they come to a head through a principal mechanism: selection and retention.

Now of course, there is no perfect mechanism for the people to ensure that judges stay within their proper bounds within our democratic self-government. We’ve changed how we do this periodically in our history, tried about every method available at one time or another to seek to either impose greater accountability or lesser accountability on judges, depending upon the felt needs of the people at the time. But accountability is a critical element in order to preserve democratic self-government and is a mechanism to ensure that judges should endeavor to stay within their proper roles. Some have been found wanting, and some in fact argue that they are not restricted to their proper role.

In many of the universities now, in law schools, we talk about “the living Constitution,” as if the Constitution were an empty vessel—the judge can just pour his or her personal policy preferences into it. There are plenty of respectable people that are making that argument, which is in my view directly contrary to the whole notion of democratic self-government.

That takes me to distinguishing among the nature of the cases that are brought before the court. First is the development of the common law. We know when that occurs. Public policy views and judicial philosophy are perfectly appropriate for the judge to apply in that context. It’s also perfectly appropriate for the people to disagree and throw you out. For instance, in the tort “hellholes” in the south where the throw-outs I’m describing have occurred, the people believe that the businesses and jobs need more consideration in the balance. Perfectly legitimate. Exercise discretion.

There are so many areas of the law where, in applying the law to a particular party, the judge has exercised discretion, and it's perfectly legitimate for the people to second-guess—to feel that the judge's values are not the same as theirs. If it's serious enough to justify the judge being removed, then that's a proper exercise of accountability. When the judges are making law, the people have a right to consent or not to. And that's what they would be doing in that situation.

As to statutes and constitutions, here the judge has a much different responsibility, and that is to be faithful to the decisions that are made by others. The judge should ask what the statutes or constitutional provisions mean, and what the people who wrote

them intended to accomplish. And regardless of your personal views on that, the wisdom or lack thereof in the statute or constitution, the judge is obligated to follow those democratic self-government choices.

When they don't, it's a legitimate question for public discussion. When Justice Rose Bird voted fifty-eight consecutive times against the death penalty, maybe forty-five or fifty people started getting the picture that she was just flat against it as a personal policy preference and wasn't going to uphold it, no matter what anybody said. That is absolutely a proper situation to throw out somebody who is exercising judicial power.

The final situation, of course, is statutory and constitutional provisions where they are vague and in conflict. Again, it's perfectly legitimate for a judge to use his or her policy preferences as to what is the best for society in the resolution of these questions, but at the same time the public would be entitled to ask whether or not that is actually the true result.

I don't think there's any procedural mechanism that will solve or fix the problem or replace actual public accountability.

The bottom line is, I don't think there's any procedural mechanism that will solve or fix the problem or replace actual public accountability. I think the problem is a matter of philosophy—the philosophy of judging. I think that judges who go outside the mainstream development of the common law put themselves at risk. I think people who want to judge based upon the “living Constitution” theory

of judicial activism certainly place themselves at risk, and they should be placed at risk if that is their approach to the matter. The central threat to judicial independence is judicial activism, and no procedural mechanisms are going to solve the problem.

Honorable R. Fred Lewis

It's a pleasure to be here. This is the first time I have attended an all-expenses-paid trip since I've been a judge, and I did so intentionally. I have just come from one of the most interesting merit selection/merit retention battles in the United States. I have the absolute luxury now to never have to face another retention election, so it gives me a great deal of freedom to speak openly and honestly about the process that I found. And with all due respect, sir, it is quite interesting to follow someone who has used every raw partisan political buzz word to discuss what it is that we do as judges.

It's perfectly legitimate for the people to second-guess—to feel that the judge's values are not the same as theirs.

And I'm here this morning to suggest to you that many of the things that Professor Geyh is discussing in the area of politics are definitional. I'm speaking of raw partisan political activity with regard to judicial actions, judicial positions, and the operation of state government. Certainly, courts are political to the extent that they fall within the definitional basis of governance, because we do have to have governance.

But it is clear to me that, unlike what was designed by our founding fathers, the politicians—the raw partisan politicians—are riding on the backs of the courts, riding on your backs to make their partisan political points. I found that the buzzwords of “accountability” and “activism” fell on some tired ears in the state of Florida.

And I found that when the executive committee for a partisan political party became involved in a nonpartisan matter, Floridians who were concerned about the honest operation of government were not receptive. And yes, the state elective processes, and the operation of our court system, are becoming noisier. It's becoming noisier because there's more and more money being thrown into these types of considerations.

Certainly, courts are political to the extent that they fall within the definitional basis of governance, because we do have to have governance.

I remember the statement of Justice Pfeifer of the Ohio Supreme Court, that he never felt more like a hooker at the bus station than when he was forced to become involved in the elective process.⁷ Everyone he encountered was expecting to buy something. There's something wrong with that type of system. There's something wrong when it's so contrary to what our founding fathers suggested.

Over 200 years ago our founding fathers called out a king, and one of the complaints was that our courts were beholden to the king. I suggest to you that that concept tells us that being beholden to any group, be it a political group or a particular interest group, is contrary to our notions of self-governance. That is how our nation was formed, and it has been a perversion of that concept that has led us today to these loud, noisy contests.

Yesterday morning I spoke in Chicago, and I showed the videos of what was happening in the Michigan elections and the Wisconsin elections, in Ohio and in Pennsylvania, Alabama, all across this country. The people are seeing on their airwaves things that cause them to lose trust and confidence in what it is that we need to do, and that is to be able to operate a system that's impartial and fairly administers justice as best we can.

If today we were following what so many of the people want in many communities (even though it's politically incorrect to say it), we'd still have slavery in some of these places. Are we so naïve as to not see beyond what's going on today? And many times, Professor Geyh, I suggest that the academic arena fans the flames of this type of behavior, fans the flames of bigotry and hatred, because we are not accountable as judges.

If we are to believe the raw partisan politics of the day, each and every one of you who occupy these chairs is not acting fairly, not being impartial. Someone's out there saying you're dishonest and that you're a cheat. And yes, at times it may appear that the courts are losing the debate. But the problem is, it is not a debate, it has become a monologue. And we must find ways to change that model.

We do not, as judges and justices, have the power to reach out in a mass media way as raw partisan politicians do, and we have to understand that and be able to deal with that. The difficulty that we face is that we're in a changing society. Recently, our court ruled on a Fourth Amendment question involving the search of a telephone. It's not our grandmother's and grandfather's telephone, it's that handheld computer. I'm sure that the U.S. Supreme Court is going to take the case and make a decision. Where does one fall on that spectrum with regard to those types of things? Who would have thought, when I was watching those movies of World War II, with all those German shepherds running and sniffing everywhere, that one day we would have dogs sniffing under our front doors? This is what we're into, a changing society, a changing time, and a change in expectations.

Being beholden to any group, be it a political group or a particular interest group, is contrary to our notions of self-governance.

Certainly the will of the people, through their elected bodies through the legislatures, are entitled to have the laws applied and upheld. But we are also a common law tradition nation, which in and of itself inescapably says that we as judges and justices will be involved in social policy, because the common law is an application of so many of those things that are created as we live together and deal with the stresses of our time. And yes, we do have to behave ourselves.

But in Florida, we are not in the practice of disciplining any of the judges for the decisions that he or she may make. We are in the business of making sure that we don't have corrupt and dishonest judges, whether or not they make the right decisions, but we want them to make them without inappropriate influences.

I don't know where the *Caperton* decision will take us. I never thought that I would see a five-four vote in that case. But just before that case was argued in the United States Supreme Court, I was at an ABA conference in Atlanta, and some people were saying that the Supreme Court would never become involved in requiring judges to recuse themselves in cases due to money. And I felt at that point in time, if that were the outcome I was in the wrong line of work. Thankfully the U.S. Supreme Court saw its way to limit (although I don't think it did so in a strong way), but to limit to a certain extent the amount of money that would be spent in connection with these judicial elections.

I came to Florida in 1970. I've lived through partisan political election processes. I travelled the state with one of the finest trial judges, running for an elective office. I saw at that time the worst dirt, the worst corruption. It almost caused me to decide to go into another line of work, it was that bad.

In 1976, Floridians said we can't continue down this path. I don't know if any of you had seen how bad it was, but we even had one justice who had submitted to a competency evaluation as to whether he was sane. We had justices receiving proposed opinions from special interests, and then allegedly flushing them down the secret toilet in my building. That's why the plumbing still doesn't work there.

We had four justices on the Florida Supreme Court in the early 1970s under proposed impeachment proceedings. And one who even went "on the lam" after being indicted died in 1986 while on the run from the law, rather than serving the law. I've been through that process. Personally I never thought I was going to be a judge because I didn't want to be, but I've been through the merit retention process.

And then you see the TV ads being run. The one that was most popular in Florida, it's a terrible case, an awful case, because that's what we deal with—awfulness. Activist judges have to be held accountable, but they represented how I had voted in a case, and it was an absolute lie—an absolute, outright lie. I had dissented in the case. So if that's the way we're going to have accountability for judicial offices, and if that's going to be the bottom line where we find ourselves, or which we desire to reach, I wonder what's going to happen for my children and for my grandchildren.

Raw partisan politics will shift and change. They'll fly from one side to the other. And the loser is going to be the constitutional democracy that we established in this great nation.

the schools, nonpartisan, with no agenda, speaking about our core documents on who we are as Americans. We've lost a great amount of our educational process due to some of the testing that's going on. We don't test for those values, those constitutional values. I suggest to you that each and every one of us carries the responsibility, the absolute responsibility, to reach out to tomorrow's American leaders so that they can understand those documents.

I thank you for permitting me to be here, and I'm sorry I've become so passionate about some of these things. But I've had it almost up to here with these buzzwords. Thank you very much.

Edward H. Zebersky

I must tell you, this is a really hard act to follow, but it is my absolute honor to be here following one of my judicial idols, Justice Lewis. My name is Ed Zebersky, I'm a trial lawyer in Fort Lauderdale, Florida. I have a law firm of three lawyers, and what I do is I try every day to endeavor to help individuals fight against corporations.

I was one of the lawyers that assisted Judge Lewis in the merit retention battle. And I want to talk a little bit about that, but before I do I want to implore all of you that I truly believe, and many of my colleagues believe, that our democracy is at a crossroads right now. It is at a crossroads because one of the things that makes our democracy great is the fact that we have checks and balances, and we have three independent branches of government. We have the executive branch that's supposedly there to enforce the laws. We have the legislative branch that is there to make the laws. And as importantly, if not sometimes more importantly, we have the judicial branch to interpret the laws. And that's what you all do.

So when you start saying that what we do is political, it is a field of pure danger. Because raw partisan politics will shift and change. They'll fly from one side to the other. And the loser is going to be the constitutional democracy that we established in this great nation. So I urge each and every one of you to become involved.

Speaking of education, we have a justice teaching program in the State of Florida. We have over 4,500 lawyers and judges going into

When a person goes into a court of law, they need to feel they're going to get a fair shot no matter who the judge is.

Now, when I was growing up, in civics class what we learned was that justice is blind. Justice is impartial. You get a fair shot in the courts. And I believe that if we allow politics into the courtroom, that justice will no longer be blind. And what you're going to find is a winnowing away of the public's trust not only in the judiciary, but in our entire system.

I wish I could tell you that I thought things were going to get better, but one thing I agree with Professor Geyh on is that things are going to get worse. And one of the reasons why things are going to get worse is because it isn't public outrage over judicial activism that is causing all of these judicial elections and the amount of money that's being spent in those elections. It's a well-coordinated effort by certain special interests who no longer want the checks and balances, and they want to be able to do what they want, when they want. All you need to do is to take a look at who is funding most of these judicial elections to figure out why they are occurring and why they are going to continue.

And they're only going to get worse because of the *Citizens United*⁸ decision. Because a lot of times now people can just give whatever they want as independent expenditures, and there is no accountability at all because they don't need to disclose who they are. But the truth is, if you take a look at who has been giving the money over the years, most of the groups have been funded by the Chamber of Commerce.

And I heard something that really upset me earlier, the "tort hellholes of the South." That's really what this is about, to a large degree. Not in every state, but a lot of them. This is a coordinated effort by the Chamber of Commerce to get rid of the "tort hellholes." And unfortunately you are all victims of that.

Now, I can't sit up here and tell you that the trial lawyers don't get involved in judicial races, because we do. We got involved on the side of our Florida justices who were unjustly attacked by vicious, libelous ads. And one of the reasons why they're all still there is because when the lawyers mobilized, the Chamber of Commerce realized how much it was going to cost to win, and they backed off, thankfully.

Another thing that I also want to talk about is Professor Geyh's discussion about messaging. And I think Praveen touched upon it, too. Professor Geyh feels that judges need to accept, and need to alert the public, that sometimes judges' ideology gets involved in decision making. I think that would be a terrible mistake. I think most of the public out there realizes that judges use their discretion in deciding cases. And I think the public understands that there is a hierarchy in judicial decision making. The public views trial courts differently than they do appellate courts, and they view the Supreme Court differently than even the appellate courts. And if we accept the notion that the rule of law becomes less meaningful at the lower levels, I think that's where you're going to find a public revolt.

I think when a person goes into a court of law, they need to feel they're going to get a fair shot no matter who the judge is. And if we change the message, and tell the public that the judges in the trial courts, or even the intermediate appellate courts, are using their own discretion to come up with decisions, I think that will be ruinous.

In civics class what we learned was that justice is blind. Justice is impartial. You get a fair shot in the courts.

I think the public realizes that there are judges who sit on our Supreme Court who make decisions based on their own ideology, and they accept that. But at the other levels, if the public no longer believes that judges are following the law that they swore to uphold, and that they're following their own ideologies, I believe that is the beginning of the ruin of the judiciary.

So as I implore all of you to maintain your independence, to recognize the oath that you all took to uphold the law, even if some of your decisions may be unpopular, and some of your decisions may draw the ire of the Chamber of Commerce. Because without you and your independence, everything that we stand for in this country, and our democracy, is going to start to fray. And that would be a terrible thing.

Response by Professor Geyh

I have just a couple of things. One, I'd like to begin with Justice Lewis, because I think he is absolutely right that raw partisan politics is precisely the problem we ought to be most concerned about. I think it's revelatory that in his experience in Florida, what we started to see was the electorate becoming tired of those raw partisan politics.

I think some of the disagreements we're having here stem from the fact that we define politics differently, and I think Justice Lewis was talking about that. And I think that to the extent that we can diminish the raw partisan politics, that is all for the best. And the judiciary can't get out there with massive advertising campaigns, as he said.

The only reason these raw partisan politics are used is because they work. If they don't work, they won't get used anymore.

My point really dovetails with that, which is: How do we get our public to essentially tire more quickly of the raw partisan politics? Because the only reason these raw partisan politics are used is because they work. If they don't work, they won't get used anymore. And the way they won't get used is by doing exactly what he is saying and what I am arguing—that you get out there, you start having conversations with school children who become

voters, who become members of the community as they grow into adults. When you're talking to the rotary club and when you're talking with jurors, it's that ongoing conversation. You take it one bite at a time. And so in that sense, I am in complete agreement with Justice Lewis.

Ed is the only person with whom I have some disagreement here, because I've been turned into a cartoon caricature. The public understands certain things about what judges do. I'm not advocating we go out there and talk about being partisan or ideological. I never said that, I never wrote that. What I'm saying is that we go out there and have a candid conversation about how judicial discretion works. It's as simple as that. And to claim that "we follow the law," full-stop, doesn't make it.

At the trial court level, when the press reports that judge so-and-so sentences someone to one year and judge so-and-so sentences him to five years, it prompts a conversation about whether one of them is ignoring the law. The answer is "no." I'm not suggesting that either judge is disregarding the law, I'm saying they're exercising discretion in different ways. They're both following the law.

And that is what I emphasize in my paper: that the law is a flexible enough instrument to tolerate differing interpretations. We don't need to play partisan "gotcha" games, because different people are evaluating the law in

different ways. It means that judges exercise discretion by following the law in all cases to the best of their ability. It is not ruinous to talk about the discretion you exercise and why independence is necessary to promote that kind of discretion, and to say that it is within the ambit of the law, although it can be exceeded. That's why we have appellate courts; that's why we have various other mechanisms that are designed to keep it in check.

As far as Jim Bopp and I are concerned, I think Jim and I both get a little uneasy when we agree with each other on much of anything. And I was pleased to see that he agreed with me. When we get into issues of judicial selection, we part company. And the only point I will make there is an historical one, because I do disagree a little bit with Jim on the point he was making there. When it comes to where we are now with judicial elections and the role they play, it is different than what they were during the time of Andrew Jackson.

Yes, it's true that Jacksonian Democrats thought that elected judiciaries would be a good way of keeping the judges in check and rope them in, control them. But elections didn't really hit the stage in a big way until well after Jacksonian Democracy was over, beginning in the 1840s, and the reason that elections hit the stage was to promote an independence of the judiciary from the cronyism that was being perpetrated by governors. Look at Jed Shugerman's book, which is wonderful, and Kermit Hall's work.⁹

Elections were intended to make judges independent of those kinds of influences. They weren't intended to hold them accountable for their decisions on an election-by-election basis. I don't mean to get into essentially a micturition contest over that, I'm just saying it is more complicated than to say ever since Jackson we've been all about holding judges accountable for their decisions. It's a complicated, lengthy process in that way.

Let me close with mentioning Praveen's point, which is, I think, that there are risks to candor, and I think that's Ed's point as well. I don't think it's ruinous if we talk about our discretion, but it is true that if you want to have a bumper sticker it makes a whole lot more sense to say "We follow the law" than to say "We follow the law, kind of, sort of, but here's how it works." It is not easy to explain these things in sound bites. We need to have conversations, longer conversations that are essentially going to better inform people that the partisan stuff that Justice Lewis is very angry about (justifiably so) ends up getting put in its place. That's really what my ambition is in saying, "Let's start a dialogue that's a little more candid."

QUESTIONS AND COMMENTS FROM THE FLOOR

PARTICIPANT: Professor, I think your point about candor is extremely well taken. But I think you conflate, at least in terms of appellate courts, discretion with judgment. Discretion we speak of as something where there are multiple acceptable legally correct answers, but at the appellate level in particular we speak of error in getting a decision right. And I think when we speak that way we ought to recognize that law is not mathematics, but we're also saying something that is true and that is important about holding our policy preferences at arm's length.

Prof. Geyh: We have no accountability for the special interest groups. There's no

We have no accountability for the special interest groups. There's no accountability for those groups after the election, there's no accountability for the lies.

accountability for those groups after the election, there's no accountability for the lies that Judge Lewis talked about. There's no accountability in what can be done about that given the U.S. Supreme Court's approach and the present environment. Because they're never held accountable, and there's no one to sue. The best crappy answer I have for you is that for the last fifteen years, bar organizations have struggled to develop response teams that answer that. On paper it sounds really good. If they can't do it quickly enough to make it relevant, they lose interest. Praveen's organization, Justice at Stake, jumps in from time to time and does a terrific job with that, but I think that the only thing you can do is counter speech with more speech, and the real question is, how do you create opportunities for that? I think in the abstract there is a role for bar organizations and response teams, but I'm unsatisfied with any of the results we've got.

Ed Zebersky: Politics isn't a game of beanbags. And that was one of the interesting things we heard in this last political election. And also one of the reasons why I think it is very sad about what political elections have become; because the only way you can fight back the ads that are lies is with other ads talking about the truth, and talking about what is really going on in these elections. And I agree with Professor Geyh about the relief that the courts find from those attack ads through the bar. I don't agree with him necessarily that the bar is slow to act. I know in Florida we were very quick to act. We saw it coming, and we started organizing. And I suggest to anyone who feels that they are going to have a situation where they're going to be attacked by a special interest group to talk to Judge Lewis about what to do.

James Bopp: *Citizens United* was also one of my cases. The application of *Citizens United* in this context means that organizations, whether they be corporations or labor unions, are able to spend their own money

Which judge here do you want to decide what's the truthful speech and what speech can be made by somebody?

to advocate the election or defeat of a particular candidate, where they were in many cases (not all) prohibited from making those sorts of statements.

It is not true that the vast majority of the money is hidden. The biggest growth industry since *Citizens United* has been Super PACs, and they are all federal political action committees that report their contributors over \$200, those

that participate in the federal system. And studies have been made and less than 10 percent of the money comes from organizations, 90 percent or more comes from individuals who obviously are reporting their own contribution.

The answer to the judge's question of course is, who holds them accountable is the people. Judge Lewis won. I don't know the merits of the situation in his context, but as Professor Geyh says, in our system the way to combat false speech is more speech. That puts the onus on people to get their act together and deal with it, no question.

But the people are the ones who should decide. You think the government should decide? Which judge here do you want to decide what's the truthful speech and what speech can be made by somebody? In the context of the First Amendment ("Congress shall make no law . . . abridging the freedom of speech . . ."), that's just not possible.

Justice Lewis: May I add one additional comment? The problematical posture is created by money. Until I started going back into schools all across the country, I had no idea what a lack of civic knowledge and

understanding was going on in our schools—and it's not just Florida's schools. And I don't say that to criticize our children or our educational systems. I respect the hierarchy of studies that we have developed, and the high-stakes testing to make sure that education is working, the sciences and math.

But it is frightening how little our students know about the founding of this great nation, about our core values, about our core documents, and about how the system even works. They learn how the system works through the money that has paid for ads on TV. I am a big believer in education. Maybe it's because, coming out of the coal mining areas of West Virginia, I really was frightened my entire life that I wouldn't have access to an education.

But education to me has meant everything, and I think it means everything to the strength of this nation and the strength of the judicial branch, which I believe is unequalled by any other in the world. And I think that's what keeps our freedoms and our liberties—the style of judicial independence and impartiality that we see here, and the trust and confidence that has been generated.

But I look across the room, and most of you have white hair like I do. Today's education is not what we experienced in the schools. So I would encourage each and every one of you to follow the model of educating our students—not in a partisan way, but using the core documents, your state constitutions, our federal Constitution.

And that, I believe, is the promise of tomorrow: the education of our youth. And you as appellate judges, you have time to do this. We started in Florida. They laughed at me and said it doesn't pay anything so lawyers won't do it, judges won't do it, they won't get out of their courthouses and get out of those seats. Well, you know what? They do, and they did, and Floridians are better for it.

Chief Justice Maureen O'Connor, Supreme Court of Ohio: Good morning. I wanted to bring up the points that Justice Lewis just made about the fact that we have citizens in this country, and in my state of Ohio, where I'm Chief Justice, who don't understand what appellate judges do. We have such a lack of education, and I agree 100 percent that it's up to the bar and it's up to the bench to get out and talk to not only students but adult groups as well. They believe that judges have constituencies, which is just so wrong. So it is through education that we'll be able to prevail, and that will make elections much more meaningful. In Ohio we do have the head-to-head elections at every turn.

And I also want to follow up by maybe putting Justice Pfeifer's comment in context. Justice Pfeifer was my colleague, my dear friend, who said that he felt like a hooker down at the bus station when he was running for judicial election and was courted by the special interest groups and the lawyers and everybody who was donating money. Now, Justice Pfeifer came from decades in the legislature. I can tell you based on conversations I've had with Paul that he has thought maybe he shouldn't have made that comment to *The New York Times*, but I felt that the correct analysis is that money follows the candidate's philosophy and record. A true judicial candidate and judicial officer does not change who they are and what their values are and how they do their job based on their contributions. I think it's the other way around, with their record and who they are attracting contributions from similarly philosophically aligned individuals. That's what I'd like to make clear.

Notes

¹ Throughout the Report, footnotes for oral remarks were added by the Forum Reporter.

² Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA REP. 395 (1906), reprinted at 35 F.R.D. 241 (1964).

³ Roy A. Schotland, *Comment*, 61 LAW & CONTEMPORARY PROBLEMS 149, 150 (Summer 1998), available at <http://scholarship.law.duke.edu/lcp/vol61/iss3/8>.

⁴ Republican Party of Minn. v. White, 536 U.S. 765 (2002).

⁵ Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 873 (2009).

⁶ 536 U.S. 765.

⁷ Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, available at <http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all>.

⁸ Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

⁹ Jed Shugerman, *The People's Court: Pursuing Judicial Independence in America* (Harvard Univ. Press 2012); Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 9 AM. B. FOUND. RES. J. 345 (Spring 1984).

HONORING YOUR OATH IN POLITICAL TIMES

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Introduction

Although the exact words of the judicial oath vary among jurisdictions, state and federal judges alike swear to administer justice “impartially” and in “accordance with the law.”¹ The U.S. Constitution guarantees federal judges life tenure and salary protection to ensure that they can fulfill that oath by insulating them from public and political pressure that could influence their decisions. Yet state judges—most of whom are elected or appointed to office for limited terms—have no such protection. How are state judges to live up to their oath of independence under such conditions?

Part I of this paper asserts that all judges—even life-tenured federal judges—should take public opinion into account when deciding cases and explains that doing so is entirely consistent with the judicial oath to remain impartial and independent. Judicial independence requires that a judge be free to ignore political and popular pressure to reach an outcome that cannot be reconciled with the law, but it does not demand that a judge ignore the majority’s views when faced with an ambiguous statute or broadly-worded constitutional provision. As Roscoe Pound noted over a century ago, the law is not an abstract logic problem, but rather a tool for social control that must be infused with a “human element.”² The public’s views should be respected on the ground that they are a source of information about the meaning of the law—just as text, legislative history, original understanding, and longstanding practice are also used to guide judicial interpretation.³ In short, majority preferences have a legitimate role to play in shaping the meaning of the law.

However, Part I concludes by noting there will always be hard cases in which a judge will conclude that the correct ruling—that is, the only ruling that an “impartial” judge could issue “in accordance with the law”—will anger, perhaps even outrage, the general public. A judge is obligated by her oath of office to rule as she believes the law requires, regardless of the personal and political consequences. Admittedly, however, that is an easy statement for an observer to make, and a much harder one for judges facing election or reappointment to follow.

That said, Part II explains that even unpopular decisions in hard cases rarely result in the ouster of an incumbent judge, and thus judges should not be overly fearful of an electorate that returns most of them to office. This part examines the risks facing state appellate court judges today and concludes that even in the new era of high-salience judicial elections, the chance of losing office over a few unpopular decisions remains small. Certainly, elected judges are sometimes voted out of office by constituents unhappy with their decisions, as was vividly illustrated by the ouster of three justices in Iowa’s 2010 retention elections. Even now, however, the great majority of incumbent state judges are retained, and the risks of losing office are particularly low for the judges who face retention elections rather than competitive elections, as well as for those who are reappointed to office by one of the political branches. Furthermore, it is very hard to predict today which cases will incite voter wrath at the ballot box tomorrow, particularly because creative opponents can mischaracterize decisions that, if properly understood, would be supported by most citizens. For all these reasons, judges should spend less time worrying about re-election when deciding individual cases. Judges will be attacked by their opponents no matter how they rule in individual cases, but they will usually prevail.

Admittedly, however, in rare cases judges may lose elections, or fail to be re-appointed, as a result of their votes in particular cases. Part III describes a few historical examples of judges who made the hard choice to rule

as the law and their conscience required in controversial cases, risking not only their jobs, but their professional reputations, their social standing, and sometimes even their lives in the interest of living up to their judicial oath. They are an inspiration to all judges, and in particular to elected judges, who today face greater pressures than ever before to avoid backlash rather than follow the law.

I. DEFENDING MAJORITARIAN JUDGING

To be independent, a judge must be able to decide cases as she thinks best, free from external compulsion to reach a particular outcome. Judges must be able to approach each case on its merits and be willing and able to ignore pressure by elected officials, campaign donors, special interests, and the general public. When a new judge takes an oath to be “impartial” and to decide each case in “accordance with the law,” that is the promise

To be independent, a judge must be able to decide cases as she thinks best, free from external compulsion to reach a particular outcome.

she is making. Indeed, it is the need for just this kind of independence that led the framers of the U.S. Constitution to provide federal judges with life tenure and salary protection.⁴

Judicial independence does not require that a judge ignore majority preferences, however.⁵ As Pound’s sociological jurisprudence teaches, the law is not some abstract truth to be mechanically deduced through pure logic, but rather a tool for social control that must be interpreted and applied in light of its

real-world consequences. The majority’s preferences, as well as those of their elected representatives, can be an appropriate source of information to which judges can refer when making hard choices about the meaning of ambiguous laws.

A. Majoritarian Judging in Theory

1. Federal Judges

Many scholars agree that federal courts should keep majority preferences in mind when deciding cases, despite the fact that these judges are insulated from public opinion by constitutional design. An entire academic movement known as “popular constitutionalism” has been devoted to the idea that judges can, and should, take a back seat to the people when it comes to constitutional interpretation.⁶ The conventional view—the one held for centuries by judges, legal scholars, and even executive and legislative branch officials—granted courts the final say on the meaning of the U.S. Constitution and state constitutions.⁷ Popular constitutionalists have criticized this tradition of judicial supremacy, arguing instead that the public should play a major role in defining and applying constitutional norms.⁸

Popular constitutionalists contend that judicial supremacy is at odds with democratic principles, which demand that federal judges consider the views of the people they serve. Also important, giving the people a role in constitutional interpretation promotes an active and engaged citizenry. Finally, despite their insulated status, the federal courts need the support of the public and their political representatives to ensure that their opinions are respected and enforced, and thus they must continue to care about the people’s reactions to their decisions despite their job security. For all these reasons, constitutional interpretation should take into account majority preferences, even if it should not always turn on them.

Popular constitutionalists recognize, however, that one purpose of a Constitution is to protect rights and values that could too easily be cast aside by a fleeting and tyrannical majority. For that reason, most popular constitutionalists do not reject judicial review altogether. They continue to believe that judges should strike down legislation and invalidate executive action that transgresses constitutional boundaries, at least in clear cases. But they do argue in favor of judicial restraint. That is, they contend that courts should show greater respect for the judgment of elected officials—and by extension, those who elected them—by adopting strong presumptions that legislation is constitutional, by issuing minimalist opinions that cause the least disruption possible to the choices made by democratic institutions, and by avoiding some such disputes altogether through “passive” devices such as the constitutional avoidance canon and justiciability doctrines.⁹

Many scholars agree that federal courts should keep majority preferences in mind when deciding cases.

A court’s decision about the meaning of a statute can be overridden by an unhappy legislature, but only at significant cost.

Although much of the scholarly literature has focused on constitutional interpretation, statutory and regulatory interpretation should also take into account the preferences of the democratic institutions that enacted these provisions. Unlike constitutions, statutes and regulations are often detailed and specific. Nonetheless, they will always contain ambiguities and gaps that come to light only when applied in a concrete case. A judge can look to majority preferences to help resolve such confusion. Not only is doing so consistent with democratic values, it is also practical and efficient.¹⁰

A court’s decision about the meaning of a statute can be overridden by an unhappy legislature, but only at significant cost. Better for a court to conserve resources by adopting the interpretation that is most likely to please the people and their representatives, assuming other sources of statutory interpretation allow.¹¹

Interestingly, federal judges themselves acknowledge the need to remain in touch with the values of the majority of Americans. Seventh Circuit Judge Richard Posner made this point explicitly:

[A]s long as the populist element in adjudication does not swell to the point where unpopular though innocent people are convicted of crimes, or other gross departures from legality occur, conforming judicial policies to democratic preferences can be regarded as a good thing in a society that prides itself on being the world’s leading democracy.¹²

Even Supreme Court justices have acknowledged the need to keep judicial decisions in line with public expectations. When then-Justice Rehnquist was asked whether the justices were able “to isolate themselves from the pressure of public opinion,” he responded that “we are not able to do so and it would probably be unwise to try.”¹³ Although Justice Ruth Bader Ginsburg supports the result in *Roe v. Wade*, she has criticized that decision on the ground that it was unnecessarily broad, needlessly antagonizing those on the other side of the abortion debate. As a result, she observed that the decision “seemed to have stopped the momentum that was on the side of change.”¹⁴ In her view, the Court should have issued a narrower ruling striking down the Texas statute at issue in the case—which outlawed all abortions except those necessary to save the life of the mother—without making a sweeping pronouncement about the constitutional right to abortion.¹⁵ Similarly, Justice O’Connor

has explained that to ensure the enforcement of its decisions, the Court is dependent on the “confidence of the public in the correctness of those decisions” and so it “ha[s] to be aware of public opinions and of attitudes toward our system of justice.”¹⁶ Recently, Justice O’Connor questioned the Supreme Court’s decision to hear *Bush v. Gore* because it “stirred up the public” and “gave the Court a less-than perfect reputation.”¹⁷ Posner, Rehnquist, Ginsburg, and O’Connor all see a need for courts to issue narrow, minimalist decisions that take public preferences into account and avoid needlessly antagonizing those who disagree with them.

2. State Courts

If federal courts have an obligation to consider majority preferences when deciding cases, then state courts have even more reason to do so.¹⁸ With a few exceptions, state court judges are elected or appointed to limited terms.¹⁹ In other words, the state in which they serve has chosen a selection method intended to keep judges accountable—either to the electorate, or to the political elites, or sometimes both. Of course, just because a judge is selected through such a system does not mean that she is obligated to follow the preferences of the voters. Nonetheless, the method of selection suggests that the state intends for these judges to look to public opinion as one factor among many to help them determine the meaning of an ambiguous statutory text or the scope of a broad constitutional provision.²⁰ Indeed, one could argue that the selection method itself becomes a part of the state law. If a state chooses to elect its judges through partisan elections every six years, then that state intends for its statutes and constitution to be interpreted with a thumb on the scale in favor of the majority’s values and preferences.

In their book *In Defense of Judicial Elections*, Professors Chris Bonneau and Melinda Gann Hall argue that elected judges have an obligation to decide close cases in light of public preferences. They acknowledge that some will react with “shock and dismay” to the idea of a state court judge deciding cases in accord with the will of the people because judges are supposed to decide cases as the *law* requires, not as their constituents prefer. But they contend that once a case reaches a state supreme court, the legal issues are often not simple or obvious, and thus the law itself—in the form of text and precedent—provides no clear answer. Bonneau and Hall believe that “[state] law should represent public preferences and political culture, as long as the mandates of the United States Constitution and other federal laws are observed.”²¹

David Pozen agrees with Bonneau and Hall that judges can incorporate majority preferences into their decisionmaking without abandoning the rule of law, though he carefully cabins the weight to be given public opinion.²² He asserts that judges can “confine their populism to cases in which the legal answer seems uncertain, while public sentiment seems clear . . . [and] widespread,” and explains that, even then, public opinion should not be given dispositive weight, but rather should “supplement or gloss the traditional interpretive aids.”²³ In short, he concludes that state courts can defer to public opinion in much the same way federal courts defer to agency views when applying *Chevron* deference. [See Part I.B.2 below.] By doing so, Pozen concludes that

If a state chooses to elect its judges through partisan elections every six years, then that state intends for its statutes and constitution to be interpreted with a thumb on the scale in favor of the majority’s values and preferences.

the “majoritarian jurist can aim to avoid the least popular options within the range of plausible alternatives”—and thereby show respect to rule of law principles as well as democratic values.²⁴

Accordingly, state court judges, like their federal counterparts, can and should look to public opinion to guide them in close cases. If open-ended statutory language has more than one reasonable interpretation, or if a vaguely worded constitutional provision can be applied broadly or narrowly, then it seems reasonable for *any* judge—and particularly one from a state that chooses to give the people or the state government a direct role in that judge’s selection and retention—to take the public’s views on the matter into account when making a final decision.

Judges can incorporate majority preferences into their decisionmaking without abandoning the rule of law.

B. Majoritarian Judging in Practice

1. Federal Courts

Although scholars have only recently begun to tout the idea that courts *should* follow majority preferences, it appears that courts have long been doing so in practice, if not always openly. Most of the research thus far has focused on the U.S. Supreme Court. As several academics have demonstrated, the Supreme Court’s decisions generally track public opinion, rarely straying too far from majority preferences—a surprising result considering that its members are life tenured and thus not directly accountable to the people.²⁵ Occasionally, this stock-taking is even explicit. For example, in *Chevron v. NRDC*, the Supreme Court held that courts must defer to an

agency’s reasonable interpretation of an ambiguous statute, in part because the agency is accountable to the people in a way that federal courts are not.²⁶ Similarly, when applying the Eighth Amendment, the Supreme Court frequently surveys state practices to determine whether a penalty transgresses the nation’s “evolving standards of decency.”

The Supreme Court’s decisions generally track public opinion, rarely straying too far from majority preferences.

In his book *The Will of the People*, Barry Friedman challenges the conventional view of the federal courts as a counter-majoritarian institution in tension with democratic values. Friedman chronicles the Court’s long

history of deferring to majority opinion. Again and again, Friedman explains how the Court’s most famous (and infamous) decisions—from *Dred Scott* and *Plessy v. Ferguson* to *Brown v. Board of Education* and *Loving v. Virginia*—can all be understood as the Court falling in line behind public opinion.

Friedman argues that the Supreme Court is not the staunchly independent institution it appears to be on paper, but rather is highly attuned to public preferences. For example, in *Naim v. Naim*,²⁷ decided in 1957, the Court refused to strike down a state ban on interracial marriage out of fear that a contrary ruling would provoke outrage that would undermine *Brown v. Board of Education* and its efforts to promote racial equality.²⁸ The Court did not return to the issue until its 1967 decision in *Loving v. Virginia*, by which time the states that continued to prohibit interracial marriage were in the minority. A more recent example of the Court’s

fear of hostile public reaction can be found in *Elk Grove Unified School District v. Newdow*, in which the Court manipulated standing doctrine to dodge the question whether school children could be forced to recite the Pledge of Allegiance in light of its reference to “under God.”²⁹ Finally, as the New York Times recently observed in an article entitled “Court Follows Nation’s Lead,” the Supreme Court’s decision in *United States v. Windsor* to strike down the Defense of Marriage Act is in perfect accord with public opinion polls.³⁰ Friedman concludes that the Supreme Court is well aware that Americans “support the exercise of judicial review . . . only so long as the Court’s decisions d[o] not stray far, and for long, from the heart of what the public understands the Constitution to mean.”³¹

2. State Courts

Even as legal scholars have been focused on the U.S. Supreme Court, political scientists have studied the decisions of elected and appointed state court judges to determine the degree to which the selection method affects their decisions. Numerous empirical studies confirm that selection method affects judicial decisionmaking.³² Elected judges differ in the size of tort awards, and in the length and severity of criminal sentences when compared to appointed judges.³³ The evidence shows that the more directly accountable the judge, the less likely she is to invalidate legislation enacted by the state legislature: In a study of abortion cases, political scientists determined that those judges retained through competitive re-elections were less likely to invalidate statutes than judges facing retention elections and judges with life tenure.³⁴ Judges who were

The more directly accountable the judge, the less likely she is to invalidate legislation enacted by the state legislature.

subject to legislative or gubernatorial reappointment avoided hearing constitutional challenges to abortion legislation more often than judges who were retained through contested or retention elections, using their power over their own docket, or justiciability rules, to avoid addressing these controversial questions altogether.³⁵

Elected judges themselves acknowledge that they are influenced by constituent preferences. In a survey of 369 judges in states using retention elections, only a small minority considered themselves to be independent of voter influence.³⁶ The administrators of the survey found that a “very high percentage

of judges . . . say judicial behavior is shaped by retention elections.”³⁷ As a former justice on the California Supreme Court put it: “There’s no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.”³⁸

C. The Limits of Majoritarian Judging

As just explained, public opinion should, and does, play a role in judicial decisionmaking. But the rule of law means that public opinion should not be given dispositive weight, and it should be disregarded in cases in which the public’s animosity toward a particular segment of the population is at odds with constitutional values. Determining when public opinion may be consulted, and the weight to give it, are hard questions that are outside the parameters of this paper. Almost everyone will agree, however, that in some categories of cases a judge should disregard the public reaction—even if that reaction is likely to be anger or outrage.

Such cases are difficult for *any* judge, but they pose a particular problem for a state court judge whose term is nearing its end, especially one who must run for re-election against an opponent eager to use every controversial decision as fodder in the next campaign. Although such cases do not arise on a regular basis, there are sure to be moments in every judge's career when the judge will put herself at risk by ruling on a question that is likely to generate opposition by interest groups, and perhaps lead to widespread media coverage and retaliation at the ballot box. In such cases, the judicial oath requires a judge to put aside her own political future and rule as she believes the law requires, regardless of personal consequences.

Doing so is made a little easier for two reasons. First, as discussed in Part II, the risks of a controversial judicial decision should not be exaggerated. The great majority of elected and appointed judges retain their jobs—even those who issue unpopular decisions and then must

run against an opponent in partisan elections. Second, judges today can look for inspiration to those who faced such hard choices in the past and voted as the law (and their conscience) required. As discussed in Part III, these “heroic judges” should serve as role models for judges facing electoral pressure today.

The great majority of elected and appointed judges retain their jobs—even those who issue unpopular decisions and then must run against an opponent in partisan elections.

II. MEASURING THE RISKS

Most state court judges are elected or appointed to office for limited terms, and thus must convince the public, or the public's representatives, to retain them. In recent years, judges have been voted out of office after being targeted for their decisions in controversial cases. In 2010, Iowa Supreme Court Chief Justice Marsha Ternus, along with Justices David Baker and Michael Streit, were defeated as a result of joining the Iowa Supreme Court's unanimous opinion in *Varnum v. Brien* holding that the Iowa Constitution gives same-sex couples the right to marry. California Supreme Court Chief Justice Rose Bird and two associate justices on that same court lost their seats in 1986 after voting repeatedly against the death penalty, and in 1996 Tennessee Justice Penny White lost an election for the same reason. In 2006, Nevada Supreme Court Justice Nancy Becker was voted out of office after interest groups targeted her for her vote in favor of a tax increase.³⁹ Over the last twenty years, dozens of other judges have lost elections because their opponents highlighted their records in criminal matters and accused them of being “soft on crime.”

As explained in Part I of this paper, public opinion can play an appropriate role in shaping judicial decisions, but it should not trump all other considerations. And yet how can judges be asked to ignore the political consequences of their decisions—the ever-present “crocodile in the bathtub?”⁴⁰ In part, the answer is that the risks of defeat, even in the “new era” of contested judicial elections, are not actually all that great. Moreover, it is difficult to predict which decisions will provoke backlash that translates into votes in an election. In light of both the low risk of losing office and the difficulty of predicting voter reaction, judges should give public opinion only the weight that it *legitimately* deserves in crafting a sensible legal rule, while at the same time making every effort to disregard its impact on their retention.

A. The Risk to Incumbents

Admittedly, the risks of losing office have increased significantly in recent years. Judicial elections were once “sleepy, low key affairs” in which the incumbent was rarely challenged and turnout was low.⁴¹ Starting in the 1980s, however, judicial elections entered a “new era,” in which campaigns came with more money, more advertising, more opposition, more interest groups, and ultimately the defeat of more incumbents.⁴²

The risks facing judges today are real, but they should not be exaggerated. A closer look at the numbers shows that only a small fraction of state court judges are forced out of office by the electorate. Between 1990 and 2004, even as the “new era” in judicial elections was well underway, 91.3% of all state supreme court justices were re-elected to office.⁴³ Although challengers are appearing in higher numbers than before, about a quarter of incumbents in non-partisan state supreme court elections during that fourteen year period ran unopposed, and thus were *assured* of retaining office.⁴⁴ Even when challenged, 85% of incumbent supreme court justices in states with non-partisan elections prevailed. Justices running for re-election in states with partisan election were most at risk, losing 31% of the time between 1990 and 2004.⁴⁵ That is a high loss rate, to be sure, but it nonetheless means that the great majority of even these vulnerable judges are returned to office.

Incumbents in retention elections are extremely likely to retain their positions.

Incumbents in retention elections are extremely likely to retain their positions. Between 1990 and 2004, only 3 of the 231 incumbent state supreme court justices facing retention elections were defeated.⁴⁶ In the most recent retention elections in 2012, not a single justice was forced out of office. Nor were most elections close. Since the first retention election in 1936, only 6.8% (47 out of 688 elections) have resulted in a margin of victory of less than 60%.⁴⁷ On average, incumbents in retention elections are supported by 75% of the electorate—in other words, they not only retain their seats: they do so by a landslide.⁴⁸ In short, despite high-profile anomalies such as the 2010 Iowa elections, incumbents in retention elections almost always keep their seats, and incumbents in partisan and non-partisan elections are very likely to do so.⁴⁹

Intermediate appellate court judges are even more secure than their supreme court counterparts. A study of all intermediate appellate court general elections from 2000 through 2006 revealed that only 27% of incumbents faced an opponent, and only 8% were voted out of office.⁵⁰ Again, most elections were not even close. On average, intermediate appellate judges up for re-election received 75% of the vote.⁵¹

A few conclusions stand out from all these numbers. First, judicial elections today are more competitive than ever before; and second, even today, the vast majority of judges will be returned to office. The 2010 election in Iowa aside, judges who face retention elections are remarkably likely to retain their seat, with their re-election rates hovering around 99%, and the overall retention rate for all elected judges is over 90%.

B. Reacting to the Risks

Of course, such numbers tell only part of the story. Despite the incumbent success rate, elected judges are more likely to be ousted from office than incumbent members of the U.S. House of Representatives—an institution designed to be responsive to popular pressure.⁵² Furthermore, the fact that many judges are unopposed, or easily win re-election over a challenger, does not suggest that they are free to ignore public

opinion. To the contrary, these judges may be successful because, in the words of one longtime observer, they “constantly work to make voters happy so that they will not have to face a quality challenger in the future.”⁵³

That said, judges should not be overly fearful of elections. As just explained, most incumbent state judges win re-election, and most serve terms considerably longer than the two years granted to members of the House of Representatives. Even when these judges are targeted for defeat for their rulings on controversial matters such as abortion, same-sex marriage, prisoner rights, property rights, and taxes, most survive the challenge—many by quite comfortable margins.⁵⁴ So although the risk of non-retention is real, at least as of today it is not very large.

Moreover, even when judges lose their bid for re-election, it is not clear that the substance of the judge’s decisions was the deciding factor. Obviously, there are exceptions. No one doubts that three Iowa Supreme Court Justices lost their bid for retention because of their vote in *Varnum v. Brien*. But in other elections, the reasons for an incumbent’s defeat are far less clear.⁵⁵ Although judges are often targeted for defeat for being “soft on crime,” it is not clear whether votes in criminal cases matter as much to retention as votes

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affecting business. Negative advertisements often criticize a judge’s vote in criminal cases, but the great majority of these ads are funded by pro-business interests, and their sponsors’ real concern is that the incumbent is unfriendly to revisions to the tort system, or too friendly to class actions.⁵⁶

For example, Justice Warren McGraw was voted off the Supreme Court of Appeals of West Virginia after Don Blankenship, the CEO of Massey Coal Co., spent \$3 million to oust him from office and replace him with Justice Brent Benjamin.⁵⁷ In a remarkable admission, Blankenship told New York Times reporter Adam Liptak that he “instruct[ed] his aides to find a decision [by Justice McGraw] that would enrage the public.”⁵⁸ They succeeded, locating a decision in which Justice McGraw agreed to free a convicted pedophile, which Blankenship then featured in advertisements criticizing Justice McGraw.⁵⁹ However, as Blankenship “cheerfully conceded” to Liptak, “his real objection was to Justice McGraw’s rulings against corporate defendants,” not his alleged leniency in criminal matters.⁶⁰ In other words, if Warren McGraw wanted to keep his job, it is not clear that it was his opinion in the criminal case that was really the problem. Rather, it seems that it was his reputation as being hard on corporations, and not soft on crime, that ultimately ended his judicial career.

A judge can never be sure which of her decisions will catalyze opposition, or which line from an opinion will be extracted and cited against her. Of course, judges are well aware that some issues are high salience, and thus more likely to provoke opposition than others, but even obviously controversial decisions will not always produce the expected reaction. The same Iowans who ousted three supreme court justices for their ruling in favor of same-sex marriage in 2010 returned Justice David Wiggins to office with 55% of the vote in 2012 despite a concerted effort to defeat him for his vote in *Varnum*.⁶¹ Likewise, California Supreme Court Justice Carlos Moreno was in the 4-3 majority that struck down the state law invalidating same-sex marriage in California, and he was the *only* justice to vote against Proposition 8, which amended the California Constitution to override the California Supreme Court’s decision.⁶² And yet, to the surprise of some observers,⁶³ Justice Moreno easily survived his 2010 retention election, winning 67% of the vote. In short, no judge can know in advance whether a particular decision will mobilize opposition and lead to his removal from office.

The electorate remains poorly informed about judicial elections.

Furthermore, the electorate remains poorly informed about judicial elections and is more likely to vote blindly based on name or party affiliation than on knowledge of that judge's voting record.⁶⁴ Until that changes, judges can assume that most of the people voting for (and against) them have no knowledge of their judicial philosophy or how they voted in recent cases. And at least some of the well-informed voters

should value judges who issue principled decisions based on the law, even if they disagree with the result. In other words, at least as of today, the *substance* of a judge's decisions will not typically be the basis for a judge's re-election or defeat. For the same reason, a judge should not let speculation about how the voters *might* react to his decision improperly influence his vote in a pending case.

C. The Scope of the Risk

Finally, it is worth noting that the risks facing most judges in the United States are almost entirely limited to the ballot box. Today, American jurists are almost never in any physical danger as a result of issuing unpopular decisions. In contrast to countries such as Pakistan, Kenya, or Afghanistan, where judges and their families are sometimes physically attacked for their decisions,⁶⁵ American judges are almost never injured or killed by those unhappy with their rulings from the bench.⁶⁶ Certainly, many judges are *threatened* with violence at some point during their careers—and all such threats must be taken seriously—but these threats are almost never carried out.⁶⁷ For the most part, judges in the United States do not have to fear for their lives, or for the lives of their families, when deciding hard cases.

Thus, the worst consequence of a judge's unpopular decision is that he will lose his seat at the end of his term. Losing office is a blow, particularly after a contentious election. Typically, however, being voted out of office is not a career-ending event. Judges who were removed from office for their principled stands on important issues are now serving in government,⁶⁸ have returned to private practice, or have entered academia.⁶⁹ Their actions are recognized through awards and offers to speak across the nation.⁷⁰ Many declare that they are proud of having voted as they believe the law required.⁷¹ For example, former Iowa Supreme Court Chief Justice Marsha Ternus has publicly declared that she “would make the same decision today, even knowing that it would cost me my position on the court.”⁷²

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III. HEROIC JUDGING

The judicial history of the United States is filled with examples of judges who voted as they believed the law and their conscience required, despite the personal and professional consequences. Referring to the lower federal court judges who presided over desegregation in the South, Owen Fiss wrote that it “is not reasonable to expect judges to be heroes, but the truth of the matter is that many lived up to these unreasonable expectations—they fought the popular pressures at great personal sacrifice and discomfort.”⁷³ These judicial heroes serve as examples for state judges under intense political and popular pressure today.

A. The Civil Rights Movement and the Fifth Circuit Four

The lower federal court judges charged with implementing *Brown v. Board of Education* in the face of the South's massive resistance were forced to make hard choices. These judges had not set out to change race relations in the South; that challenge was thrust upon them by the inspiring, but vague, Supreme Court decisions holding that separate is not equal and that southern public schools must therefore desegregate at "all deliberate speed." After its decisions in *Brown I* and *Brown II*, the Supreme Court bowed out of the matter, leaving desegregation almost entirely in the hands of the lower federal courts. Although these judges were guaranteed life tenure and salary protection, no one could guarantee their physical safety or social acceptance in the southern states in which they lived and worked. And yet, despite these uncomfortable realities, the judges on those courts took on the task with zeal.

Four judges on the Fifth Circuit led the way. Together, Judges John Brown, Elbert Tuttle, Richard Rives, and John Minor Wisdom mandated the integration of public institutions in the South despite the active opposition of the state government and most of the population, and with little help from a timid federal government. Two of the "Fifth Circuit Four" were born and raised in the South, and all four practiced law there. They were members of civic organizations, leaders of the bar, and regular attendees of their local churches. In short, they were pillars of their communities. In the words of one historian, they were the "unlikely heroes" of the civil rights era.⁷⁴

Judge Rives authored the three-judge district court decision striking down Montgomery, Alabama's segregated public transportation system on the ground that it violated the Fourteenth Amendment—a case that received national attention after Reverend Martin Luther King led a boycott of the city's bus system.⁷⁵ Looking back today, Judge Rives's vote seems like an easy one, but it must not have felt so to him at the time. Judge Rives was faced with the question whether segregated public transportation was unconstitutional in 1956, at a time when nearly all of southern civic life was segregated. Moreover, *Brown v. Board of Education*, decided only two years before, did not address public transportation or any of the other segregated public facilities, and so there was no clear precedent directly on point to guide his decision. In his dissent from Judge Rives's opinion, Judge Lynn argued that segregation in public transportation could be overruled only by the Supreme Court, and then cited one of Rives's earlier opinions to support the point that the lower courts should not anticipate Supreme Court decisions. Rives could easily have voted the other way.

Rives was an odd candidate for the role of civil rights savior. As he himself later put it, he was not "pure on this question of bigotry."⁷⁶ Rives was a respected member of a community that broadly supported separation of the races. He once advised the Montgomery Board of Registrars on how to thwart an early registration drive by black voters.⁷⁷ In short, Judge Rives seemed like the last person who would risk his comfortable position in society to go several steps beyond the Supreme Court's most controversial ruling on questions of race. And yet in joining with Judge Johnson to end segregation on Montgomery's buses, he wrote "[w]e cannot in good conscience perform our duty as judges by blindly following the precedent of *Plessy v. Ferguson* when . . . we think that [case] has been impliedly, though not explicitly, overruled."⁷⁸

Rives paid a price for his decision. State Senator Sam Englehardt declared that "the real white people of Alabama [will] never [] forget the names of [Judges] Rives and Johnson. Nothing they can ever do would rectify this great wrong they have done to the good people of this state."⁷⁹ An anonymous caller told Judge Rives's wife to "enjoy your husband while you can. You won't have him long."⁸⁰ Rives's son's grave was desecrated by vandals.

When he and his wife arrived at church on Sunday mornings, the other parishioners would get up to move away from him. His lawyers' club switched the location of their weekly luncheon without notifying him.⁸¹

But Rives was not deterred. Indeed, he continued to strike down inequality in all facets of Alabama's civic life, from the segregation of public schools and parks to the exclusion of blacks from jury pools and the ballot box. For 15 years Rives did battle with Governor George Wallace, who excoriated Rives and repeatedly flouted his rulings. When Rives was asked how he felt about being snubbed by those he had known all his life in Montgomery, Rives replied simply: "I feel sorry for them."⁸²

Perhaps Rives was comforted by the fact that he was not alone. Judge John Minor Wisdom, like Rives, was also a "son of the Old South who became an architect of the new South."⁸³ Judge Wisdom took center stage in the "showdown in Mississippi," which resulted in James Meredith's enrollment at the University of Mississippi despite Governor Ross Barnett's every effort to circumvent the court's rulings, and the furious public reaction that followed.⁸⁴ As one of the "Fifth Circuit Four," Wisdom played a central role in ending segregation in voter registration, jury selection, and public education. His decision in *United States v. Jefferson County Board of Education* laid out in detail the assignment of students and teachers to specific schools to achieve integration, forcing desegregation to proceed "lock, stock and barrel."⁸⁵ And, like Rives, Wisdom suffered for his active role in the civil rights movement. He was subjected to death threats and harassment. Two of his dogs were poisoned, and rattlesnakes were thrown into his backyard.⁸⁶ (When asked about it years later he shrugged and said "they were small rattlers."⁸⁷)

Judges John Brown and Elbert Tuttle played similar roles and suffered similar consequences. Judge Brown commented on the social pressure that he faced in the wake of his decisions requiring southern school boards to integrate the public schools: "[L]ifetime tenure insulates judges from anxiety over worldly cares for body and home and family. But it does not protect them from the unconscious urge for the approbation of their fellow-man."⁸⁸

These judges were threatened, harassed, ostracized, and vilified for their decisions. Their wives and children and parents suffered as well. Was it worth it? Those who watched them in action reported that it was. Burke Marshall, who ran the Civil Rights Division in the Department of Justice during the Kennedy Administration, wrote:

Those four judges, I think, have made as much of an imprint on American society and American law as any four judges below the Supreme Court have ever done on any court If it hadn't been for judges like that on the Fifth Circuit, I think *Brown* would have failed in the end.⁸⁹

B. Judge Horton and the Scottsboro Boys

James Edwin Horton Jr., who presided over one of the "Scottsboro Boy's" trials, was also an unlikely judicial hero. The Scottsboro Boys were nine black teenagers accused of raping two white women in 1931, and has long been viewed as a case in which racism prevented the accused from receiving fair trials. Judge Horton's father was a former slaveholder, and his grandfather was a general in the Confederate army.⁹⁰ Horton was elected to the Alabama circuit court in 1922. In 1933, when he was assigned to preside over the second trial of defendant Haywood Patterson, he was in the fifth year of his second six-year term. Judge Horton was a highly respected jurist and at the time of the case he was lauded in the Alabama papers for his "unusually equable nature,

great legal ability, and fairness.”⁹¹ Even the Scottsboro Boys’ prosecutor declared that Horton “would make an excellent judge.”⁹²

From the outset, Horton made it clear that he would protect the defendant’s right to a fair trial. When he heard rumors that a mob was planning to lynch Patterson, Horton denounced them as “cowardly murderers” and informed the packed courtroom that he had ordered the police to shoot to kill if necessary to protect the prisoner.⁹³ Over the course of the trial, Horton began to doubt the defendant’s guilt, but the jury convicted Patterson of rape and sentenced him to die. On June 22, 1933, Horton stunned observers by setting aside the jury verdict. He concluded that a “defendant should not be convicted without corroboration where the testimony of the prosecutrix bears on its face indication of improbability or unreliability and particularly when it is contradicted by other evidence.”⁹⁴

Judge Horton lost his bid for re-election the following year, and he retired from judging. His defeat did not come as a surprise. After a visitor suggested that if Horton dared annul the jury’s verdict he would lose his upcoming bid for re-election, Horton asked “What does that have to do with the case?”⁹⁵ When asked years later to discuss his decision to void the jury verdict, Horton quoted his family’s motto: “*Justitia fiat coelum ruat*”—Let justice be done though the Heavens may fall.⁹⁶

C. Seven State Supreme Courts and Same-Sex Marriage

To date, seven state supreme courts have held that their state constitution protects same-sex couples.⁹⁷ Although none of the judges on these courts are subject to contested elections, five of the seven states require that the justices be periodically reappointed or re-elected through retention elections, and so the justices on these five courts knew that their decisions could put an end to their judicial careers.⁹⁸ Furthermore, justices on all seven courts faced at least a mild version of the social ostracism and threats to their physical safety experienced by the “Fifth Circuit Four.” Despite the personal and professional risks, the justices on these seven supreme courts voted as they believed the law required, and thus they too qualify as judicial heroes.⁹⁹

Chief Justice Marsha Ternus and her fellow justices on the Iowa Supreme Court were well aware of the risks they took by issuing a decision in favor of same sex marriage one year before retention elections. As Chief Justice Ternus subsequently explained, “I can assure you the members of our court were very much aware when we issued our decision in *Varnum* that it would unleash a wave of criticism. Nonetheless, we remained true to our oath of office in which we promised to uphold the Iowa Constitution without fear, favor, or hope of reward.”¹⁰⁰ Three members of the Court, including Chief Justice Ternus, were voted out of office the following year. California Supreme Court Justice Carlos Moreno joined the 4-3 majority in support of same-sex marriage in 2008, and was the only member of the court to vote to invalidate the constitutional amendment that overrode the court’s decision in 2009, despite the fact that he faced a retention election the following year.¹⁰¹ Illustrating the randomness of judicial elections, Justice Moreno was easily re-elected, but it would have surprised no one if opponents of same-sex marriage had targeted him for defeat. Justices on other state supreme courts faced threats to remove them through impeachment or by petition. While ultimately unsuccessful, none of these justices could be certain that he/she would remain in office after issuing such a controversial decision.

The personal costs were high as well. Massachusetts Supreme Court Justice Roderick Ireland knew that his position on that court was secure, as Massachusetts is one of only three states to provide their justices with life tenure.¹⁰² Nonetheless, he and his colleagues were well aware that their decision in *Goodridge v. Department*

The integrity of the court as an institution must remain a judge's paramount concern.

of Public Health would receive a great deal of public attention, much of it negative, and so they prepared themselves for the onslaught that followed. The justices received hundreds of letters and emails criticizing the decision, most vitriolic in tone, and some containing death threats against the justices and their families.¹⁰³ After receiving credible death threats, Justice Ireland was accompanied by an armed guard when giving a public speech on Martin Luther King, Jr., Day.¹⁰⁴ Critics hired airplanes to fly over the justices' homes trailing banners condemning them for their decision. Another group came to Justice Ireland's church on multiple Sundays, disrupting the service and asking the church to rescind his membership and support a petition to remove him from the bench.¹⁰⁵ Although Justice Ireland described being shaken by the hostile public reaction, he does not doubt his decision:

No matter how difficult the case, no matter how controversial the issue, and no matter how intense the scrutiny of the media, the integrity of the court as an institution must remain a judge's paramount concern. Our actions as jurists must be consistent with this principle. My court interprets the Massachusetts Constitution—that is what we are sworn to do, to the best of our abilities. We judges, we must learn not to take criticism from the public, media, litigants, or politicians personally. Keeping my focus on protecting the integrity of my court helped me to do the job expected of a person in my position.¹⁰⁶

CONCLUSION

This paper contends that the judicial oath of independence does not prevent judges from taking public opinion into account, as long as they do so in ways that respect rather than undermine the rule of law. However, in those rare cases in which a judge concludes that the right outcome is also one that will generate the kind of outrage that might oust him from office, he must follow the long and noble tradition among judges and cast his vote as the law and his conscience require, despite the risks. Happily, however, those risks are small—smaller, perhaps, than most judges realize when on the precipice of casting such an important vote.

Notes

¹ See, e.g., 28 U.S.C. § 453; Iowa Code § 63.6; Ohio Rev. Code Ann. § 3.23; Tenn. Code Ann. § 17-2-120.

² Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 Green Bag 607, 612 (1907).

³ For the purpose of this paper, “public opinion” and “majority preference” are used to mean the preference of a majority of the citizens within a judge's jurisdiction, as determined by sources such as opinion polls, amicus briefs, protest marches, media coverage, election results, and the preferences of the democratically elected legislature. Admittedly, however, majority preferences are sometimes difficult, if not impossible, to measure. Moreover, the public may not have a coherent view on many legal questions, and judicial decisions themselves can shape public opinion. See, e.g., David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2132 (2010) (discussing the problem of ascertaining public opinion, and questioning whether it even exists) [hereinafter “Pozen, Judicial Elections as Popular Constitutionalism”]. Although this paper acknowledges that measuring “majority preferences” is a complex, and sometimes futile, endeavor, it assumes that judges are able to gauge the public's views in at least some of the cases that come before them, and particularly on high-salience issues such as abortion and same-sex marriage.

⁴ CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* 29-30 (2008). See also THE FEDERALIST No. 78, at 426 (Alexander Hamilton) (E.H. Scott ed., 2002) (stating that the “complete independence of the courts of justice” is an “essential” component of a constitution that limits legislative power).

⁵ See *supra* note 3 for a discussion of the difficulty of ascertaining “majority preferences.”

⁶ See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). Although the popular consti-

tutionalists tend to focus their fire on the deference given to federal courts' interpretation of the U.S. Constitution, their views would similarly suggest dethroning the role of state courts in interpreting both the state and federal constitutions. See Pozen, *Judicial Elections as Popular Constitutionalism*, *supra* note 3, at 2067.

⁷ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (declaring that the "federal judiciary is supreme in the exposition of the law of the Constitution" and that government officials must follow the Supreme Court's pronouncements).

⁸ See, e.g., *KRAMER*, *supra* note 6.

⁹ See Pozen, *Judicial Elections as Popular Constitutionalism*, *supra* note 3, at 2076-77.

¹⁰ William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 405 (1991) (arguing that the Court should pay attention to current legislative preferences and interest group configurations to avoid the need for Congress "to revisit statutes constantly to update them—a job the Court can perform more efficiently for a wide range of issues").

¹¹ See, e.g., *In the Matter of Jacob*, 660 N.E.2d 397 (N.Y. 1995) (interpreting New York's adoption statute to permit the unmarried partners of biological parents to adopt children after recognizing demographic changes in family composition, as well as the New York legislature's consistent pattern of expanding categories of adults who may adopt). See also WILLIAM N. ESKRIDGE JR., *DYNAMIC STATUTORY INTERPRETATION* 152 (1994) (arguing that the preferences of the current Congress are relevant to interpreting statutes passed by a previous Congress).

¹² RICHARD A. POSNER, *HOW JUDGES THINK* 136-37 (2008).

¹³ BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 371 (2009).

¹⁴ Jason Keyser, *Ginsburg: Roe Gave Abortion Opponents a Target*, *SALON* (May 12, 2013), available at http://www.salon.com/2013/05/12/ginsburg_roe_gave_abortion_opponents_a_target/.

¹⁵ See *id.* However, Robert Post and Reva Siegal argue that backlash generated by *Roe v. Wade* had many benefits. They point out that it sharpened the debate and promoted political engagement by both those in the pro-life and pro-choice camps. And they point out that such backlash may be an "unavoidable consequence of vindicating constitutional rights." Robert Post & Reva Siegal, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *HARV. C.R.-C.L. L. REV.* 373, 395 (2007).

¹⁶ See FRIEDMAN, *supra* note 13, at 271.

¹⁷ Dahleen Glanton, *Retired Justice O'Connor: Bush v. Gore "stirred up the public"*, *CHI. TRIBUNE* (Apr. 26, 2013), available at http://articles.chicagotribune.com/2013-04-26/news/chi-retired-justice-oconnor-bush-v-gore-stirred-up-the-public-20130426_1_bush-v-retired-justice-oconnor-high-court.

¹⁸ See, e.g., Chief Judge Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 *N.Y.U. L. REV.* 1 (1995) (asserting that state courts' authority to make common law means that they have the legitimacy and competency to update statutes and constitutional provisions to reflect new circumstances).

¹⁹ See CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* 6 (2009) (chart of state selection methods noting that only three states give their supreme court justices life tenure); David Rottman, Chantal Bromage, Michael Zose & Bryan Thompson, *National Center for State Courts, Judicial Selection 101: What Differs and What Matters, Court Statistics Project: Caseload Highlights*, Oct. 2006, at 1, available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/judicial/id/54> (reporting that approximately 90% of all state court judges are elected to limited terms).

²⁰ See Pozen, *Judicial Elections as Popular Constitutionalism*, *supra* note 3, at 2083-84 (suggesting that selection method should influence a judge's interpretive philosophy); Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 *U. CHI. L. REV.* 1215, 1242 (2012) (same).

²¹ BONNEAU & HALL, *supra* note 19, at 14-15. Although Bonneau and Hall do not say so directly, it appears that they believe state court judges should interpret both state statutes and state constitutions in light of public opinion.

²² However, Pozen is a critic of Bonneau and Hall's contention that judicial elections promote democracy. See David E. Pozen, *Are Judicial Elections Democracy-Enhancing?*, in *WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* (Charles Gardner Geyh ed., 2011) (hereinafter "Pozen, *Are Judicial Elections Democracy-Enhancing?*").

²³ Pozen, *Judicial Elections as Popular Constitutionalism*, *supra* note 3, at 2082. Pozen's article is focused on the role of state judges in resolving constitutional questions, and thus he does not express any opinion on the role of the elected state court judge in statutory interpretation.

²⁴ *Id.* at 2083. See also Pozen, *Are Judicial Elections Democracy-Enhancing?*, *supra* note 22, at 265 ("Elective judiciaries might legitimately be responsive to the present popular will at the margins, when the law is unclear."); Bruhl & Leib, *supra* note 20, at 1242 ("Depending on how exactly one construes the intent behind the creation of elected judiciaries, that intent would seem to . . . require greater consideration of popular views.").

²⁵ See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. PUB. L.* 279 (1957) (arguing that the Court usually follows majority preferences); See FRIEDMAN, *supra* note 13 (same).

Although federal judges are insulated through life tenure, they are not completely unaccountable to the public or the political branches. Some federal judges will desire promotion to a higher court, which will keep them attuned to the preferences of the President and the Senate, although of course Supreme Court justices have nothing to aspire to. All federal judges are well aware that Congress can control their jurisdiction, the remedies they can provide, and the size of the federal judiciary's budget, which can influence their decisionmaking. Finally, federal judges know that they must rely on the willingness of the state and federal government, as well as the people themselves, to enforce and abide by their decisions, which operates as a further check on their rulings.

²⁶ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (agencies, and not courts, should choose between "competing political interests" because "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . ."). The case arose from the Reagan Administration's view that the term "stationary source" in the Clean Air Act should be interpreted broadly, allowing for the emission of more pollution than alternative definitions. The Court deferred to the agency, but in doing so made clear that a narrower definition of "stationary source" would also be permissible, thereby allowing the meaning of that term to shift with changes in administration.

Of course, agency views on the meaning of statutory terms may not accord perfectly with public preferences. Approximately 40% of eligible Americans do not vote for President, and even those who do vote will not have a clear idea of how that President's political appointees will interpret vague terms in statutes.

²⁷ 350 U.S. 891 (1955).

- ²⁸ See FRIEDMAN, *supra* note 13, at 249 (quoting a law clerk's memo stating that "[i]n view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time").
- ²⁹ Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). See also Cass R. Sunstein, *If the People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 157 (2007).
- ³⁰ Adam Nagourney, *Court Follows Nation's Lead*, N.Y. TIMES, Jun. 26, 2013, at A1.
- ³¹ FRIEDMAN, *supra* note 13, at 14.
- ³² Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 169 (2009) ("The evidence supports the widespread belief that judges respond to political pressure in an effort to be reelected.").
- ³³ See, e.g., Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999) (finding that judicial elections influence tort awards); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When it Runs for Office?*, 48 AM. J. POL. SCI. 247, 258 (2004) (reviewing hundreds of decisions by elected judges in Pennsylvania and finding that "all judges, even the most punitive, increase their sentences as reelection nears").
- ³⁴ Paul Brace et al., *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265, 1294 (1999).
- ³⁵ *Id.* at 1291.
- ³⁶ Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312 (1994).
- ³⁷ *Id.* at 315.
- ³⁸ See Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 39 (2003) (quoting Paul Reiding, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52, 58).
- ³⁹ Editorial, *Becker Has the Right Stuff*, LAS VEGAS SUN, Oct. 22, 2006, at A4.
- ⁴⁰ See Baum, *supra* note 38.
- ⁴¹ Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 733 (2010). See also MELINDA GANN HALL, COMPETITION AS ACCOUNTABILITY IN STATE SUPREME COURT ELECTIONS, IN RUNNING FOR JUDGE 165, 172 (Matthew J. Streb, ed., 2007).
- ⁴² See, e.g., David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 267-68 (2008).
- ⁴³ BONNEAU & HALL, *supra* note 19, at 71.
- ⁴⁴ *Id.* at 79-80. In states with partisan elections for the supreme court, 90% of the incumbents face a challenger. *Id.*
- ⁴⁵ *Id.* at 84.
- ⁴⁶ *Id.* at 83.
- ⁴⁷ Herbert M. Kritzer, *Change in Supreme Court Elections: Is Voting Becoming More Partisan?* (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879952.
- ⁴⁸ BONNEAU & HALL, *supra* note 19, at 80-81.
- ⁴⁹ In a study of 3,912 judicial retention elections spanning a 30-year period, only 50 judges (about 1 percent) were defeated. See Bruhl & Leib, *supra* note 20, at 1233. (Citing Larry Aspin & William K. Hall, *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 3-4, 8 (2000)). More than half of those defeated (28) were in Illinois, which requires that judges receive at least 60% of the vote to retain their seats; only one judge in Illinois received less than 50% of the vote in that period.
- ⁵⁰ Matthew J. Streb, et al., *Contestation, Competition, and the Potential for Accountability in Intermediate Appellate Court Elections*, 91 JUDICATURE 70, 70, 74 (2007) (the authors analyzed 942 intermediate appellate court general elections held between 2000 and 2006, 412 of which were retention elections, 389 partisan elections, and 141 nonpartisan elections).
- ⁵¹ *Id.*
- ⁵² Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AMERICAN POLITICAL SCIENCE REVIEW 315 (2001). Hall's research shows that partisan state supreme court elections are significantly more competitive than elections for the House of Representatives.
- ⁵³ Streb, et al., *supra* note 50, at 73.
- ⁵⁴ See Kritzer, *supra* note 47, at 31 (describing 2010 retention elections in Colorado and Alaska).
- ⁵⁵ Cf., Cass Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 176 (2007) (questioning the ability of a judge to determine which decisions will provoke backlash). But see Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1669 (2010) ("[S]tate judges are far better positioned than federal judges to weigh the costs and benefits of potential backlash."); see also *id.* at 1671 ("[W]hile state justices cannot perfectly anticipate what consequences will follow from their decisions, they are positioned to make well-educated guesses about potential backlash risks in many of the high visibility cases that they decide").
- ⁵⁶ Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 COLUM. L. REV. Sidebar 27, 35 n. 35 (2011).
- ⁵⁷ See *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 873 (2009).
- ⁵⁸ Adam Liptak, *Case May Alter Judge Elections Across Country*, N.Y. TIMES, Feb. 15, 2009, at A29.
- ⁵⁹ Liptak described these ads as "arguably misleading." The defendant was a juvenile when he abused a younger half-brother, and he himself had been the victim of sexual abuse at the age of 7 by two adult family members. Justice McGraw had joined in a majority opinion agreeing to release the defendant on probation when he turned 18. The advertisements criticizing Justice McGraw's decision did not include these salient facts.
- ⁶⁰ Liptak, *supra* note 58.
- ⁶¹ Tedi Mathis, *Iowa votes to retain Justice David Wiggins*, IOWA STATE DAILY (Nov. 6, 2012), available at http://www.iowastatedaily.com/news/article_bd7af54e-2886-11e2-b0c2-0019bb2963f4.html.
- ⁶² See *Strauss v. Horton*, 46 Cal. 4th 364 (2009) (holding valid Proposition 8's amendment to the Constitution defining marriage as between a man and a woman).

⁶³ One observer noted that Justice Moreno is an “obvious target for voters who are opposed to gay marriage” and expressed surprise that the issue did not come up in his retention election. See <http://chooseyourjudges.therampant.com/2013/02/is-gay-marriage-an-issue-in-judicial-elections/>. Some academics speculate that California voters, unlike Iowa voters, can fairly easily override Supreme Court decisions through the constitutional amendment process, and thus have another outlet for expressing their hostility to controversial judicial decisions. See, e.g., Devins *supra* note 55.

⁶⁴ Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, in *RUNNING FOR JUDGE* 140, 141 (Matthew J. Streb ed., 2007).

⁶⁵ See, e.g., Kevin Sieff, *Car bomb outside Afghanistan's Supreme Court kills at least 17*, WASH. POST (June 11, 2013); *Kenya's Chief Justice says judges have been threatened before elections*, available at <http://news.msn.com/world/kenyas-chief-justice-says-judges-have-been-threatened-before-elections> (describing threats by a “criminal gang” and attacks on five judges). See also United Nations Special Rapporteur on the independence of judges and lawyers, Ms. Gabriela Knaul, Preliminary observations on the official visit to the Islamic Republic of Pakistan, 29 May 2012, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12194&LangID=E> (describing “serious threats and attacks o[n] judges,” and in particular relating to their rulings in blasphemy cases).

See, e.g., http://www.washingtonpost.com/world/middle_east/car-bomb-outside-afghanistans-supreme-court-kills-14/2013/06/11/dab51ac2-d29a-11e2-8cbe-1bcbee06f8f8_story.html.

⁶⁶ However, there are some rare exceptions.

⁶⁷ *Threats against federal prosecutors, judges are up*, U.S.A. TODAY (Jan. 4, 2010), available at http://usatoday30.usatoday.com/news/washington/2010-01-04-judge-threats-increase_N.htm (reporting that the number of threats against federal judges have more than doubled between 2003 and 2008, but that no federal judges have been killed).

⁶⁸ For example, former West Virginia Supreme Court of Appeals Justice Warren McGraw is now a circuit court judge in West Virginia. See <http://www.courts.wv.gov/lower-courts/counties/wyoming.html>.

⁶⁹ See, e.g., Professor Penny White's faculty web page, available at <http://law.utk.edu/people/penny-j-white/> (describing former Tennessee Supreme Court Justice Penny White's position as Director of the Center for Advocacy and Elvin E. Overton Distinguished Professor of Law).

⁷⁰ See, e.g., Iowa Justices Who Legalized Same Sex Marriage Honored with 2012 John F. Kennedy Profile in Courage Award, available at <http://www.jfklibrary.org/Events-and-Awards/Profile-in-Courage-Award/Award-Recipients/David-Baker-Michael-Streit-Marsha-Ternus-2012.aspx?t=2> (announcing that three Iowa Justices who were voted out of office as a result of their votes in *Varnum v. Brien* were awarded the John F. Kennedy Profile in Courage Award in 2012); Marsha Ternus Biography, available at http://www.mternuslaw.com/?page_id=8 (describing former Chief Justice Marsha Ternus's work in private practice, speaking engagements, honorary degrees, awards, and publications); Former Iowa Supreme Court Justice Michael Streit, '75, to Deliver 2013 Commencement Address, available at http://www.sandiego.edu/about/news_center/news/news_detail.php?_focus=45012.

⁷¹ See, e.g., California Supreme Court Chief Justice Rose Elizabeth Bird's Concession Statement, Election Night November 1986 (stating that she “accepts” her defeat with “equanimity because . . . I took the oath of office . . . guarantee[ing] to the people of this state that I would well and faithfully discharge my duties and that I would uphold and defend the Constitution and Bill of Rights. I've tried during these years I've been in this position to do my very best to fulfill that obligation. And so this evening I accept this decision with a conscience at peace.”)

⁷² See, e.g., Ternus: No regrets on *Varnum v. Brien* ruling, available at <http://oneiowa.org/2013/04/ternus-no-regrets-on-varnum-v-brien-ruling/>.

⁷³ OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 89 (Indiana University Press 1978).

⁷⁴ JACK BASS, *UNLIKELY HEROES* (1981).

⁷⁵ *Browder v. Gayle*, 147 F. Supp. 707 (1956).

⁷⁶ BASS, *supra* note 74, at 73.

⁷⁷ *Id.*

⁷⁸ *Id.* at 75.

⁷⁹ *Id.* at 77.

⁸⁰ *Id.* at 79.

⁸¹ *Id.* at 79-80.

⁸² *Id.* at 80.

⁸³ JOEL WILLIAM FRIEDMAN, *CHAMPION OF CIVIL RIGHTS: JUDGE JOHN MINOR WISDOM* 374 (2009).

⁸⁴ *Id.* at 154-70.

⁸⁵ 372 F.2d 836 (5th Cir. 1966).

⁸⁶ See Dennis Persica, *John Minor Wisdom: The Times-Picayune covers 175 years of New Orleans history*, THE TIMES PICAYUNE (Jan. 29, 2012), available at http://www.nola.com/175years/index.ssf/2012/01/john_minor_wisdom_the_times_pi.html.

⁸⁷ True Wisdom, available at http://www.cbsnews.com/8301-3445_162-47855.html.

⁸⁸ John R. Brown, *Hail to the Chief: Hutcheson, the Judge*, 38 TEX. L. REV. 140, 1415 (1959).

⁸⁹ BASS, *supra* note 74, at 17.

⁹⁰ Douglas O. Linder, *Without Fear or Favor: Judge James Edwin Horton and the Trial of the 'Scottsboro Boys'*, 68 UMKC L. REV. 549, 549 (2000).

⁹¹ *Id.* at 553.

⁹² *Id.*

⁹³ *Id.* at 565.

⁹⁴ *Id.* at 575.

⁹⁵ *Id.* at 574.

⁹⁶ *Id.* at 578.

⁹⁷ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 193 P.3d 384 (Cal. 2008); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

⁹⁸ See Devins, *supra* note 55, at 1675-77 (discussing the appointment and retention systems of these seven state supreme courts).

⁹⁹ Even if one disagrees with these judges on the merits, or thinks the legality of same-sex marriage should be resolved through the democratic process rather than through judicial decisions, one can still admire these judges for taking a principled position in the face of significant personal risks.

¹⁰⁰ Matthew W. Green Jr., Susan J. Becker, Hon. Marsha K. Ternus, Camilla B. Taylor & Daniel P. Tokaji, *The Politicization of Judicial Elections and Its Effect on Judicial Independence*, 60 CLEVELAND ST. L. REV. 461 (2012).

¹⁰¹ See *supra* notes 63-64 and accompanying text.

¹⁰² Justice Ireland is now Chief Justice of the Supreme Judicial Court of Massachusetts.

¹⁰³ Letters Justice Ireland received called him “dumb,” “nuts,” “an abomination,” a “communist,” and a “traitor.” One person wrote, “We pray every day that you all get cancer and rought [sic] in HELL.” See Roderick L. Ireland, *In Goodridge’s Wake: Reflections on the Political, Public, and Personal Repercussions of the Massachusetts Same-Sex Marriage Cases*, 85 N.Y.U. L. REV. 1417, 1421, 1431 (2010).

¹⁰⁴ *Id.* at 1431.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1433-34.

ORAL REMARKS OF PROFESSOR FROST

Good afternoon. It's a real honor to speak to all of you today who are doing that hard work in the trenches that we academics like to just write and talk about. I'm a law professor, so I speak to many audiences, but my typical audience is twenty-somethings, and I have to say it's a real pleasure to speak to a group of people who are not updating their Facebook status as I speak!

The topic today, generally speaking, is judicial independence. Although the exact words of the oaths that you have taken differ, all of you have promised to administer justice impartially and in accordance with the law. Indeed, that is the same oath that federal judges take before they take their seats.

Yet, as we all know, the U.S. Constitution gives federal judges the benefit of life tenure and salary guarantees, protections that the framers thought were essential to maintaining their independence. In contrast, as we all know, the great majority of state court judges are limited in their terms and must face either reelection or reappointment in order to continue to serve in the role of judge.

So the hard question for us today—and I don't think we're going to answer it today, but we can be talking about it—is: How are judges to fulfill that oath of office when they lack that kind of independence and protection that our nation has chosen to give to federal judges, but not to most state court judges?

So I have three points that I want to make today. I want to start out by talking about the fact that it is not forbidden or prohibited to take public opinion into account in judicial decision making in a very narrow and cabined way in cases in which there is room for discretion. Those are very important qualifications, and I'll talk more about them in a minute. But that's the first point I want to make.

However, I recognize that there will be cases (and all of you will have them) in which the right answer, clearly the right answer according to the law as you see it, will be at odds with what the people of your state prefer, and in fact might even anger or outrage them. Those are the really tough cases for those who face the need to be reelected or reappointed.

So I have two observations I want to make about those hard cases. One I hope will be comforting, and one I hope will be inspiring. The comforting point I hope to make here is that the risks in such hard cases may not be as great as you think they are, and I'll give you some statistics to back that up.

The inspiring point is that we are part of a nation that has a long and noble tradition of judges being willing to risk and sacrifice their jobs—and sometimes even more: their social status and perks, even their lives—to do the right thing in these hard cases. I have some examples of such judges that I hope will be an inspiration for those of you who find yourselves in similar difficult situations with hard cases to decide.

It is not forbidden or prohibited to take public opinion into account in judicial decision making in a very narrow and cabined way in cases in which there is room for discretion.

Why shouldn't public opinion be part of the analysis in the same way that you look to other factors in such hard cases, such as original intent, the legislative history, and long-standing practice?

So to start with my first point, there's nothing wrong with taking public opinion into account in cases in which there is room for discretion—that is, in which there is a vague constitutional provision or an ambiguous statute or regulation in which you have some latitude, in which there is no clear, obvious answer.

Why shouldn't public opinion be part of the analysis in the same way that you look to other factors in such hard cases, such as original intent, the legislative history, and long-standing practice? These are all tools that courts use to help them decide such cases. I and many other academics think public opinion should be a part of that process—not a dispositive factor, and not one that should ever trump the law when it is clear, but nonetheless something that courts can look to.

Indeed, “*Chevron* deference,”¹ which federal courts and state courts use to help decide the meaning of statutes that are administered by agencies, is in a way the same kind of thing, a willingness to look at what agencies think—that is, what a political branch of government thinks about the meaning of a statute—to help a court decide what that meaning should be, as long as that statute is truly ambiguous.

Popular Constitutionalism

There is a whole academic movement called “popular constitutionalism” that says that not only should judges look to public opinion, but also that the public should take a more active role in helping us interpret the Constitution. They frown on this idea of judicial supremacy, the idea that only judges should tell us what the law should mean.

Popular constitutionalists think it promotes respect for the Constitution and an active, engaged citizenry, to turn to the citizens and have them help with that hard task of constitutional interpretation. There has also been a lot of acknowledgement of this by judges, even federal judges, who one would think would be completely insulated from public opinion. Federal judges have said, “Yes, we think we can, do, and should look to public opinion to help resolve some cases.” Judge Richard Posner on the Seventh Circuit, who has written and thought a lot about the role of a judge, has said that judges should indeed look to public opinion when deciding cases—not to the degree of overlooking the law or ignoring the law, but just as an aid. He says that's consistent with our democratic principles. Even Chief Justice Rehnquist, when asked if the justices were able to isolate themselves from the pressure of public opinion, responded that “We are not able to do so, and it would probably be unwise to try.”

Courts never stray too far or for too long from what the public is willing to accept.

A final point I'll make here is that many political scientists and legal scholars have looked at decisions by courts, particularly by the U.S. Supreme Court, and have said that their opinions really do track public opinion. They never stray too far or for too long from what the public is willing to accept. I think two really good

examples are the recent decisions in *United States v. Windsor*² and *Hollingsworth v. Perry*,³ the same-sex marriage cases before the U.S. Supreme Court this term, which were decided almost completely in accordance with what the public felt was acceptable. Indeed, *The New York Times* published an article on this, the title of which is, “Court Follows Nation’s Lead.”⁴ So I think it’s accepted that public opinion (or if not “accepted,” it’s something that a lot of people have been talking about, judges and scholars alike) could play a role at the margins in cases in which there is room for discretion.

The really truly hard cases are the ones in which I think we can all agree that judges sometimes have to rule in ways that they know the public will dislike, perhaps even be outraged by, but the judge feels the law requires that outcome. No one questions (or at least I’m sure no one in this room questions) that judges nonetheless must rule as the law requires despite the public backlash and the public outrage that may follow. So what about these hard cases? What do we do in these situations?

One of the points I wanted to make here is that maybe judges should not be as fearful of making these decisions as they might feel when they first see that case come onto the docket and worry about the public reaction to the decision. Because the risks are actually not as great as one might think if one only paid attention to high-profile events like the recent Iowa retention election, in which three justices lost their seats after voting in favor of same-sex marriage.

No one questions that judges must rule as the law requires despite the public backlash and the public outrage that may follow.

I thought the statistics on this were pretty striking, and pretty important to repeat to you. Between 1990 and 2004, more than 90 percent of all state supreme court justices were reelected to office. This is in this new era in which we see far more contested elections, a lot more money in elections, and a lot more outside groups getting involved. Nonetheless, even in this new era, we see over 90 percent of supreme court justices being reelected. A quarter of the incumbents in nonpartisan state supreme court elections during that period ran unopposed, meaning they were assured of retaining their spots. Even when they were facing an opponent, 85 percent prevailed. Incumbents in retention elections are particularly likely to retain their seats.

Again, between 1990 and 2004, only three of the 231 incumbent state supreme court justices facing retention elections were defeated. In the most recent elections in 2012, *no* justice was forced out of office. Intermediate appellate court justices are even more secure than their supreme court counterparts. Between 2000 and 2006, only 27 percent of incumbents even faced an opponent in an election. So another point I want to make here is that the risks are not that great. The great majority of you facing reelection and reappointment will prevail even if there is a controversial decision out there that has your name on it. Those are just the facts, even today. This situation may be changing. If I stood here ten years from now, I don’t know if I could say the same. But at least as of today, the great majority of justices and judges are returned to office.

I think another important point to make here is that when judges or justices are voted out of office, it sometimes is for reasons that have nothing to do with the substance of their decisions. Sometimes name recognition, party affiliation can be the basis for a vote. We see fairly random results, such as three justices in Iowa being voted out of office. Yet a justice in California, Carlos Moreno, retained his seat by a wide margin in his retention election although he had voted in favor of same-sex marriage—and this in a state that rejected

that through Proposition 8 shortly thereafter. So I think it's important to realize that we can't really guess when a judge is faced with a hard case which one of those cases is going to be the inspiration for someone to run against him, or is going to become part of an attack ad.

Indeed, I think something important to mention here is that often, attack ads attack decisions that aren't really the basis for the opposition. So often justices are called soft on crime, and that will be the accusation

I feel very lucky to be a lawyer in a country that has this tradition of judges who are willing to take risks.

made, and there will be an advertisement running that describes some decision that the judge issued to release someone on parole or to shorten someone's sentence. Yet when you see who's funding that ad, it will be a business interest, someone whose real interest is in promoting corporate interests over those of private plaintiffs.

I think one really obvious and interesting example of this was when Justice Warren McGraw was voted off the Supreme Court of Appeals of West Virginia after Don Blankenship, the CEO of a coal company, spent \$3 million to help oust him.

Don Blankenship gave a surprisingly frank interview to Adam Liptak of *The New York Times*, in which he said that he had "instructed his aides to find a decision that would enrage the public."⁵

So that's an example of that phenomenon. I think it's very hard for judges to know beforehand what decisions will actually inspire/provoke opposition, and they're likely to be successful in any case. So my argument is, "Do what you know you should do, which is decide cases regardless of the chance that it might inspire an opponent to run or the public to vote against you."

The last point I want to make is one that I hope will be inspiring. I've talked to many of you in the morning sessions and at lunch, and I know you're going to vote the way you know the law requires regardless of the public reaction. And you do that because you're part of a long tradition of judging in this country, and I feel very lucky to be a lawyer in a country that has this tradition of judges who are willing to take risks, who know that it's more important that they fulfill their oath than that they preserve their job.

At the end of my paper, I profiled some of these judicial heroes, because I think they are very inspiring. The first example I give are four judges on the Fifth Circuit who were vital in implementing *Brown v. Board of Education*,⁶ and who did so while living and working in Southern states where the people were very much opposed to what they were doing. They were vilified in the press. Judge Reeves's son's grave was desecrated. Judge Minor Wisdom had rattlesnakes thrown into his backyard, and his dogs were poisoned. They didn't hesitate or flinch in the face of this opposition. It couldn't have been easy.

I hope you all will continue to fulfill that long tradition we have of doing justice, even "though the heavens may fall."

We see as another example an elected state court judge in Alabama, Judge Edwin Horton, who was assigned to preside over the Scottsboro Boys trial—a famous case in which young black men were accused of raping white women in the 1930s. After the jury convicted one of these men, Judge Horton said the evidence didn't

support it, and he acquitted the defendant, and of course he lost his election the following year. When he was asked, “How did you stand up to the pressure? How did you do that? What inspired you to issue the decision you did, knowing you’d lose your job?,” he responded with a Latin phrase that I hope I will not murder here: “*justitia fiat coelum ruat*,” which, translated, means “let justice be done though the heavens may fall.”

So I want to leave you all with a message here: that, first of all, I don’t think the risks are as great as you may think if you just read about the few judges that end up being ousted from office for the content of their decisions. But in any case, I hope you all will continue to fulfill that long tradition we have of doing justice, even though the heavens may fall.

COMMENTS BY PANELISTS

Honorable Russell Carparelli

Good afternoon, and thank you to the Pound Civil Justice Institute for doing this program each year and inviting me to speak. I spoke to Professor Frost candidly earlier, and I told her I thought there would be a lot of pushback on this. Now I don’t know if that’s the case or not, but my original reaction to it was, “What are you thinking?” Then I decided that maybe I ought to pay more attention to what she is thinking and to look into her paper more and see what I agree with in the paper, and I’ve done that. And so what I want to do now is I want to talk a little bit about the scope of the paper and the premise of the paper, and then I want to talk about what we can do.

So, first, in my skepticism about the paper, I went back to the beginning, and I saw that she was talking about appellate judges, not trial judges. She was talking about ambiguous statutory text, not clear text, and the scope of broad constitutional provisions, not clear and decided constitutional provisions. But then she referenced public opinion, and then I had some more problems. She said it might include opinion polls, amicus briefs, protest marches, media coverage, election results, and the preferences of legislatures. And my reaction to this was twofold. One was Justice Scalia’s remark about the different ways that we interpret statutes, and that we have so many different ways to interpret statutes that we look out over the audience and we pick out our friends. And in this regard if we were to look at these things that are listed, it would be subject to that, that we could look for the polls that suit our own values and our own subjective judgments.

The other problem is, of course, they’re not in the record. And if they’re not in the record, we’re not supposed to consider them. And if we do consider them, do we then send it out to the lawyers and say, “Before we consider this, please comment on it”? Because it’s an adversarial system, and there is a right of confrontation against the evidence, and if this is going to be considered, then both sides ought to be heard.

We have some real problems there. The premise of the paper is that judicial supremacy is at odds with demographic principles. Whatever that means, and whatever the *Federalist Papers* had originally intended, I want to reframe that. What I want to do is to talk about how we already do what we do, how we keep the separation of powers, and how we apply and respect the separation of powers.

First of all, we recognize that there are three branches of government, and I want to throw in a pitch here for a pet peeve of mine. Have you ever heard the Executive Branch referring to itself as “the first branch”? Or a legislator saying, “We here in the second branch”? And yet we perpetually refer to ourselves as “the

third branch.” I prefer “the judicial branch.” We share powers, all three branches: separate powers and shared responsibilities.

We respect the legislature. But we judges have special expertise in the Constitution, don't we? We study the Constitution, we study the interpretation of statutes. The legislators are not as well versed in government as we are. We have certain rules by which we give deference and respect to the legislature, but they really don't have comparable traditions with regard to respect for the judicial branch. We apply accepted principles of statutory

We respect the legislature. But we judges have special expertise in the Constitution, don't we?

interpretation. More and more, I think, we are using textualism as a way of understanding precisely what the legislature said.

I want to reframe the notion that judicial supremacy is at odds with democratic principles. What I want to talk about is public trust and legitimacy. Isn't that what we talked about this morning, and isn't that ultimately what Professor Frost, I think, is talking about? We need public

trust, we need to be concerned about maintaining public trust, and this was all in regard to the legitimacy of this branch of government. And I have some suggestions on how we might do that.

First of all, when we apply the separation of powers principles in our opinions, we can make that very explicit. We tend to do that, but we tend to do it in a way that is more suited to the way judges did it 100 years ago. If you think about how our judicial tradition has developed, in the first century of judicial tradition, we were a common law country. We were not the modern administrative state. And so much of our perspective and our traditions come from that.

It wasn't until the Industrial Revolution and then later, the Great Depression and World War II, that we became so intensely affected by statutes and by regulation. And so we have to recognize that we're in a different era than we were in the purely common law era. When we have public opinion that we know is out there, we know this is a tough case. We're in a new age also because of mass media, and we know that people are going to pick it up. And they are going to pick up the opinion for their own purposes, and they are going to try and twist it and use it for their own purposes.

In the past, our general approach has been: “I just write them, I don't explain them.” We have to move on from that.

In the past, our general approach has been: “I just write them, I don't explain them.” We have to move on from that. What we have to do, I think, is be aware of these things, and I suggest that when we have a difficult opinion, we be very explicit that we understand, that we are aware that this is a highly contested issue, that we are aware that there is public sentiment on each side of it.

Yet we are bound by the decisions of the Supreme Court of the United States, or we are bound by the words of the legislature. And those words are these words. And then, to the extent that there's ambiguity, we do our best to speak to the layman, to the pundits, to put in the words that at least some pundits who will be more favorable will accept and will use to help explain the opinion.

We don't comment on legislative policy, do we? We don't say in an opinion, "I can't imagine what the legislature was thinking when they wrote this, but I'm stuck with it." And yet we hear similar things said about our decisions all the time. So here are some things. I would like to frame this question as, "How do we foster public trust? How do we maintain our legitimacy?" And one way, as I've already said, is that we honor the separation of powers. We do it explicitly. Another is that we exercise judicial restraint. We do. And we need to make sure we continue to do that. But we also need to engage.

“How do we foster public trust? How do we maintain our legitimacy?”

And this is the piece where maybe we haven't done it as well as we might have. We have been sleeping dogs, if you will. We just sat back and then this wave of criticism came on, and now we have to engage it. And I don't think we have to debate it, I don't think that we have to fight it, but I think we have to engage it. And we have to frame the engagement in a way that suits what the message is for us, not necessarily the way the other side, the attackers, have framed it.

So, for example, in Colorado, we have something on the order of 750,000 new filings each year. We have about eighty Colorado Supreme Court decisions. Of the eighty supreme court decisions, maybe two are controversial. And yet people will take those two opinions, and they will disagree with them and they will criticize all judges, as if all judges overstep and are activists and are anti-democratic.

We need to change the frame of that. The frame is that, in Colorado, there are 300 judges sitting every day in courthouses around the state meeting with individuals and representatives of corporations, and they are doing their best to apply the rule of law fairly and equally to everybody. And these people are public servants. They want *only* to get it right. I think we need to frame that up a little bit more to show the public servants that the judges are.

In addition, I think that we need to get into public education—specifically adult civic education. We've talked about educating the children. The children's needs for information are fundamental: the three branches of government, the Constitution, etc. That is a pipeline that we have to be concerned about. But what about the adults who are out there right now who are voting and who are affecting policy today? Who is speaking to them, and how are we speaking to them? To the extent that we are, are we going out and giving them "Civics 101" lectures, or are we actually engaging them?

In Colorado in 2008, we began an adult public education program that has now spoken to more than 400 audiences—more than 12,000 people. We go to them with an interactive presentation. We give them a hypothetical, a slip-and-fall case. We say: You over here, you're the plaintiff. You here, you're the defendant. You in the back, you're the public. What is it that you're looking for in this trial today? And we engage them in an experiential context in which they realize they want the same thing. They want the rule of law to apply fairly and equally under due process of law. That's what everybody wants, and the public wants that because they may be in court someday.

And I say to one of the parties, "I came in today, and there were a lot of people with placards outside. Do you care if I consider what those placards said?" They ask, "Well, what did they say?" "They said you should lose the case." "Well, no, of course not." Then I say to the other party, "I read an editorial in the newspaper today. Is it okay if I consider that?" "No, you can't consider that." We put them in the role of understanding the challenges that we face.

When we go out and meet the public, they take our measure. They see who we are. There is a face, not just a robe. This is not an anonymous black robe tyrant, this is a person.

Now, there's one more thing about that. When we go out into the public and we meet them, they take our measure. They see who we are. There is a face, not just a robe. This is not an anonymous black robe tyrant, this is a person. This is a personable person. This is a person I feel like I can trust. They take our measure. And we should let them do that, because when they take our measure, they're going to have more confidence, they're going to have more trust in the courts and in the rule of law.

One last thing I want to tell you about is two projects. I mentioned to you Colorado's "Our Courts" project.⁷ And now we're working with Justice at Stake for a national program to give you some resources so you can set up a program in your state.⁸ And I'll be happy to talk with you more about it. My plea is that we need to maintain trust in the judicial branch, we need to maintain the legitimacy of the judicial branch, and we need new approaches in this new age.

David T. Biderman

Thank you all very much. Oliver Diaz was great today. He's gone now, but he did say some great things. And one thing he said is that all lawyers are storytellers. Every story has three parts, so I'm going to try to be quick. But the three points I'm going to cover are: what I do, who I represent, what my clients do and what they're looking for in courts. And then I'm going to try to circle back to some of the things that Professor Frost said, and try to demonstrate how some of the things my clients look for are identical to the things some of the plaintiffs and their lawyers are looking for.

Just quickly, what do I do? Basically, I defend corporations. I defend corporations in consumer class actions, in catastrophic accidents, in airplane accidents, in a variety of contexts. And that is what I do. And one question to you, we talked about movies: Can anybody identify a movie where a person who does what I do, defends corporations, is the hero? We've got *Erin Brockovich*, we've got *A Civil Action*, we've got any movie by John Grisham, we've got *Hot Coffee*, we've got *The Verdict*, we've got *The Insider*. We've got *Philadelphia* with Tom Hanks. Remember that one? So we're waiting for the movie that's going to be called *The Summary Judgment*. But I'm not holding my breath.

But anyway, that is what I do. And the point I want to make is: People ask me, "How can you do what you do? How can you represent the people that you represent?" And the first point I do want to make is that, when you talk about representing corporations, you're talking about representing individuals. Corporations are made up of individuals—human beings who make decisions, who try to do their very best, and generally do do their very best. And they think about these issues very carefully.

And the other thing to know about corporations at this point in time is because of fantastic lawyers on the other side—fantastic plaintiff lawyers such as Simona Farrise, and others. Corporations know the law, and they want to try to obey the laws, and they want to try to make safe products. They have no interest in doing anything different, truly.

And what corporations need, or those who work in corporations need, is some form of certainty, some understanding of what the rules are going to be, confidence that the rules are going to be consistently applied, and that they're going to get a fair shake, even in the face of cases where there has been a catastrophic accident, or where there is going to be a consumer or a lawyer on the other side talking about greedy corporations caring only about money.

Unfortunately, as many of you may know, given the perception of corporations in certain state trial courts, certain state jurisdictions, that is not going to happen. They cannot get a fair trial. So, in general, every time we get a case, the first thing that we look to do is

see if we can take the case to federal court. And I know that I'm speaking to a group of state appellate judges, but I'll just be candid. To put things in context, that's the first thing a defendant corporation does.

Part of the reason for this is that the rules of federal court are different. They have *Daubert*⁹ as a causation standard in toxic tort cases. The summary judgment standard in federal court is probably a little easier because of burden shifting. Class action cases, of course, have all been shifted to federal court by virtue of CAFA. There are other rules, and sometimes federal jury pools in a large urban area will sweep to sort of a broader base.

So we do look at those kinds of factors, which are embedded in the system, and those aren't going to change. But there are also some other factors that affect views about whether state court is a better place to be.

There's a perception by some of our clients that in state court, the rules of evidence are more loosely applied, that state court trials are a little more freewheeling.

I don't mean to overgeneralize, and I'm certainly not trying to be critical of any court, but there's a perception by some of our clients that in state court, the rules of evidence are more loosely applied, that state court trials are a little more freewheeling, that because of the qualification requirements to become a federal judge versus qualifications to become trial court judges in some states, you get more

consistent, reasoned decisions. I'm not saying those perceptions are all correct; I'm just saying those are some of the perceptions that our clients have. And that affects their decisions about what forum they look for and where they want to try their cases.

So, circling back, the points I want to make are the very same points that have been made all day: the idea of an independent judiciary, a judiciary that can look at public opinion but at the same time make a fair and honest decision. And when we talk about public opinion, again, the movies that are made, they're not made about corporate defendants, they're not made about the good corporations, they are made about the underdog plaintiffs.

And so public opinion does shape those kinds of decisions. So you appellate judges in the state courts are viewed by us defendants as the backstop, as those who will apply the law, call the balls and strikes wherever they may be, and all our clients are looking for is really consistent, uniform rules that we can follow that are evenly

All our clients are looking for is really consistent, uniform rules that we can follow that are evenly applied.

applied. And so I guess at the end of the day I don't see a lot of difference between our views about an independent judiciary, the rule of law, and those of the plaintiff side.

With respect to Professor Frost's paper, the only comments I would make is that there are close questions, and there are decisions where the law is not clear, and oftentimes those are, I

think, more in the political sphere than they are in the commercial sphere. I think the rules in the commercial sphere or the product liability sphere are fairly well defined, and so that's why in general the consistent application of those rules would be helpful for us. And I'm certain that you judges do apply that, and we thank you for your efforts.

Honorable David Wiggins, Iowa Supreme Court

First I want to thank the Pound Institute for having me here. I guess you get famous by having your picture on a bus that is going around the state with Rick Santorum and Bobby Jindal talking about you when you are up for retention.¹⁰ I do not really think anybody should go through that. But I do want to talk about the paper, because I too was taken aback on this majoritarian judging issue, because I think, and maybe I do not know what I do, and maybe I am not conscious of what I do, but I think majoritarian judging as expressed in the paper does a disservice to the rule of law.

And I say that for a number of reasons. When the legislature passes a law that is ambiguous or unreadable, and we all know that happens once in a while, we have to figure out what they said. What we try to do, or at least what I try to do, is look at the rules of construction and interpretation and apply those rules to come out with a consistent result. Sometimes it may be the majority view, and sometimes it may not be the majority view. Sometimes the legislature actually takes some leadership, or the executive branch actually takes some leadership, and actually passes laws that are unpopular. If those are ambiguous, I do not see it as my job to fix it to set the policy for the popular view.

So I think that, if we start undermining the legislature with majoritarian judging, we are going to end up with the rule of law being determined based on who's serving as a judge or a justice at this time, who is interpreting law. So I think there has to be some consistency. When you deal with constitutional questions, and basically social issues (and God knows we know about those in our state, with the same-sex marriage case), you have to look at the case, not at what the majority wants or what the majority does not want.

Our court has taken the view that we have to look at what our court has done in the past when faced with these issues over time. I see in the paper, Professor Frost talks about *Plessy v. Ferguson*,¹¹ *Brown v. Board of Education*, the *Dred Scott* case,¹² and those types of cases. Some scholar may be able to draw a parallel between the majority view in the United States versus what the United States Supreme Court did. But our experience in our small state is very different. The first case that our state ever decided was called *In re Ralph*,¹³ which was the

exact same facts as *Dred Scott*. We did it seventeen years before *Dred Scott* came down, and we said the slave is free, doesn't have to return to Missouri. It was the same fact situation. In our state in 1868, we had a "separate but equal" policy for education. In 1868, we struck it down under the Iowa Constitution, and we integrated the schools.¹⁴ In 1869, we were the first state to allow women to practice law, because we thought that it was unfair to discriminate against women in the practice of law.¹⁵ In 1873, the state gave equal accommodations to blacks and women, well before what the United States Supreme Court did.¹⁶ I can tell you if you read the history of our state, these were not popular decisions back then, and they were not majority views. They were what the court thought it was necessary to do under our state constitution.

It goes on and on. In 1901, we gave protections to the press. We adopted the *New York Times v. Sullivan*¹⁷ standard in 1901, well before the United States Supreme Court did.¹⁸ In 1908, we invalidated an election because the City of Des Moines did not allow women to vote.¹⁹ We thought that was unfair in our state. You hear about the lunch counters in North Carolina, but we upheld, on equal accommodations grounds, a criminal penalty against an owner of a drugstore in Des Moines, Iowa, who in 1949 wouldn't let four blacks sit at the counter and have lunch.²⁰ So I think when you talk about how to handle these social issues, I don't know if it is really majority judging. I think it is more looking at how your state treats these things. We've treated the Fourth Amendment differently for 100 years,²¹ we've treated many things differently than the U.S. Supreme Court has, and I think it's just our history of doing those things that causes us to do what we did in the same-sex marriage case.²²

Now, the argument can be made that if we'd had that same-sex marriage case forty years ago, we would never have decided it that way. The problem is, you would not have that same-sex marriage case 40 years ago because it really was not an issue in this country. And courts do not decide what cases to take—courts have to take the cases that are brought to them. So when the issue came to us, the time was ripe to decide the issue, we decided it based upon our constitutional history and based upon the way we had looked at equal protection under our constitution.

As all of you know, that decision led to three of my fellow justices being voted out in the next retention election. And it wasn't even close. I think they lost by eight points. The opposition came late, the opposition came with a lot of money—it was all out-of-state money. It sort of dovetails with Iowa's "first in the nation" caucuses, where everybody comes to Iowa first to try to become president of the United States, and they're all trying to get certain interest groups there. But we learned after that that they were not going to go away.

I do not know what the answer is, because Professor Frost may be right that it is going to go away, but I do not really know if it is going to go away. I won retention. I did not campaign; I chose not to campaign. There were some special-interest groups that campaigned on both sides. I ended up winning by four points. There were many reasons why I won, but none have been attributable to me. It was all other people's work and other people's effort. But it's important to know that after that election, we did what all these other states are doing—we started doing more outreach, we started doing more public speaking. I call it speaking at the "animal clubs": the Elks, the Moose, all those clubs. You go around speaking at the clubs.

If we start undermining the legislature with majoritarian judging, we are going to end up with the rule of law being determined based on who's serving as a judge.

We actually started holding court at night four or five times a year, in gyms, in towns of 6,000 or so people. We had dinners with the people, and visited the high schools and did other public outreach, just to try to get the message across. We took this idea from our court of appeals, who do a great job of public outreach. God bless our court of appeals and our district courts.

I think every state has to do what is comfortable in order to get the message out about what judges do. Because I think this morning's speakers were right. Education is pretty poor as to what a court does and how it works and how it is different from the other branches. But I do not think this is over. This weekend in Des

I think what politicians have figured out is that retention elections will invigorate your base.

Moines there is a Californian by the name of Lane, I think his last name is, organizing already for conservative evangelical churches to start registering their members to start getting involved in these elections, including the judicial elections. I think Ted Cruz and Rand Paul were speaking.²³ Next month, the Family Leader, which is an arm of the National Organization for Marriage, is having a big summit in Des Moines for the same thing, inviting all these people and raising money for these issues. I think these retention elections do two

things. One, you can get rid of a judge for an unpopular decision or something you do not agree with. But, more importantly, I think what politicians have figured out is that retention elections will invigorate your base.

So you may not knock the judge off. And if you do knock the judge off, that is just gravy. But when you start doing all this campaigning, you get your base to come out to the election to vote not only against the judge on the popular issue, but vote for the politician who you want to be governor, president, senator, member of Congress, or whatever. So I think the retention election vote will still be around. I think if we are vigilant and we educate people, I think we can overcome some of this ignorance.

And I think you're going to have to depend on your local bar. Actually, our local bar was following around these bus tours. The people on the tour would say something, and the bar would respond. There was also a nonprofit group in our state who got sick of what happened last time, raised some money, and did the same thing. But unless you are vigilant, I think this thing is going to come over and over again, and maybe not just to get rid of the justice or the judge, but maybe just to invigorate their base.

So those are the things we have to be careful of when we deal with these retention elections. I do not have any experience with partisan or nonpartisan elections. But I think that each state needs to educate and figure out what will best serve their people, to tell those people what judges do in their state and how they operate, and how they are different from the other branches of government.

Patrick A. Malone

This is a very provocative, interesting paper by Professor Frost. The idea that there's nothing wrong with taking public opinion into account, and doing majoritarian judging, at first sounds very innocent, and I don't want to just pile on, but I think it's a very treacherous concept. And I have two basic questions. One is, "How do we know what the public wants, what this majority even is?" And second, "Do we really want judges to openly acknowledge public opinion as an important influence, or *any* influence, on their decision making?"

I was kind of having a fantasy just now thinking about jury trials. I'm a plaintiff's lawyer, I'm a champion of jury trials. Juries are a core concept of democracy. But I'd be the first to say in horror, "Wait a minute, you could

take this jury concept way too far. What if you had juries decide the law on the case too?” You know they do that, or they have done that in other places. Wouldn’t we recoil at that? And I want to return to that idea later on, with regard to some of the judicial heroes that Professor Frost mentioned. So, the idea of majorities being trusted with everything in society is something that I think we all pull back from.

In her paper, Professor Frost acknowledged, in a footnote early in her paper, the problem with figuring out what the majority wants. When I was learning how to read scholarly articles and also judicial decisions, some wise person told me to study the footnotes closely because that’s where the bodies are buried. And sure enough, Professor Frost acknowledges that. She says, “For the purpose of this paper, public opinion and majority preference are used to mean the preference of a majority of the citizens within the judge’s jurisdiction, as determined by sources such as opinion polls, amicus briefs, protest marches, media coverage, election results, and the preferences of the democratically elected legislature. However, majority preferences are sometimes difficult, if not impossible, to measure. Moreover, the public may not have a coherent view on many legal questions.” That’s a quote from her. And just to think about that for a minute, how do you really even know what the majority wants?

Well, let’s take her first item in her list, opinion polls. Everyone knows that there is a huge difference in the answers you’re going to get on an opinion poll depending on who is asking the question and how the question is framed. Amicus briefs, that was item

two. Amicus briefs are from interest groups who can afford to weigh in. They do not at all represent the great unwashed masses out there. Election results are on her list. But if those always counted, Proposition 8 would still be the law here in California. Media coverage, another item on the list. Which media are you talking about? Are you talking about MSNBC media or Fox News media? It makes a huge difference. And finally, preferences of the democratically elected legislature. Well, what if the legislatures, like our Congress and many of our state houses now, are hopelessly paralyzed and divided bodies?

How do you really even know what the majority wants?

I’ll just give you an example from the state I live in, a very fresh example. My office is in Washington, D.C., but I live in Maryland and practice in Maryland, D.C., and Virginia. And a couple of weeks ago, our highest court in Maryland said, when it was confronted with whether or not the 166-year-old common law doctrine of pure contributory negligence—which Maryland and only three or four other states still have, as compared to comparative negligence—it

would continue to be the rule in Maryland. Why? They said it’s because “it’s not our job anymore to decide that issue of judicial policy.” Our Maryland legislature has not voted to do away with contributory negligence despite some bills having been introduced to that effect at various times over the years, and the court equated that to a legislative preference for continuing contributory negligence, not just evidence of legislative paralysis.

Now, what does the public think about contributory negligence? Well, it kind of depends on what part of the public you talk to. If you talk to what Hugo Black liked to call “the organized money branch of the public,” business interests, they love the concept that someone can be just a tiny bit negligent and have their whole case wiped out. With consumer groups, not so much. But most of the public probably never gave the issue a thought.

Do we really want judges to openly acknowledge public opinion as an important influence, or any influence, on their decision making?

And so in the meantime, we have legislative paralysis being translated into legislative preference for the old rule, which to me seems like a strange result for separation of powers. So I think it's really hard to know what the public really wants.

And that segues me to my second question, which is, "Do we really want judges to follow what they think the public wants?" And as one little observation I came up with while looking at the Model Code of Judicial Conduct, there are a few times when we know what the public within a jurisdiction really wants, and those are precisely the times when we *don't* want judges to follow what the public wants. Rule 2.4 of the Model Code

The judges we call heroes are precisely those who cut against the grain of public opinion.

says, "A judge shall not be swayed by public clamor or fear of criticism." So when they're marching outside with their placards and the pitchforks and the torches, that's exactly the time, outside the courthouse, when you're supposed to shut the drapes and pay no attention. So the values that we uphold for judges are precisely contrary to majoritarian judging—objectivity and open-mindedness.

Public trust for my old profession, journalism, which I was in for a bunch of years before I became a lawyer, has greatly eroded. And why? Because journalism, I suggest, has lost that strength of being perceived as not oriented to just what the public wants. Now they chase ratings. Ratings are popularity, but they taint the institution.

Just a couple more quick thoughts. The judges we call heroes are precisely those who cut against the grain of public opinion. Professor Frost gave a really good example about the Fifth Circuit judges. By accident, we don't have jury trials in equity. We could have, but historically the chancellor decided on his own, did not have a jury, and that translated across the Atlantic to our country. But let's just take one example of jury trials, and that was when Justice Brennan wrote the decision in *New York Times v. Sullivan*. You'll recall, that was a libel lawsuit by a public official in Birmingham, Alabama, that was not just against the *New York Times* but was against the NAACP. A multi-million-dollar libel judgment could have easily wiped out the NAACP and would have been a great tool to bankrupt the entire civil rights movement in its infancy in the South. And Justice Brennan came up, totally out of whole cloth, with a brand new anti-majoritarian rule of law, which says, "Where the First Amendment is concerned, you have to show 'actual malice.'" And the public has accepted that, because sometimes we have met the enemy, and he is us. So I think it is just a great peril for the legitimacy of the judicial institution that we even acknowledge the influence of public opinion on judicial decision making, and an even worse peril to explicitly follow it. It's a third rail. Don't touch it.

The influence of public opinion on judicial decision making—it's a third rail. Don't touch it.

Response by Professor Frost

It's interesting, because I didn't really think this idea that judges should take public opinion into account when deciding cases about a vague or ambiguous statute or constitutional provision would be all that radical. I'll give you a couple examples of when courts explicitly do it. My examples are from the federal courts, but I'm guessing there would be plenty of state court examples.

Chevron deference is one example. If you read the opinion, the Supreme Court said that when a statute is truly ambiguous, we could make the choice as to which of two policy choices are intended by the legislature. But we're not that good at that, and we're not as democratically accountable as the agency. That is, we're not like an agency official who is responsive to the president, responsive to political pressure, reflecting the ideology of the day. *Chevron v. NRDC* came down to an environmental policy choice that the Reagan administration had made that environmentalists didn't like. What the court was saying was, "We're going to defer to the decision of the people to elect Reagan, who appointed people that made decisions that environmental groups didn't like." So that's a classic example, a very explicit example of majoritarian judging, that I consider acceptable and maybe folks on the panel don't.

Another example would be from the Eighth Amendment, which looks at evolving standards of decency. In two recent cases involving striking down the death penalty for juveniles and for the mentally incapacitated, in both cases the court said, "We looked to see what the current values of our society are. We do that in part by looking to see whether states have laws for the execution of juveniles and the mentally incapacitated, and whether they're implementing those laws." That's a very explicit part of the analysis. That is, look to see what the current population thinks is a cruel and unusual punishment. That's exactly what I'm referring to when I'm referring to majoritarian judging.

When you think the law requires one thing, that's what you have to do, regardless of how the public will react.

People may not like it, but I don't think it's all that radical. But I'm more sorry that I buried my lead because, frankly, I'm less interested in that, or at least that's not, I think, the focus of today's discussion, because I think those cases aren't the hard cases. The cases in which there are two truly debatable policy choices to be made out of an ambiguous statute and you have to make that

choice, I don't think those are the really hard cases. I think the hard cases are the ones like Iowa justices faced a couple years ago, where they felt *compelled* to vote in favor of same-sex marriage, that the Iowa constitution as they read it required that, and they also knew that it would anger and maybe outrage the public. Yet obviously there's no question in my mind, and I want to be clear with the panelists and you all: When you think the law requires one thing, that's what you have to do, regardless of how the public will react.

My view that public preference should play a role in decision making is in the cases involving true ambiguity. When you're clear as to what the law requires, you have to do that—that's the oath you take as a judge. It's at those moments that I think judges really are heroic, and I put Justice Wiggins in that category, because they make those hard choices knowing there will be real consequences for them, and when doing that they fulfill their oath. And I admire you for doing that every day.

QUESTIONS AND COMMENTS FROM THE FLOOR

Honorable Robert J. Cordy, Supreme Judicial Court of Massachusetts: I don't really have a question, but I would like to make a narrow observation. We don't face elections of any sort in Massachusetts, so we're freed from much of what this discussion is about. But we do face questions of public trust and public respect in our judiciary, and we've had to face a lot of complex social questions going back centuries, I have to say.

There is one area, though, that you touched on, where we have over the last 15 years sought opinion outside of cases to guide us when we have ambiguous statutes or when we have a request to change the common law, which we do from time to time. And that is the amicus process. We have used it very effectively. What are the effects of interpreting the statute one way versus another? And we use that information to think about whether the legislature would have intended this effect versus that effect. We're dealing with ambiguities, where there is no clear answer. Often people walk away from the table claiming victory, knowing that it's going to be the courts that are going to have to figure out exactly what was decided at the table. So in this area, and in areas involving the common law, we have developed a fairly sophisticated amicus bar—not just representing the wealthy, but representing lots of interests in our broader community. And that has been helpful, at least at our supreme court level, in questions of common law and also statutory interpretation. So that's just a narrow observation.

PARTICIPANT: I did have a question. For the members of the panel who were expressing concerns about Professor Frost's view on the role that majoritarian influence should play in traditional decision making, how about situations that really are pretty pervasive, in which judges have to decide what cases they're going to hear? In other words, their agenda-setting at the Supreme Court level, and the choices they make as to what

We have used the amicus process very effectively. What are the effects of interpreting the statute one way versus another? And we use that information to think about whether the legislature would have intended this effect versus that effect.

cases they're going to hear. "We don't want to go there because of the reaction, so we're not going to decide cases that are politically incendiary." Standing decisions oftentimes sort of have that little aspect to them of trying to avoid unnecessary political maelstrom.

Justice Brandeis's opinion in the *Ashwander*²⁴ case goes through all the ways in which we are very mindful of public opinion in trying to avoid incendiary questions. In other words, there's this whole range of recognition, I think, that the judiciary has a reservoir of goodwill and is very careful about not tamping it down too much. And there

is clearly an attentiveness to a majority public opinion in that whole range of situations. Do you regard that as fundamentally different, or do you not like that, either?

Justice Wiggins: I can speak about what we do in Iowa, because we are one of the few states left that have a "deflective" court, so everything gets appealed to us, and we can either send the case to the court of appeals or retain it.

We do not have the luxury of saying we are not going to review the court of appeals decision on that issue, because we get it right away. So I do not have that luxury, so I cannot answer that question in your frame. Maybe our judge from Colorado can, but we don't operate that way.

Everything comes to us, and our guidelines say that if it's a question of great political importance, like the constitutionality of a statute, we generally keep all those cases. So we cannot, for lack of a better word, duck the issue or delay it. Although some of my court of appeals colleagues will say we do because we send it to them, but we try not to.

Judge Carparelli: I've not participated in that. I'm not on the supreme court. In our opinions, if we think we're seeing the same issue again and again and it needs to be addressed, we sometimes will say (or we'll have a separate opinion saying), "this is an issue that we'd encourage the supreme court to entertain." But the difference between

what you're saying and what I think the paper says, is that this doesn't determine the outcome of the case. What you're saying is in the process of judging on whether to take cert—that's the decision as to whether to entertain the case. But I think the paper to some measure is saying you would take public opinion into consideration in deciding how to resolve the case, and I think that's an area I've already commented on.

Honorable Paul H. Anderson, Minnesota Supreme Court: I'm Paul Anderson, from Minnesota, and I don't know that I'm going to articulate this right. But with respect to majoritarian judging, is there an intersection of proper judicial restraint as opposed to judicial decision making? For example, it could be argued that *Roe v. Wade* was the right decision, but that it was too broad. All they needed to do was strike down the Texas statute, and let it play out in the majoritarian body of legislators. Juxtapose the DOMA case, *United States v. Windsor*, which is viewed as narrow, with the bigger issue playing out in the broader majoritarian body, with *Brown v. Board of Education*, where the court makes a decision, and it won't play out. What is that intersection with majoritarian judging and restraint in separation of powers?

Professor Frost: I think that's a good point. I don't mean to restrict it just to taking public preferences into account in decision making; it can also be part of the cert-granting process, certainly for the Supreme Court and for those of you with some control over dockets. It's quite clear the Supreme Court has used the cert process that way, and has used standing doctrine that way.

There's a great law clerk memo I cite in footnote 28 on page seven of my paper, about a case called *Naim v. Naim*, which sought to challenge the constitutionality of a ban on interracial marriage. But it was bought in 1957, ten years before *Loving v. Virginia*²⁵ was decided, and the law clerk memo says, "The nation is not ready for this, and it will disrupt our effort to implement *Brown v. Board of Education*, and we should duck this issue." You may have a problem with that. It may not have been the right thing to do, but that's very clearly taking into account public reaction to the decision. Of course the court hoped that not too long thereafter, it could actually take the case and decide it, as it did in *Loving v. Virginia*.

So I think both ways, I think majoritarian judging can involve saying, "Okay, we have a truly ambiguous statute, let's look to see what the politically accountable agency thinks about its meaning. Not that it is dispositive, but that may affect our interpretation." That's one example. Another example might be, "If we have control of our docket, let's wait five years to take this case when we might be able to win the public support for it."

PARTICIPANT: I think you make an excellent point. And the way I understand it is not necessarily to determine the outcome of the case, but the limits of what you say. And I think we have a great tradition of judicial restraint, and I think part of that is recognizing when we're saying things that we don't need to say, when we're deciding issues that we don't need to decide, but somehow or another our values are so strong that we're tempted to do that.

How about situations that really are pretty pervasive, in which judges have to decide what cases they're going to hear?

And then I think if we do it, then we're risking that the public opinion will be against it and that we're undermining the trust and confidence in the court system. That's why, at least in part, we have judicial restraint. So in that sense I think it makes sense as a check on ourselves.

I was talking to Professor Frost earlier, and she was saying, "Don't you think that the justices on the Supreme Court consider public opinion?" And my reaction was, "No, I don't think Justice Scalia considers public opinion. I think Justice Scalia has his values, and he votes his values." And the *Crawford* case²⁶ is a good example. I was certainly startled by the *Crawford* case and his interpretation of the Confrontation Clause. But he was reflecting his values, and I cannot imagine any time that the justices on the Supreme Court frankly would vote against their values if the majority was on the other side.

I can't quite imagine the Supreme Court, a justice on the Supreme Court, having strong values about something, and then saying, "It's a close call, therefore I'll go with what I think is the majority." I think at that point they're in that crux that we all face where the law is not clear and we have to make a judgment, and we have to make it consistent with our oaths and with traditional principles that we apply, and we have to be guarded as to the extent to which our values influence our decision. But in the end, I think, at the Supreme Court level, I can't imagine that Justice Scalia, having strong opinions on something, would vote against his own values.

Professor Frost: I just want to say we completely agree that Justice Scalia doesn't care about public opinion at all.

CLOSING PLENARY

Kathryn Clarke: Welcome back. I hope you enjoyed your discussions this afternoon. I wanted to make a comment about the *Hot Coffee* film before we proceed. We forgot to mention this at the lunch, but *Hot Coffee* premiered at the 2011 Sundance Film Festival and won awards at several other film festivals.²⁷ So you might want to know that as a background, it was well received generally, not just by lawyers.

At this time I'd like to ask our paper presenters if they'd like to make any final remarks.

Professor Geyh: There is a way of looking at the world, and judges are accustomed to that way of looking at the world in terms of the rule of law and the role of independence. And frankly, that's a system that is well worth defending and is the system that I defend. Where the challenge comes is that we're seeing the world changing

in ways that threaten that way of life, and the question becomes whether judges need to change with it, or whether there are other ways that we can respond to it.

The business of being more candid about the judicial function and what judges do is the first step, but it comes at a peril.

From my way of thinking, the business of being more candid about the judicial function and what judges do is the first step, but it comes at a peril. I've had conversations with folks outside of this room, about being candid about the discretion you exercise. One judge described it as akin to asking Lenin to embrace capitalism. And I think it is a difficult thing, and it is a perilous tack. But I worry that if the legal community doesn't do it, that

we are going to have a harder and harder time coping with the partisan politics that really are debilitating. Because we need to come up with a good answer that explains in honorable terms why the judiciary exercises the discretion it exercises. But I've learned a great deal from the assembled groups today, mostly outside of the plenary sessions, and my thinking is much improved for it.

Professor Frost: Actually I feel very similarly, much as that I really enjoyed sitting in on the discussion sessions, where I got to mostly listen to you all talk and debate. Particularly this afternoon there was a really fascinating discussion among a number of judges and justices about whether the perspective of an elected judge differs from that of an appointed judge, and should it? Is the elected judge in some way closer to the people that that judge serves, such that the judge understands them better?

That was one conversation, and there were definitely differing viewpoints there. I heard some really interesting discussions about the effort to avoid concurrences, to have a unanimous decision, or a decision that wasn't fragmented—really interesting practical concerns that judges were sharing with each other. And then just a really earnest and interesting debate about how it is that you go about this judicial task in an age in which we have these high-profile defeats of judges in retention elections or in partisan and nonpartisan elections, and how does that influence judging, and if it should at all? So I've just been really fascinated by the discussion, and hope to hear a little bit more.

PARTICIPANT: I have a question. Listening to everyone talk in the sessions was really interesting, and my question is, when you realize there are these groups out there now who are interested in challenging judges for retention, or whatever the kind of election is, has anyone perceived any kind of a “pitcher brush-back” tactic coming and having any impact on other judges that you know? In other words, is there a sort of chilling effect, where it doesn't matter so much if the group wins, they just want you to know that they're out there, and if you think about doing something in a certain direction they're going to be coming after you later, and has that affected any other judges that you know of?

Notes

¹ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

² *United States v. Windsor*, 133 S. Ct. 2675 (2013).

³ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁴ Adam Nagourney, *Court Follows Nation's Lead*, N.Y. TIMES, June 26, 2013.

⁵ Adam Liptak, *Case May Alter Judge Elections Across Country*, N.Y. TIMES, Feb. 15, 2009, at A29, available at <http://www.nytimes.com/2009/02/15/washington/15scotus.html?pagewanted=all&r=0>.

⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁷ See www.OurCourtsColorado.org.

⁸ See www.OurCourts.Org.

⁹ *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

¹⁰ The “No Wiggins” bus can be viewed at <http://www.journalexpress.net/archive/x403282723>.

¹¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹² *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

¹³ *In re Ralph*, 1839 WL 2764.

¹⁴ *Clark v. Bd. of Directors*, 24 Iowa 266, 1868 WL 145 (1868).

¹⁵ See Iowa Commission on the Status of Women, *Arabella Mansfield*, available at http://www.women.iowa.gov/about_women/HOF/iafame-mansfield.html.

¹⁶ *Coger v. N.W. Union Packet Co.*, 37 Iowa 145, 158 (1873).

¹⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁸ *Cherry v. Des Moines Leader*, 114 Iowa 298, 86 N.W. 323 (1901).

¹⁹ Coggeshall v. City of Des Moines, 138 Iowa 730, 117 N.W. 309 (Iowa 1908).

²⁰ State v. Katz, 241 Iowa 115, 40 N.W.2d 41 (Iowa 1949).

²¹ See, e.g., State v. Tonn, 195 Iowa 94, 191 N.W. 530, 532 (Iowa 1923).

²² Varnum v. Brien, 363 N.W.2d 862 (Iowa 2009).

²³ See Jennifer Harper, *The Call of 2016: Ted Cruz and Rand Paul Both in Iowa*, WASH. TIMES, July 19, 2013, available at <http://www.washingtontimes.com/blog/watercooler/2013/jul/19/call-2016-ted-cruz-and-rand-paul-both-iowa/>.

²⁴ Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936).

²⁵ Loving v. Virginia, 388 U.S. 1 (1967).

²⁶ Crawford v. Washington, 541 U.S. 36 (2004).

²⁷ The film's official Web site is <http://www.hotcoffeethemovie.com/Default.asp>.



REMARKS OF HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA

Good morning. Welcome to San Francisco, California. I have enjoyed my time listening to the questions and the answers. And in the spirit of a little bit of preaching to the choir and taking some personal privilege, what I would like to do is first of all extend a special welcome to my colleagues from the California Courts of Appeal who I see here, who are active in civic engagement across the state, and ethics.

But first, let me say, whenever I come to a new state or a country, what I like to know is a little bit about their governance and their judiciary and how they're selected, and a little bit about their size and diversity. So let me, as a captive audience, give you a snapshot of California: we have over 1,700 bench officers, over 19,000 court employees, occupying 19 million square feet, serving 38 million Californians.

We have over 1,600 trial court judges, who stand for general election. We have approximately 112 appellate justices—105 on the court of appeal, and seven on the supreme court, who stand for retention elections. Now, even though we have retention elections and general elections, what we saw in California in 1986, and not since then, was the takedown of three supreme court justices, including the chief justice of California.

At that time, \$11.5 million was spent to and for the campaign to unseat or support these justices in a retention election where they ran against no one except a “yes” or a “no” on the ballot. But not since 1986 has there been a successful attempt to unseat a justice from the court of appeal or the supreme court. Not that there aren't threats, as a result of decisions our judges have made.

But I want to point out that what we saw in the trend across the nation in 2006 prompted my predecessor, former Chief Justice Ron George, to hold a summit of all judicial leaders to bring together the minds and ideas of how we can do a preemptive strike on having partisan politics inserted into California's judicial elections. A year later a task force was created, called the Commission on Impartial Courts. It was a huge commission, with many tentacles, that addressed several issues facing the branch.

And what they did was they studied and recommended ways to strengthen our court system, to ensure and increase public confidence in our judiciary, and also to ensure judicial impartiality and accountability. A year later, after many town halls, a report came out with final recommendations, many of which have been implemented.

They included promoting ethical and judicial conduct, professionalism in judicial campaigns (not only for judges running, but also for lawyers), and engaging the bar organizations and the state bar to further that influence, making sure that judicial candidates follow a code of ethics. Additionally, there was a better attempt at regulating the money in campaigns and the process of disclosure and disqualification of judges when that money had to be announced.

Important now more than ever is the effort to ensure the public's awareness of the judiciary's role as a gatekeeper in democracy.

Additionally, and importantly now probably more than ever to me, was the effort to ensure and increase the public's awareness, as we discussed here today, of the judiciary and its role as a gatekeeper in democracy. So there was an attempt and a recommendation to improve civic education, awareness, learning, and engagement.

And as of this year I've been able to bring together the state Superintendent of Public Instruction, and we created a task force. We held a summit here with former U.S. Supreme Court Justice Sandra Day O'Connor; we kicked off our initiative, which is called "Your Constitution: The Power of Democracy."¹

And with the state superintendent, we came together and we created awards for high schools that had the best models for engaging high school students in community work, in civic engagement, and civic learning. And I went up and down the state with the superintendent to give this award to these high schools, and that generated an incredible competition.

Judges understand that civics education is the prophylactic measure for ensuring institutions of democracy.

But also what it brought about in those communities or those high schools, was what we saw—local leaders came forward. There was absolutely no disagreement with the need for civics education, whether it was about the judiciary, the legislative operation, or the executive operation. Everyone came together with enthusiasm in counties across California to further civics education. We knew we had to increase it and make it something long-lasting.

So what we've created is a task force to join with our Superintendent. We reached out to the Association of Teachers of Social Sciences to include and integrate the understanding of the role of the judiciary in democracy and the other two sister branches of government in the core curricula of math, of English, of art, in a way that it becomes naturally part of their learning.

As I've heard the speakers say here today, it's true that the education that's received today is not what we received, not what you received. Civics education is taught in the senior year when seniors' minds are halfway out the door. I know this—I have one at home! I also want to commend the judges and the lawyers who've made special efforts in California to reach out to the community.

Last week we had, offered by the Court of Appeal, Third Appellate District, a celebration of the Emancipation Proclamation, the 150th year anniversary, with an actor who portrayed Lincoln at Gettysburg. It was an hour-long program at the state fair, where many people came and watched, and it was covered in the newspapers. It was heralded and taped and has been shared with justices.²

When we try to encourage judges and justices to speak out to the community, we try to make it as easy as possible. We give them talking points, we send them videos, we help them in any possible way that we can give to them so that when they're speaking to, as was said earlier, the rotary club, or a high school or any other organization, a Lions' Club, they don't have to start from scratch.

We encourage it, we shine a spotlight on it, we put it on our website, we talk about it amongst ourselves. Because judges understand that civics education is the prophylactic measure for ensuring institutions of democracy. And the strength of our institutions relies upon peoples' understandings of those institutions. And so we are trying to further this prophylactic measure, but we're always worried about dark money, we're always

worried about the partisan statements, the easy sound bite that vilifies a judge's decision or a justice's campaign.

I say all this, thinking of what Justice Anthony Kennedy once said. Justice Kennedy said that the command of the law or allegiance to the law is only because there is respect for the law.³ But there is only respect for the law if people believe their judges are neutral. And he also said that judges need independence not to do what they choose, but to do what they *must*. It is a sophisticated argument, it is a complicated platform. And we are the experts who must begin the dialogue.

I was talking to a friend who does work in the Middle East, and we were talking about democracy. And she said civics education is like democracy. In order to be a prophylactic measure to ensure our institutions, we have to have started 500 years ago. We're starting now. We hope to catch up, and we are going to do the best we can. But it is through you and your status and your voice that we will preserve judicial independence. Thank you for being here and carrying on this conversation today.

“There is only respect for the law if people believe their judges are neutral.”

Notes

¹ See California Courts, Your Constitution: The Power of Democracy Steering Committee, <http://www.courts.ca.gov/21763.htm>.

² See, e.g., Jann Murray-Garcia, *Nice to Meet You, President Lincoln*, DAVIS ENTER., June 30, 2013, at A13, available at <http://www.davisenterprise.com/forum/opinion-columns/nice-to-meet-you-president-lincoln/>.

³ Interview by Bill Moyers with Justice Anthony Kennedy, PBS Frontline (Nov. 23, 1999) (Justice Kennedy stated, “. . . the law commands allegiance only if it commands respect,” <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html>).



LUNCHEON REMARKS

Introduction by Justice Jim Kitchens, Supreme Court of Mississippi

You know, because it's in your materials, of the qualifications of my friend Oliver Diaz, to be a lawyer, to be a Supreme Court justice. His academic credentials and his experience and his legal acumen is not what this is about, so I will skip that part and tell you just a little of what you don't know about Oliver Diaz.

Oliver is a member of one of the oldest families in Mississippi. He's told me several times that when the Spaniards came to our Gulf Coast in 1699, that his ancestors were on the second ship. So they've been around quite a while. And they are a good family, they are good people, they are stalwart, good citizens of our state and of the United States, and it is such a tragedy when something bad happens to a good person. That's always the case.

Oliver went through an ordeal that I think is unprecedented in the annals of prosecution in the United States, and I say that as a former prosecutor. Oliver had a distinguished career as a very young man in the Mississippi legislature. He was elected several times to our House of Representatives. In the mid '90s the legislature created our court of appeals. That was during the time when many states were seeing the need for courts of appeals to take pressure off the backlogs of supreme courts in states all over the country. So Mississippi did that and created a ten-judge court of appeals. Oliver was elected to that court. He was one of the original judges on the Mississippi Court of Appeals. About five years later, he sought a seat on the Mississippi Supreme Court. He was first appointed because of a vacancy in office, and then was elected in his own right and served on the Mississippi Supreme Court. He went through a hotly contested election, and there is considerable reason to think that election itself was the thing that may have provided the catalyst or may have generated the prosecution that was to follow.

In about 2002 there was a big case that got opened up in our federal court in the Southern District of Mississippi that arose from the 2000 election, when Oliver had received a majority of the votes in a contested election. Our state elects all of our judges—our trial judges and our appellate judges—and the appellate judges on both the court of appeals and the supreme court are elected from districts that are established by the legislature. But once elected and sworn into office, we serve the entire state. So we don't have to run statewide, which we think is a good thing. But in any event, Oliver was prosecuted along with a couple of trial judges, and an attorney, in a so-called bribery scheme. Oliver Diaz was never anywhere close to having bribed or attempted to bribe anyone, or having been bribed himself. And that was established beyond any doubt by the jury's "not guilty" verdict.

But this was not without a very protracted stay in federal court. He had to take a leave of absence from our supreme court. And not only was he prosecuted, but his wife Jennifer Diaz was prosecuted, and I still can't figure out why, except that maybe there was some thought on the part of the prosecution that prosecuting her might put pressure on him to plead guilty or something. That is a subject that I've given a lot of thought to, because I represented Jennifer Diaz. I was her attorney. (This was before I was on the bench, of course.) I represented her, and Oliver had to have separate counsel, and he was very ably represented by my friend Rob McDuff.

In any case, Oliver Diaz was acquitted of all charges and then afterwards was prosecuted again by the same U.S. Attorney's office, and by the Justice Department, who sent lawyers down from Washington to try to convict Oliver Diaz. They indicted both Oliver and Jennifer on some tax charges, and Oliver was acquitted.

Oliver and Jennifer have two beautiful children, and they were quite young at the time. And Jennifer was terrified that one or, in her mind, perhaps both of them might be convicted. And if so, under the federal sentencing guidelines both of them probably would have gone to federal prison, leaving their two children without a parent at home to rear them. And they are, by the way, wonderful parents.

So Jennifer Diaz from day one asked me, as her attorney, to find a way that she could get probation, though she knew she had done nothing whatsoever that was wrong. The tax indictment was kept secret, was under seal for a long time. Eventually the tax indictment came forth, and per her instructions I did get her a deal, and Jennifer got probation. This was the offered plea to end all offered pleas, because the woman had done nothing wrong. But she took a fall, and she took probation so that her children would have at least one parent at home.

Of course, not being able to predict, I have no doubt she would have been acquitted just as Oliver was. But after Oliver's bribery case was over the feds came after him with this tax charge and tried him for that as well, and he was acquitted on that charge as well. His good name, which he richly deserves, was terribly tarnished by all of this, as you might imagine, so much so that when he had to run for reelection for our supreme court in 2008 he was defeated.

Oliver's opponent in that election, I will hasten to say, did not make any of that an issue in the campaign, but nevertheless it was there. And so Oliver Diaz, to the great benefit and good fortune of his clients, has returned to the private practice of law. He is a superb lawyer, and the bar is very blessed to have him in its ranks in Mississippi. He and his wife Jennifer are the most courageous people I can think of.

I noticed recently in a highly celebrated trial from Florida, that just had a "not guilty" verdict a few days ago, the prosecutors were being interviewed on one of the networks, and the interviewer said I would like you to describe the defendant in one word. One of them said, "murderer." The other one said, "lucky." So it made me think of what one-word description would I use to apply to Oliver Diaz. And there are a lot of words that would work: "Honorable" is high on the list. But I think first and foremost, "courageous." I give you my good, courageous friend, Oliver Diaz.

Oliver E. Diaz, Jr.

Wow, I know who I want to do my eulogy. Thank you all for having me here. It really is an honor to be here. I've been a judge participant of the Pound Forum many times in the past, but this is the first time I've had the opportunity to speak. When Justice Kitchens was talking, it reminded me, the interview on the courthouse steps—I was going to talk about this. So he saved me a great deal of background information because I didn't have to go into a lot.

But one of the things that came to mind while Jim was talking, he talked about the prosecutors on the courthouse steps, and it was a federal prosecutor who prosecuted me. We grew up thinking—I did, and I think many of us do—that our federal criminal system is beyond reproach, it's not political. And, generally, criminal prosecutions were not political in the United States of America. And so I had a hard time believing I was being prosecuted for the things I was charged for.

The prosecutor had boasted for three years or so about how big a corruption trial he had brought, and that a supreme court justice in Mississippi was doing all these things. After the trial, he walked out on the courthouse steps, and the media said, “You’ve been telling us this guy was guilty. The jury found him not guilty in a fairly quick amount of time.” They said, “What do you have to say about that?” And he looked at the camera, and he said, “I’m not really that surprised,” he said, “We really didn’t have much against Justice Diaz in the first place.” It’s on film, folks, believe it or not. I’m not a violent person, I don’t get upset very easily, but that one got to me.

Another quick story from the trial: Justice Kitchens was one of the great lawyers in the State of Mississippi when he was practicing, and now we’re honored to have him as one of the great justices on our supreme court. (I see that the Mississippi delegation is in the room.) Justice Kitchens spoke about my wife, Jennifer, but she’s not anywhere near one of his most famous clients. The guy has represented folks. His legal skills were immortalized forever in the 1996 film *Ghosts of Mississippi*. You all need to check that out.

He was talking about what happened after the trials. In the second trial, I was found not guilty of the bribery charges fairly quickly, and it was on a Friday afternoon. On Monday morning, the same prosecutor unsealed the tax indictment and made it public. So for about two days, I didn’t have any charges hanging over my head and was able to sleep fairly good that weekend, but on Monday morning it all came back. The prosecutor’s theory at that point was, “If the jury didn’t convict him of bribery, I bet he didn’t report those campaign contributions properly on his income tax returns, and therefore I’m going to indict him for tax evasion.” So about six months after that trial, I had to stand another federal trial. It was much shorter this time. The first trial lasted over three months in federal court in Mississippi. The second trial was a week long.

About a year after that trial, I was out shopping. Mississippi is a small state, by the way. You all probably know that. There are three million people in the state, but it’s actually much smaller than that. I was out shopping, and I ran into the jury foreman for my second trial. I was sort of taken aback when I ran into him. I didn’t know how to act and what I should say.

And he ran up to me, and he said, “I’ve been wanting to see you since that trial. I always wanted to tell you something, I wanted to apologize to you.” (I get that a lot, actually, I’ll go out in public, and people I don’t even know will say, “We’re so sorry about what happened to you, we think it was a travesty of justice,” and they’ll apologize on behalf of everybody.)

So I thought he was going to do the same spiel, apologize for everything I’d had to go through. But he said, “I wanted to specifically apologize to you for how long we took to return that verdict in your case.” Mind you, the verdict came back in 15 minutes—not guilty. And I looked at him, and I said, “I’m a lawyer, I’m a judge, I’ve never seen a verdict in 15 minutes. That is the quickest verdict I know about, why are you apologizing for taking so long?”

He said, “I was the foreman. We really didn’t know how to act as a jury. We went into the back room, and I led the discussion, I said, ‘I don’t think this guy did anything wrong. I’m not voting to convict him of anything. Does anybody else in the room want to convict him?’ All the heads shook no and everybody said, ‘Not guilty.’ I said, ‘Let’s just go back out there and tell the judge he’s not guilty.’”

He said they were just about to walk out, and one of the guys in the back of the room said, “Wait a minute. The last thing the judge told us is we had to deliberate and consider all the evidence. If we go back out there we might screw something up. We have to deliberate.” So everybody went and got a cup of coffee, a donut, went to

the bathroom, and they came back around the table, and he said the same guy sat down and said, “I guess we could have deliberated in about 15 minutes, let’s get back out there and tell them he’s not guilty.”

We appreciate you having us here. We’ve got the Mississippi contingency back there, and I think maybe you all keep us around because we all tell good stories. Or you all want to listen to our stories anyway. We have William Faulkner and Eudora Welty and John Grisham, Morgan Freeman, Oprah Winfrey, we’ve got all those folks. So you all listen to us, and we really appreciate that.

My story was told in the 2011 documentary film *Hot Coffee*. How many here have seen *Hot Coffee*? About half. I don’t get residuals, I don’t get paid for it, but I highly recommend it to you all, especially as judges, and especially people involved in the election process. *Hot Coffee* is a documentary about “tort reform” in general. And basically it tells four different stories. It gets its name from the famous McDonald’s coffee case that everybody is familiar with.

The director of *Hot Coffee* is an excellent retired lawyer, Susan Saladoff from Oregon. She worked at Public Justice, then became a great trial lawyer, did medical malpractice trial work for about 25 years, did jury trials all that time, and she realized that these juries always had questions about this crazy McDonald’s coffee case. How can somebody spill a cup of coffee on themselves and make a billion dollars? She said she understood what had happened, and knew all the facts of the case, and spent many years talking to jurors and telling them that there’s more to the story. So she finally decided she was going to take a sabbatical from the practice of law in order to make a documentary movie.

Lawyers are storytellers. We represent our clients, we stand in front of a jury, and we tell stories. We’re telling our client’s story. Susan had never had any experience whatsoever in doing film work, but she said it can’t be much different than telling the story to the jury. If you watch *Hot Coffee*, the way she breaks it down is really great. She’s got it broken down just like you would in a case. She’s got files. The first file is the McDonald’s case file. Susan actually went back and interviewed many of the jurors from the McDonald’s coffee case, got the evidence at the courthouse, she had the actual cup that they introduced into evidence, they had video depositions, she viewed all of that and made all that part of the documentary, and she did an excellent job.

The second story *Hot Coffee* tells is about twins who were born in Nebraska. One was completely healthy, and one was born with a birth defect because of the negligence of a doctor. The mother had gone into a hospital emergency room to deliver her twins. The protocol required about nine minutes after she was supposed to be in the emergency room before they would induce her. She waited about forty-five minutes. And the testimony was that if that child had been born five minutes sooner, it would have been born without any brain injury.

And so they went to trial in Nebraska, which has hard caps on all damages. Testimony was that the child should have received about \$6 million for his care for the rest of his life. Because of the caps in Nebraska, the judge was forced to reduce the amount of damages, and so the child had to settle for less than what would have been needed to cover his injuries.

So that part of the film tells a story about what happens when we have damages caps. We as a society have to make a decision. Because damages are capped doesn’t mean damages go away. That child still has economic damages that have to be covered. And instead of tort damages or a wrongdoer covering those damages, society as a whole now has to cover the damages for that child. Those are the types of things that some people don’t think about, maybe, when legislation sounds good—“Let’s cap damages, and that way nothing can happen.” So it tells a story about what terrible things can happen when you cap damages.

The third part of the film is my story, the judicial elections. And that's why I want you all to watch this. Is Justice Lewis here? He spoke this morning. I hope you all listened to him. He talked about judicial elections and what can happen in judicial elections. It happens even in retention elections. If you don't have head-to-head elections, believe me, that doesn't mean you're safe. They're coming for you in retention elections, and if you don't even have retention elections, they are trying to change laws in states now so that all judges are elected. Those bills are introduced in states all over the country now in order to elect judges.

The corporate side has found that judges are particularly susceptible to election ad campaigns. Unfortunately, our country has grown used to these horrible ads in all of our elections. You get these terrible negative ads. We saw it recently in the presidential election. "Mitt Romney is a horrible person." "President Obama is a *really* terrible person." We see these ads all the time. So they're running in all of our elections. The difference in judicial elections, though, is that regardless of what those ads said about the president or Mitt Romney, the ads didn't define those candidates. We already knew something about them. Obama had been president for four years, Romney had been running for president since he was four years old. We knew about those people, and these ads were not going to define them.

What they've learned, though, is that these ads do in fact define judges. We're the judges, we're sitting in the courtroom, and these attorneys come before us. "Yes, Your Honor." "I'm sorry, Your Honor." "Please, Your Honor." The public stands when we walk into the room. And so we're used to that. We have this power, and we think that we're known in our communities.

The truth is we're not very well known. People don't know who we are in our communities. You occasionally see these crazy polls that show that more people can name three of the Stooges than three members of the U.S. Supreme Court. So if you think people know who you are, they don't. So when they run these ads against judges, it may be the only bit of information the public gets about us, and it can actually define who the judge may be.

In my case, when I ran in 2000, the U.S. Chamber of Commerce, in their own name—it was one of the first times they had actually started coming into judicial elections, and the ads were run in the name of the U.S. Chamber of Commerce—had these terrible ads. They would come on, they would show a judicial bench. There were these cartoon money bags with the dollar signs on them, and they had them propped up on the judicial bench. The ad would say, "Oliver Diaz is accepting \$10,000 from trial lawyers across the state of Mississippi," and they'd throw a money bag up on the bench. It was terrible, it just sounded terrible. We didn't want our kids to see these ads. They were very young at the time. My daughter was eight and my son, I think, was five. We wanted to protect them from that, so we didn't let them see those ads. But one morning we were getting dressed for school, and we left the television on, and we heard downstairs, my little daughter started screaming, "Yay, we're rich! People are giving you lots of money!" We were trying to protect her, but it didn't have the same effect on my daughter that the Chamber thought it might have. So I urge you to watch the story of *Hot Coffee* about judicial elections. I think it will open your eyes to some of the things that are going on around the country.

The fourth and last story in *Hot Coffee* talks about arbitration agreements, and the mass proliferation of these form arbitration agreements, which everybody signs. Actually, you don't even have to sign them sometimes—you just click on them with a mouse. Or if you use your cellphone you're agreeing to the terms of the contract that's been updated, which now includes an arbitration agreement. Or if you buy a car. And so it shows the problems arising out of that.

If you know what to do, arbitration agreements can be fun to deal with when somebody presents you with one. My wife and I went to buy a car, and we planned to pay cash for it. We went to the dealership, and the

dealer brings out all the forms, and I sign everything. And he said, “I’ve just got one more form, the last form here, it’s an arbitration agreement and you need to sign it right at the bottom, and here’s your keys.”

And I looked at it, and I said, “I don’t sign arbitration agreements.” And he said, “What? Nobody’s ever said that before. It’s just one of the forms that you sign.” He actually looked at me and said, “They don’t mean anything, it’s just another thing you sign.” I said, “Well, actually, I’m a lawyer, and a former judge, and they do mean something, and I don’t sign them.”

He said, “I’m going to have to go get my boss. I don’t know what to do. Nobody has ever refused to sign one of these.” So he goes and talks to his boss, and the boss comes back and says, “You have to sign the arbitration agreement.” I say, “I don’t.” And he says, “Well, then, we’re not selling you a car.” My wife, sitting next to me, elbows me in the ribs, and says, “Why do I have to be married to an attorney who causes so much trouble? Why can’t you just sign the form like everybody else does?” I said, “No, we’re not going to do it.” So we walked out.

The cities along the Mississippi Gulf Coast are fairly close to each other. We were in Biloxi, and we drove approximately twenty minutes over to Gulfport, and there was the same dealership, a Chevy dealer with locations in both Biloxi and Gulfport. So we walked in, and I said, “We just had this terrible experience. These folks at the other dealership wanted me to sign an arbitration agreement. Do you have arbitration agreements if I buy a car from you?”

The dealer said, “I don’t even know what an arbitration agreement is.” I said, “Well, are you going to make me sign one?” And he said, “No, if you want to buy a car, you can buy a car.” And so I explained to him what happened. And I said, “We had this car, my wife had picked it out, it had all the features she wanted to have on it, it was perfect for her, and so she was really mad at me.” And so I told the guy we need it to be exactly like the car she picked. He said, “It’s no problem. All I’ve got to do is pick up the phone and call that other dealership and they’re going to drive it over here and I’m going to sell it to you.” So there are ways around these things.

The other thing I sometimes do with the arbitration agreement is this: Along the side of the arbitration agreement, they ask you to sign your name, because it’s separate and apart from the rest of the contract. It’s usually in bold or whatever, and they want you to sign your name next to it. So what I started doing is I’ll write, in cursive writing, “Do Not Agree.” They think it’s my signature, and they never ask or anything. So you can do those things.

The point of my lecture here today, and what I’ve really wanted to talk to you about, is respect for the rule of law and respect for the judiciary. As I was going through my travails, it wasn’t easy. It’s easy to blame the system or say, “I hate the system now.” But that would have been pretty hypocritical of me, being a judge on the highest court in the state, and not respecting the rule of law and respecting judges. And so I tried to conduct myself at all times with dignity and respect as I was going through it. And I’m glad I did, because it actually worked out for me.

I’m inspired by the story of Nelson Mandela. We’re all basically familiar with Nelson Mandela, who served as president of South Africa. He was educated in the law as a young man, and he got older, and as an educated man, he began opposing the system of apartheid in South Africa. Because of his political participation in opposition to apartheid, he was ultimately convicted of some crimes and served twenty-seven years at hard labor on Robben Island. It’s a lot like Alcatraz. It was very cold and damp, and not a good place to be. When he

was released and became president of the new South Africa, they tried to decide what sort of justice system they wanted in South Africa. And they asked him, “How should we operate as a system of justice?”

And I want to read exactly what Nelson Mandela said: “I explored every opportunity to promote respect for the law and the judiciary. The rule of law generally, and in particular the judiciary, should be respected.” How easy would it have been for Nelson Mandela to say, “Courts don’t work, the justice system doesn’t work, we’re going to try something else”? But he recognized the importance of the rule of law and the respect for the judiciary.

Around that same time, in the mid-1990s, the Soviet Union had fallen, and China was not yet the economic superpower that it is today. President Clinton was at the height of his power, and he commanded the world’s greatest army. A small district court judge in Arkansas was hearing a case filed by Paula Jones. Clinton was at the height of his power, but the district court judge in Arkansas found Clinton in contempt of court and sanctioned him. As you all know, judges don’t have the military or police to enforce our orders. Yet Bill Clinton complied with that order of the court. Why did he do it? Because he respected judges, he respected the judiciary, and he respected the rule of law. It would have been so easy for the president to say, “I’m the president, I’m the chief executive, I’m not going to comply.”

And it’s not a party thing. The same thing, you all probably remember, happened in the 1970s with President Nixon. When the U.S. Supreme Court said, “Turn over the tapes,” he didn’t defy the order. He resigned rather than defy the court. He recognized the respect there was for the law and the judiciary. When we let politics into our judicial decisions, we lose respect from the public, and the public begins to question our decisions.

We have to keep politics out of the judiciary, and it’s up to us to do that. We can’t rely on legislators to pass laws to stop campaign fundraising or tinkering with the election process. We can’t rely on citizens to pass constitutional amendments. We have to sign up and say, “As judges we’re not Republicans, we’re not Democrats, we’re the judiciary. We’ve been entrusted with the greatest system of justice the world has ever devised, the rule of law. We are the ones who have been entrusted with that for future generations. This is not ours. That’s not our rule of law to do with as we please, to sell our seats to the highest campaign bidder.” When we see that happening in our states, we have to stand up and say, “We’re not going to allow our state to be sold to the highest bidder. We are judges, and we respect the rule of law.” It’s up to us to do that, and it’s up to us to carry that out. Thank you so much for having me here today.

COMMENTS FROM THE JUDGES

In each of the small discussion groups, attending judges were invited to consider identical prepared questions relating to the papers and oral remarks. The judges devoted more time to some questions than to others, and they raised some other interesting topics *sua sponte*.

Remarks made by judges during the discussions are excerpted below, arranged by topic. These remarks have been edited for clarity only, and the editor did not intentionally alter the substance or apparent intent of any comments. Comments of different participants are separated by a column icon (☰). Although some comments may appear to be responses to those immediately prior to them, they usually are not. Actual conversational exchanges among judges are indicated with dashes (—).

The excerpts are individual remarks, not statements of consensus. For general points of agreement that arose out of the discussion groups, please see 125 of this report. We have tried to ensure that all viewpoints expressed in the group discussions are represented in the following excerpts.

How much political interest in the courts is there in your state?



Lots. Lots of political interest.



In our southern state it's business versus labor or defense versus plaintiffs. We used to have a problem in the 80s, with a well-known lawyer who would get on TV and talk about, basically, how he owned our supreme court.



In our midwestern state I think we have 10 million people, and \$18 million was spent on our last supreme court race. It just keeps getting bigger and bigger.



Sometimes the publisher of our local paper takes an interest in a judicial race, and then he just goes off the sheet. One of the finest justices we have there, and a very independent thinker, got cross-wise with the publisher, and that race became newspaper story after story, when most people really didn't care much about it. The race really got a lot of press, but it was because of the publisher.



A lot of money was spent against me. I was just elected this November, and was a law professor for 15 years before that. Some \$18 million was spent on the race all told. Three seats were in play: an open seat and two incumbents. There were three candidates from each major party, and there were a number of small candidates. The candidate committee spent about \$3.5 million. The rest of the money was spent by the parties on issue ads. They said I love babies or eat babies, depending on your perspective. (Both are true, depending on the day.) Mostly it was the political parties in the state that were doing the spending, but against me in particular a million dollars was spent by a DC interest group just in the last week. They bought \$1 million worth of TV just to do an ad about me personally.



It depends on what you mean by politics, and that is a different discussion, I suppose. But there is a lot of criticism of our court and members of our court who recused themselves in controversial cases. The recusals become an issue among some activist people.



You are a deer in the cross hairs. There is not a whole lot you can do unless maybe you are prepared in advance, and that is hard to do too because our court is usually under the radar. Those retention elections come and go with hardly even one article in the paper. In that way I feel very fortunate because I do not have to worry about that. But if one person pops out like that and if it catches media attention you can be at great risk very suddenly and there is no preparation for the news.



They said I “love terrorists.” In the last week of the campaign, I “loved terrorists.” There was an investigation as to who was driving the spending, and it turned out to be the National Organization for Marriage folks. I had no reputation. There was no decision I had made for anyone to attack. I hadn’t written any paper, but I was viewed as potentially too friendly on that one issue. This wasn’t a party organization, but it was an issue. We will see what happens, but I won. I got the most votes—more votes than everybody else. More money was spent against me than against anybody else, but I got more votes.



I have been on my court for 22 years. I have been successful in retention elections every six years. I have very fortunately never had any kind of opposition, and no one has come after me so far. They did not come after me on a gun case that I authored. But I went to their meeting, and there were about 100 people there, and they were all armed, and I asked if I needed a Kevlar vest to talk to them, but they did not go after me after that. That was my own mini campaign. But in all of these years I have never really given it much thought when we get to retention elections because we do fly under the radar.



In our state it has become more political in the 21 years I have been on the court. We have a former governor who was running for president. On his website he is bragging that he had changed a moderate supreme court into a conservative supreme court. It is true. He has. I have seen it. Yet, the interesting thing is that some of the people who are most irritated with that posting were the judges he appointed to the court, because they now get labeled that they are his court.



One of my colleagues was directly attacked on the court of appeals because of a gun case that actually I had authored but he was on my panel. The gun people went after him in a big way with TV ads, lots of radio, lots of bumper stickers, picketing our court, and he was beside himself not knowing what to do about it. It was ironic because he is a gun owner and one of the most conservative people on our court—and we are kind of a conservative court anyway. These guys went after him as a liberal, and called him corrupt, and what was interesting is that the radio ads had to be attributed, and it was “Citizens for a Non-Corrupt Judiciary.” Their written material was unbelievably off the mark as far as describing my colleague. There is no good way to respond to this stuff. There is nobody really to take your banner and run with it. Our newspaper did give him a little bit of time on the editorial page, but who reads the newspaper? Me and my wife and about four other people.

If you have an intermediate appellate court, is there less political interest in that court?



I never feel like an intermediate court in our border state is a target for these groups. The state supreme court is the target.



There hasn't been a lot of political interest by the parties or money interest in the court of appeals races, but when it's the state supreme court and you have a pretty evenly divided court, that's where we've seen it. We saw it this past year, where \$2,500,000 came in in favor of one judge, but it's related to redistricting.



In our southern state it is very politicized at the supreme court level, with involvement of pure politics, super PACS, trial lawyer versus business interest, those kind of issues. Not so much at the court of appeal level. We elect our supreme court from our congressional districts. We have seven districts, with different demographics in different areas. One guy's slogan was “I am pro-life, pro-gun, pro-traditional-marriage,” and he got elected.



In our southern state, in the rural areas, there's a lot of interest in the court of appeals because the people know who we are. In the urban areas, it's my impression that there's not as much interest, and they don't know who the judges are.



We don't have a lot of political interest at this point, but I really see it coming. I do think that, in the court of appeals, we fly under the radar a lot more because, if we really screw up, the case will be taken by our state supreme court and they are going to have the final say on it. So I think we have escaped it, but I see it coming, especially on the supreme court level.



There is definitely less in our midwestern state. There's an attempt to change our nonpartisan judicial selection system. There has never been a Wall Street Journal article on one of our court of appeals judges, but there have been a bunch of them about judges being appointed to the supreme court. When they talk about "activist" decisions they are always supreme court decisions, never court of appeals decisions. I personally like being under the radar that way.



During our last process, it did not end up being a direct attack on our intermediate appellate courts, but the trickle-down effect of the elections is that when they go after the supreme court justices, people do not distinguish between the supreme court justices and the intermediate appellate court judges. I come from a part of the state where they do not particularly like judges anyway. In our retention elections we win a lot, so nobody lost, but we ran a lot closer than we ever have before. I think they went after us for the same issues they had with the supreme court.

How often are your state's courts asked to decide major questions of social policy?



Often.



If a case is certified as a question of great public importance, certified by a court, we will take it 98 percent of the time.



There are times when you have to look at policy when the law is just bad. In Nazi Germany, the judges followed the law. Sometimes we can't just follow the law. You have to look at public policy sometime when the law is unjust.



—Same sex marriage.

—School finance, death penalty, same sex marriage.

—Term limits, constitutionality, two-thirds majority constitutionality.



In the last year, I wrote a decision declaring our method of funding public education to be unconstitutional. Our court held that the two-thirds majority for any tax increase violates the state constitution, similar to the time when it had previously declared term limits to violate the constitution. We upheld the controversial initiative privatizing liquor sales. A Defense of Marriage Act (DOMA) case was decided before I came on the court, and my court actually upheld the state DOMA in a very fractured opinion.



I sat on our state supreme court for 11 years. During that time, I guess the most controversial case we decided was whether someone who had been appointed a guardian by the state for someone who was in an irreversible vegetative state could withdraw life support. That was the biggest issue I would consider a social policy issue that I have ever looked at. We don't have a lot of that. We are a very conservative state from a lot of aspects. Things don't really get litigated. I have never seen an abortion issue at all. I have seen termination of parental rights. It is rare really that it gets to the appellate level.



We get every kind of social issue: whether or not you have a constitutional right to physician-assisted suicide; whether or not Citizens United would overturn our anticorruption law; whether or not persons in same-sex, committed relationships are entitled to the same state benefits as married persons. We get them all.



We get a lot of social policy questions. They don't always attract that much attention.



The problem is we are talking about constituents. Who really are the legislator's constituents? They are certainly not the people. They are the money people. Most of these legislations are written by the money people and the legislators haven't read it, can't read it. They just don't understand it.



We have one percolating up that had to do with gay marriage. We had one that had to do with whether or not gays and lesbians can adopt. That became an equal protection argument. There hasn't been that much publicity on it one way or another on the way we rule. We rule based on the facts of that particular case. It is not a political decision.



A lot of social policy issues grow out of family-related issues, issues related to partnerships, marriages, adoptions. A lot of those issues come out of life and death; all of those kinds of situations I think are situations where they are talking about social policy kinds of issues.



Probably in my 20 years on the intermediate appellate court, there might have been a couple that we heard, expanding the battered woman's syndrome to children—being able to use that defense of battered child syndrome. State-wide, I don't see a whole lot of social issues coming to the court.



As an intermediate appellate court, I don't think we get a lot into policy. I think we are error-correcting courts, and our job is to serve the court below and do what they are supposed to do. That is what we look at. There are some on our court who take the position that they want to expand on the law and get into some of the policy implications. We have some disagreements in our panels because we hear cases from three judge panels, so we get into that sometimes. Personally, I just think we are error-correcting courts at the intermediate level.



I wrote on same-sex marriage. I wrote on abortion. I wrote on immigration and all of these things, and what not. Our state supreme court would say, "No review," which is why I wanted to get on the supreme court, so I could do that.



It seems that our Supreme Court is asked to deal with public employee retirement issues on a regular basis. As each round comes goes through, it is more and more political, it seems, and the media pays more attention to it. That has been a recurring subject.



I've been on both courts—intermediate appellate and supreme. I look at the cases they are taking now and sometimes think, "Wait a minute, why didn't they take that case? It needs the Supreme Court authority behind it. It is too important not to, even if they just take it and agree with what our court is doing. That would prevent it from coming up again and wasting the court's resources."



I don't think we view ourselves a policy court. We are a judicial court. It seems like a strange question. We hear cases which may involve matters of social policy, but we just decide them. I am sure that we do recognize that they affect matters of social policy. I don't think we view ourselves as a policy-making court, even though of course we are establishing rules which

have consequences in terms of the state. The question itself seems to be a loaded question, since I don't think we view ourselves as a policy-making court. I hear matters involving the constitutionality of recently passed legislation concerning sex offenders. If I had to face election, of course, that would be a rather interesting matter, but I don't. Is that a matter of social policy or a matter of evaluating the constitutionality of legislation?

Do you perceive a conflict between the demands of judicial campaigning and the restrictions of your judicial ethics rules?



No.



One thing that just developed in my state that I thought was very interesting was that one individual who just announced, who represents a certain political party, said he was going to create a PAC for judicial elections. And whoever stood for election as a judge, they would develop a survey of what you're talking about, what position they would take on certain kinds of cases, and after reviewing that if they weren't satisfied with the answers, they would prohibit that judicial candidate from speaking to that political organization.



I see a lot of tension between these judicial questionnaires that are sent out by every group on the face of the earth, wanting to know what your opinion is on Scientology, all the way through abortion, all the way through everything that could be imaginable. Some people choose not to answer them because they feel like it violates ethics. Then other people come all out because they are philosophically aligned or will align themselves in order to get endorsements from various groups. So we see that type of tension, and that is really problematic.



I used to be on our state's judicial ethics committee, and there are a number of judges who say they want to be able to response to the questionnaires.



I value the code. I think it allows us to stay above some of the fray. The people who elect me value that I value the code as well. It is just another law that is out there. There is a tension there, but it is one that most of the people that I would serve would respect and admonish me horribly if I didn't respect it.



I personally have a problem going out and asking for money, but I find fewer problems from my contributors than I find in the electorate. When you are going out a lot of times you have

to explain. You really have to educate your public about judicial ethics. You have to reinforce it. There are certain special interest groups that don't care about ethnical behavior. All they care about is their particular interest. With those, it is just more difficult to me than dealing with a campaign contributor. I will flat out tell the contributor, "This is not for sale." I think that they understand that they can get into serious trouble. When you are elected, some of the greatest pressure that is put on you is by special interest groups.



The interesting effect I have seen of running initially and then running for retention where you have to get 60 percent is you make your reversals a little more gentle. Your opinions don't tear someone apart. They try to be professional down the line. Especially if you have been a trial judge, you realize the pressure of a trial and the pressure that circuit judges and the attorneys are under. I think it makes your opinions a bit more civilized. I think it has a practical effect. If you are going to tailor the substance of your decision based on the prospects of your being retained, you shouldn't be on the bench. There is always a chance I will dictate an opinion and then I will tone it down. There is always an opportunity for that.



I think with the issue of judicial ethics and the appearance of impropriety, anytime you have an election in which money is poured into the race, I say poured, whether it is five dollars or a thousand dollars, there is always this question of the appearance of impropriety. If you go speak to one group or go see another group, you try to be as bipartisan in an election where you are running a partisan race. You are trying to be as bipartisan as possible. You do what you have to do with a gentle tone. You are always worried about the money that you received, about the appearance of impropriety.



Ordinarily, when I come to this seminar, if it does not conflict, I also attend the Defense Research Institute's equivalent seminar, the National Foundation for Judicial Excellence. However, I think anyone will understand my going to San Francisco, particularly when I went to Chicago for seminars twice last year!



I don't vote.



I vote.

Are the courts political institutions?



Let's face it. We like to think that we are above politics. That time has changed. Every judge in my state is going to be up for election next year. We all run the same day, and any member of our supreme court (of which I am one) who thinks that they are not going to be opposed has got their head in the sand. You have got to build your response now because what your adversaries are going to do, whether they are on the left or the right, they are going to get their ammunition, get their charges ready, and they are going to fire them off—just like they did in Alaska, about three months before the election, hoping to catch you unprepared. You simply have to be ready to go and if you are not and you say, “The bar association is going to save me,” good luck!



I do not think we are accountable to the legislature or the executive, but if you are appointed by the executive, I think there is an idea—and I think the empirical evidence bears this out, at least for federal judges, certainly—that they vote the way the party or the president wanted them to vote, as opposed to those who are elected.



—Politics in the strictest definition is the study and the exercise of power. We all exercise power. You have to ask if it is “small p” political or “capital p” Partisan.

—Well, the question was written with a little p.

—Then we are political. We exercise power.

Do you see indications of “popular constitutionalism” at work in your state?



No.



We have too many budget problems to talk about constitutionalism in our state. We are trying to keep our heads above water. They are trying to take part of the judges' pensions from them and reduce our money for our retirement and make us pay for healthcare.



The term “popular constitutionalism” presumes there is some informed opinion based on rational analysis, and that there is a democratic sense of what the constitution provides. The problem is that if you’re looking at public sentiment or public reaction, and it only matters on these particular hot-button issues, that’s visceral. That’s not analytical. I have a real problem saying that you take into account something that is not an informed analysis by anybody but simply the clamor of the mob, which is what that sounds like to me.



I don’t think it is at work in our southern state. I think our supreme court is not particularly swayed by what they perceive to be the majoritarian view. I guess it might come into play. In our courts, in the intermediate court, we just don’t render decisions on those kinds of cases typically. With an intermediate level court, the big, big, big issues are going to go to the state supreme court.



We have a common law doctrine that an act of the legislature is presumed to be constitutional. The legislature is a majoritarian body. Presumably when it acts, it is following majoritarian principles. By presuming we are going to uphold the legislative act, in reality we become to some extent a majoritarian court without consciously intending to.



I just think that it is firmly engrained in all of us not to bend to the will of a majority simply because there is public opinion about something. I doubt any of us have participated in any court conferences in which people have pressed a particular position because of majority public opinion. However, having said that, we all live in the real world, so inevitably when you are defining things like what is a fundamental right, you are looking in with your own experiences in your own particular state that you live in, and thinking, for example, “What is a ‘firmly rooted tradition?’” We all probably do think in terms of real-world application when we are defining some constitutional rights.



The idea that we figure out what the public opinion is, in terms of the interpretation of a statute, is silly. I can’t imagine what public opinion is as to what a word means in a statute.



—I had never even heard of it until I read the paper.

—I hadn’t either.

Do you sometimes take public opinion into account in deciding cases?



—I am human. I am sorry. It will enter my mind. I know that that is going to make someone upset.

—Every case we take will make somebody upset.

—A big segment.



The only example I could think of where I got the sense that perhaps our court was swayed a bit by public opinion was when there was a huge crowd in the courtroom for oral argument. Rarely do we have a crowd in the courtroom for oral argument. We usually just have the lawyers. On this particular occasion, the whole Fraternal Order of Police showed up. The courtroom was full, and there was an overflow room. I was not on the panel that day, but I think some of the members of the panel were swayed by what appeared to be a sense of horror on the part of police officers, in this particular case in which an officer was shot. I think it was not so much that anyone felt compelled to change their views or adopt a particular view because of the concern of the officers. It was more that the judges got a real sense of what officers face in situations like this and what their experience teaches them. It was that sort of a thing.



I am well aware of what public opinion on these issues is within my state. I suppose I am a little happier when my opinion coincides with that. Then I get to write a happy opinion. But I am not going to change my opinion because I might be going against public opinion.



I don't believe the public influences our judgment in our state. Soon we will have before us a Second Amendment question on open carry laws for weapons. The courthouses are putting up signs saying, "You can't bring guns in here," but the legislature says, "Yes, you can." We are going to have to decide that.



I don't think the public clamor aspect should affect the judgment.



We don't see it blatantly, where it's discussed in the conference room, but people on the court know who they are. Particularly when it comes election time, you see a lot of it taking place—fostering opinions to favor certain majority groups.



I have been on the court for over 12 years, and I've never seen that overtly taken into account. What we do, however, when we recognize that things are not going to be popular, is to give some care to explaining what it is that we're doing and why we're doing it. If the opinion is not going to be well received by certain segments of the population, you go out of your way to explain how you got there.



Our court declared unconstitutional the “three-drug cocktail” for lethal injection, as violating community norms, and we considered that the Humane Society had banned a similar thing for euthanizing animals. In juvenile cases, with respect to dispositions of juvenile offenders, the court has absolutely looked at evolving understandings of juvenile brain development. So I think sometimes a lot of what we do is a proxy for public opinion. Judges, typically, are terrible empiricists.



Another area is the question of what is a “reasonable expectation of privacy”—a pretty important issue in our jurisprudence, in the search and seizure area, particularly with the availability of so many types of communication and information. That's another area where you're looking to what society expects with respect to privacy. What's reasonable in this context?



I would hate to think that it's going to be reduced to opinion polls as being guideposts for how judicial decisions are made, with judges getting their information outside of the record and not in an amicus brief. Apparently 87 percent of the folks believe that if a juvenile commits a horrendous crime they automatically ought to have an adult sentence. They don't accept the lack of brain development in a juvenile. They want to see them punished very strongly and heavily, especially for violent crimes. I'm not going to take into consideration what the polls say, but I'm afraid that this majority type of a reference could very well come to that.



It is interesting to me that one of the factors that the Supreme Court considers in certain cases is if a group has been discriminated against, whether or not that discrimination is disappearing and the group is gaining more power. For example, in the same-sex marriage cases, one of the factors the court takes into account is whether this really is a persecuted minority anymore, or has it risen to the level where they have some traction in the public arena.



I think the public perception affects word choice, or how you explain what you are doing after you've made your decision. You want to have as much buy-in as possible. I think I view it as my obligation to take into account the reality of the audience to make it work as well as it can.



I think that is the function of concurrences. If the opinion is narrowly drawn to answer a particular issue or to resolve a particular issue, a concurring justice can weigh in and take into account those broader things, or at least show the legislature that this is the way the courts are thinking in this issue. I think that is the value of a concurring opinion.



I think the only people who worry about this are those who are up for election that year. I haven't sat on a panel where somebody just went against what the law is. They will follow the law. But when you get to that gray area, you can go either way, depending on what your judicial philosophy is. You can't live under a rock. You are going to hear everything anyway. You read all of the newspapers. You see everything going on, and both sides are fighting over something. You just make the best case and tell them if they want the real answer to go upstairs to the supreme court.



Before I was on the court, the question was whether our state constitution guaranteed every student in the state the same minimum level of education. I would say that, contrary to the popular notions of local control, the state supreme court went out of its way to interpret this clause to require the state guarantee of minimum funding across the state. Everybody was up in arms about it afterwards. I would think that if you have an ambiguous clause, and it was ambiguous, that Professor Frost's idea would be that you take whatever the popular notion is and factor that into your interpretation. But our supreme court seemed to not only not consider it, but actually disregard what the popular view was.



I worked in the legislature for a decade, all through the 70s. I can tell you that they are very susceptible to lobbyists, who would essentially say "Here is the bill that you will be carrying for us. It is already written, thank you very much. We will be bringing you amendments to the floor as they are needed, as the process goes through." That's a kind of "bot" legislature. That does not happen in our world at all. I won't even entertain the thought of a "bot" judiciary.



I never check polls, newspaper articles, magazines, I never look at whatever you might call public opinion. I might consider whether there has been legislation in the area, touching on the area. I might scan the country and see what other courts in other jurisdictions have done with the same issue to see what they bring to the table on this issue.



If you are elected, you are a representative of the people. If you have to get out and go to fish fries and talk to everybody, after you talk with 300 people or so you will have a pretty good idea of how they feel about gay marriage, or immigrants, or black people, or guns. I think

there is a difference in the way elected judges view their role. I do not feel any hesitancy in saying that. Because I am elected, I have a better view of what the public opinion is going to be than a federal judge would in a similar situation.



I have been doing this 22 years, and I have never seen public opinion influence a decision. We all know that there is going to be clamoring and howling of the mob. I think we respond by writing the opinion, narrowly and also defensively. By defensively I mean bringing up all of the issues so that the other side knows what we decided.



We are all political people in that we know what is going on. We listen and we are attuned to what the public is saying, to what politicians are saying. When there are gaps in the law and we have to fill in those gaps, part of our decision making should be what the majority of society thinks is fair and just and reasonable. Certainly we take those things into consideration. We are aware of what the politics are that are going on in our particular area. We are aware of public opinion as it is expressed in the media. We hear those things. We also bring our own education, our own experience, our own sense of justice and rightness and mercy. All of those factors come into play when we make our decisions. I have always said I rule without fear or favor, and I do. There is fear because there are those forces out there and if you rule against them, they may come after you. You have to be ready to take the slings and arrows, so to speak, because we have to do what is right. Certainly, we are political in the sense that we are aware of what is going on. We should be political in the sense that we are aware of what is going on. It impacts our judgment, but it should not decide our judgment.



When I am making a decision I try to think how the average voter (maybe a plumber), might look at a certain decision, because I am elected. It is not an outcome-determinative role, I follow precedent, but I think in the back of people's minds if you are elected you do consider the public view. If you are writing something, you want to explain it to the average plumber, and I think there is a space here, between an appointed judge who never has to worry about facing the public and being accountable, and judges who are elected. Part of the space is there is a certain freedom the appointed judge has to "follow the law," whatever that is. Then there is a space over here for elected judges. Because we campaign and go out there and are blessed by the public at large, I think we feel a little more accountable to the public and we may have a better idea of what public opinion is because we have to be sensitive to that if we want to keep our job.



Public opinion seems to me is almost inherently unreliable about whether a decision is correct or not.



Public opinion is only a reliable indicator of what is right when they agree with me.



I think public opinion is probably an unruly horse that I don't think I want to ride.

If you do take public opinion into account, how do you discern public opinion?



—*Twitter.*

—*Blogs.*

—*The media does not tell us what we need to know, they tell us a story they want us to read.*

—*I have got somebody down at my local laundry who is very astute about stuff.*

—*Hair dressers.*

—*Taxi drivers.*



I have heard people say, “Well, we have an amicus brief from the family law section of the state bar, and they say, ‘The world’s going to fall down in family law,’ and I want to take them at their word, and we really need to think about the practical impact and whether or not this segment of society will be well served.” So I don’t quite know what to make of majoritarian preferences, because very rarely are you able to read what the entire populace of a particular state says—but you do have indicators. And I have heard people use those indicators during conference to indicate that something we do may upset the apple cart or be controversial within a particular segment.



—*The amicus brief, is that part of public opinion?*

—*It has nothing to do with it.*



There’s a difference between the vocal groups and the majority view. Many times what people substitute for the majority is just the most vocal group, and that’s really misunderstood.



How do we know what the public opinion is? Because the newspaper said it is? Because the media’s creating public opinion? Is that the measure of public opinion? How much public opinion is enough? What about the silent majority? How are we going to do this?



I think there was a poll that indicated that 50 percent of Americans now believe marijuana should be legalized. I was thinking that that is an interesting conundrum. If we are going to be sentencing people for crimes in our states where it is not legal, and popular opinion swings to maybe 60 percent or 65 percent—something a little more persuasive than 50/50—what should be done then?



Our court is in a part of the state that is pretty liberal. But there are areas that are very ultra conservative. We are state court judges, but public opinion is very, very different within our state. I find it very troubling to try to think about figuring out what the opinion is. And for that matter, what is “the news”? Is it CNN, is it Fox, it is ABC? Everybody has an agenda, so I just don’t know how you measure public opinion.



Several years ago, I went to the NYU school for federal appellate judges. One of the things that surprised me was that I suddenly heard these federal judges say, “We don’t ever look at the legislative intent or the congressional intent.” Wow. They said, “Congress, that is just too much of making sausage, lobbyists are too involved in all of this. We do not even look at the legislative record when it is not clear as to the congressional intent.” They said, “If you go back in the record, you look at the conferences, whatever happened, whoever testified, because you are trying to understand how they came to this new law. You can hear, if you listen carefully, the special interest groups testifying. Should judges be affected by the special interest groups?” That is what those federal judges were saying. So they are taught at the federal appellate judges’ school not to look at the stuff that goes on in making the sausage. They just look at basically the four corners of the statute. If Congress didn’t say what they intended, then they will have to go back to the drawing board.



The idea that 435 members of Congress sat together and had this collective mind meld about legislation is really ridiculous. They didn’t. Some of them voted for it because the appropriation’s chair told them they had to or they wouldn’t get their bill considered. There are thousands of reasons why somebody might vote for something. For us to sit here and judge and say, “Well, I think you really intended this,” is in my opinion just a fantasy. You can’t do that. I hate to agree with Justice Scalia about much of anything, but that is his point—in interpreting a statute, the best way to do it is to look at the text.



—Let’s remember where people are getting their news—the standards of journalism. We used to have problems with media institutions that had strong, biased views, but at least they had funding and they were a big structure. That is all being diminished in a lot of places. My hometown is no longer going to have a daily newspaper. That is going to change dramatically.

—The Nancy Graces of the world will pick up the slack.



Who am I going to rely on, the majority or a plurality?



—I read the paper, watch the TV news.

—And you bring that to the table.

—Why sure. Everybody does.



There is no reliable source.

Do you sometimes encounter the kind of “hard cases” in which your decision may anger segments of the public?



It always baffles me when running for election and you get these questionnaires from these various interest groups. Of course, the abortion people are very active in that. They want to know what is your judicial philosophy, who is your favorite U.S. Supreme Court justice, and all that kind of stuff? I am an intermediate court of appeals judge, and I don't deal with death penalty cases or abortion. I am interpreting the state water code. The most controversial thing we might get is a criminal case.



Our governor might not consider appointing you if you have written too many opinions in favor of a criminal defendant or a plaintiff. That is a criticism or concern of the state bar.



We do get cases like that. We have a pretty wide varying range of policy ideas on our court, pretty diverse. But we very rarely had an argument that made it into an opinion about any of that because, first of all, there are usually two or three ways you can resolve a case based on the briefs and the points raised. So I mean if there's one of these things that's going to be controversial, that would take us into new territory and we don't have to reach it, we don't. We resolve it on a more narrow ground. So I'm surprised that a lot of these hard cases ever get directly confronted. It happens occasionally where you have to decide this, there's no other way to go about it. It's directly at issue. They've raised it all the way along from the trial court up to you. They've preserved it and you've got to do it. But to us, that's fairly rare where that happens. And we don't have people that just want to jump in and say “Let's take it, it's in there, let's go with that.”



I would have to say that's rare. Most of the cases we deal with (300 a year), are pretty routine, so you don't get into that. But occasionally you do and sometimes they're significant, but you still have to do what you think is right. You can't get into "What's the public going to think about this?"



I had a very controversial case right before I was up for election for chief. It had to do with whether or not a police officer could eyeball a speeding car and give a ticket, discern that that individual was speeding at the time and whether the ticket would be valid because there was no mechanical recording of the speed. And our court upheld it and said, "Yes, the police are trained. They went through all the training, and it was reasonable, and yes we could do that." My God, the public outcry over that was enormous. I can't think of too many other cases like that that we've decided. I authored the decision, and there were people that were writing a letter to the editors that I should be thrown off the court. A columnist actually sat side-by-side with police officers just to test to see whether they could do it. The columnist was shown that, yes, police do have that ability to do this within one or two miles per hour on these things. So they're highly skilled and trained.



Call it judicial restraint. There is a point at which you think, "Do we have to decide this issue? Maybe we don't feel comfortable deciding that larger issue and the case can be decided on a much narrower issue." Sometimes you exercise restraint not to go too far beyond what you need to do.



Obviously the issue of this decade is the gay marriage issue. In the 1960s it was civil rights. We see those cases come on a regular basis. We know them when we see them. We know them when we get them. There is not too much surprise there. I think rarely is anybody surprised by those circumstances.



I think in criminal law, at least in our state, there are a number of areas that are really hot button in terms of public opinion. One of them relates to sex offenders. Some of the laws we now have limit where they can live. There is a case before our supreme court right now involving a city where the court of appeals said they can't live anywhere in the city because there are limits on parks and the schools and things. The question of striking down a statute like that is going to be probably contrary to public opinion. I have also dealt with cases involving release of people from prison and this kind of thing.



When I was a prosecutor, one of our circuit judges said, “The skunk is not stopping on my porch.” I think there is a difference. I think the rationale or any discussion of the topic depends on what level of court you are at as to how significant it is.



You have 25 or 35 percent that vote “no,” period—not for any particular reason, not because they know anything about the candidate, and for most of the people that are voting yes, they’re voting because you are the incumbent and not because they have any information about the election. I think those statistics generally don’t tell you very much. They certainly don’t tell you much about the consequences of making a particularly significant or controversial decision.



Or they slash your budget. Unfortunately, our legislature meets every year, not every other year. This year we came through pretty much unscathed, but last year, in the face of some controversial opinions, I’m sure it was vindictive, at the very end of the session last year they slashed \$12 million from our supreme court budget, all of which was earmarked for much needed IT technology improvements and so forth. They finally relented and slashed it to \$6 million instead of \$12 million, but it still was a big-time hurt. There was no reason for it. It wasn’t because they had no money. It was totally vindictive.



Do we tend to refer to almost every criticism of a court and a court decision as an attack? Have we gotten that defensive?



We have become a nation consumed with campaigning and not governing—“Let’s turf it off to the quiet judges, because they don’t get out there and defend themselves.”



—I really think the trial courts are under the gun. I think a lot of that principle goes more to the trial courts than it goes to us. We are very insulated. Once in a while, you can just see they want to go there. It doesn’t happen very often.

—I think it goes to any judge on any level. It is about doing what is right, not based on whether or not you are going to get reelected or you are going to lose your job. Do what is right and follow the law. Even with the trial judges, it is still about standing on your integrity and doing what is right.



In our border state we sometimes know something's going to be controversial, and we're careful to craft something that is very explanatory. Where we run into problems, strangely enough, is in those cases we didn't think were controversial—they were just straightforward. And someone grabs the opinion, takes something out of context and runs with it and you go, "Where did that come from?" So we started issuing a press release with every opinion, so people couldn't spin it. We were giving it our own spin in layman's language that we couldn't do in the opinion. We let our public information officer work with the justice who wrote it. It has defused everything. The media don't have time to read a case and figure out what it says, so they just take the press release and run with it. We have not had a problem since then.



You're only as good as your last decision. One of the kisses we get is to be endorsed by law enforcement statewide or by various groups. When I was the new kid, I got endorsed by them. The next election, after I had ruled on a couple of cases, some for law enforcement and some against, they didn't remember the "for" decisions. They did remember the "against" decisions. So now I'm not endorsed by them. As I said, what was your last decision?



My philosophy has always been that any elected position is easy if you don't worry about who you offend. It was a lot easier when I was in the legislature, because I could go back and make more money practicing law. But when I became a judge, judging was my big work. I wanted to keep that philosophy, but once you give up your practice and you are out there judging, and you lose, it is a little different. It was a lot harder to be independent when I became a judge than when I was in the legislature. There is a lot of pressure on all elected officials. I think it hits the trial court more than it does us.



In the recent Trayvon Martin case, I am sure that trial judge could have said or done a few things differently to assuage the public conscious, but from what I could see, that never happened. When you get to the appellate court, the average man in the street, they have no clue who we are or what we do. When I was a trial judge, I couldn't walk to McDonald's without people beeping their horn, giving me a thumbs up or thumbs down. But in the appellate court they don't know what we do. There's no TV show called "Appellate Court in Action." It's not going to happen.



Make sure you explain well what it is you are deciding. I have a case now involving the authority of the state university to adopt an administrative regulation banning possession of firearms in a parked vehicle on campus. This is a case that is guaranteed to tick off about 50 percent of the people and make the other 50 percent happy. You could put 100 people in a room and half of them would say they need to drive through rough neighborhoods to get to the university, so they ought to be able to have a gun. Then, 50 others would say, "Well, no,

we don't want to have guns on campus. Look at Virginia Tech." It is not about the wisdom of it. I guess our only tactic is to make that clear.



I think we all know that some of the decisions we make are going to be very controversial. We recognize that and we are ready for it. I think sometimes, in those cases, we might write defensively for the audience that is going to be opposed to this, to lay out the rationale.



It's never come up in our conference room, but I have to admit that, as chief justice, I will silently cringe and think, "Do they have any idea what this is going to mean when this decision comes out? We're going to take a lot of heat for it." But it is what it is, and I give my colleagues a lot of credit. They don't care. They don't even consider what people will say.



Are you recusing or challenged because the topic is a hot button topic? I have seen what I perceived as justices recusing almost as a pretext to not have to rule on a case that might be a hot button case. If they can abstain and not rule on it, then they can't have it used against them by either side. But I find that to be problematic.



I don't have to go through elections and I don't have to worry about it. I think it takes a lot of courage for the judges that run for retention to make unpopular decisions, and I give you guys all of the credit for that. I think it takes a lot of courage.



It is almost in the nature of what we do. It is almost individual. It is almost up to each individual judge to say, "My oath means something to me. Regardless of all of this politics, I am going to do what is right, regardless of the consequences." You just have to have the backbone to do it.

Do you sometimes encounter cases in which the requirements of the law are at odds with your personal philosophy or preferences? If so, what do you do?



Sure.



I ran for an open seat, and I rebuffed inquiries into my policy preference, saying that my job was to be skeptical of my policy preferences.



—It is not uncommon, at least a couple of times a year, where we'll have a concurring judge acknowledge that the result here seems unintended and unfair, and encourage the legislature to take another look at if that's what they really intended.

—We do the same thing. And oftentimes we encourage one of the justices to do that. And I think that's a good thing for a concurring opinion to do, just exactly that. You know when a case is coming down that's going to be controversial. You need to be very careful. There are ways to say things. And you need to be very careful how you craft it.



My feeling is that I have taken an oath of office, and I don't have the luxury of deciding to walk as I might like it. There have been many times when I have decided cases where I didn't like the application of the law. I think that there have been a couple of instances where I thought it was particularly harsh. I made a point of saying that I would suggest that maybe there should be a legislative change, but that is not my job.



You follow the law.



We have rules that have emanated from the state supreme court for the intermediate court that say that we're not supposed to address things that we don't have jurisdiction of. We are supposed to rule on things in a narrow aspect. You're not supposed to tackle a constitutional issue if you don't need to tackle the constitutional issue. There's a whole list of these things that apply. Does that mean all our colleagues follow that? No. And you could identify the colleagues on your court who won't follow those rules, who want to jump in where angels fear to tread. And you usually see that in a dissenting opinion or a concurring opinion.



Well, everybody's got an example of enforcing a statute that you would never have voted for, but it's constitutional. It's a constitutional statute, so you enforce it. That's sort of a no-brainer. But everybody, at one time or another in their career as a judge, you've had many of those situations where you're enforcing statutes you think are just absolutely crazy.



When you've got a five-member court, you can't have multiple concurring opinions. You can't do it. You have got to work your very dead level best to get as many people on board as you can. And even if you've got the concurring opinion that wants to point something out, adopt that, throw it in a footnote, and let someone see that there's a problem. But the goal on a five-member court has got to be to get as many 5-0 opinions as you can get out there.



You do what the law requires.



They are probably the best decisions you write, because you hate them the most. You have got to persuade yourself as best you can.



—Those are the cases where you really want to be writing the concurrence to the majority opinion. You do have a little bit more freedom. “I must join with the majority, but . . .”

—I never seem to get that part. I always have to end up writing the darn thing.

—I have written concurrences to my own opinion.

—I didn’t join a concurrence for that purpose when I wrote the lead. I wrote the lead, but then I joined the concurrence because it was well said. It is just that it wasn’t the law.



You might write a per curiam opinion and nobody signs it. It just says, “We all agree.”



—Sometimes we will use per curiams when we are afraid the guy is going to get out of prison and come get us.

—In all of our criminal cases, there are per curiams.

—Wow.



Follow the law.



If you write an opinion you can certainly express in that opinion what your personal belief may be, but make it clear that you are not deciding the issue based upon your personal beliefs—you are basing it upon some other principle of law that you think is applicable for this particular factual situation. I think that is a way that you can express your personal beliefs and perhaps let your readers understand that you are a human being and you understand their concerns. You understand the arguments that they are making. That is not going to decide this case. It is not dispositive of this case what my personal beliefs are.



—I often write, “I am constrained . . .”

—Or, “I find this reprehensible, but . . .” That works really well too.

—Or the phrase, “We hold because we are constrained, and this is not necessarily how we would have come out if we had decided it in the first instance.” The administrative agency decided it and substantial evidence supports it and we are stuck with it, essentially.



If you can't do your job, resign.



One of the greatest things I ever heard was said by a federal judge. Someone asked her, “What about letting defendants off on a technicality?” She said, “The Constitution is not a technicality. That Constitution keeps the police out of your home, protects your privacy, and all these wonderful things.” We've got to break free from the “law and order” mindset in this country. We've got to take back the streets, as it were, and be our own best advocates. Just because we have to be neutral, that doesn't mean there aren't things we can be very zealous in advocating.



When we give speeches we sound like we have PR. The fact of the matter is we don't hire professional PR people to put our thoughts out there, nor should we. We're the silent branch of government. We do our job, for better or worse—this is why I love the elective system. The public always gets what it deserves, and that's the beautiful part of a democracy. The public puts you in there, and you decide it the way you decide it. You do your best job, and when they criticize you, bite your lip, be quiet, and go onto the next case. That's it. That's the end of the game.



Suck it up and follow the law.



I remember when I first got on the court and I was talking to the chief judge, and I said, “I am going to kill the arbitration stuff now that I am here.” He said, “Well, you can't do that.” I said, “Well, let me think about that.” I started thinking about it, and he was right. Then, the court got attacked in the newspapers for loving arbitration! Since you can't respond to newspaper articles, I started going to legal seminars and meetings, and giving a speech disclaiming all that. It turned out, I think in our courts, in about 60 percent of the cases arbitration does not prevail and about 40 percent of the time it does. I mean, I have kept studies of it because of the attacks on the court.



You follow the law. For example, a minimum mandatory sentence in which you do not have discretion to deviate, you follow the law. It is a simple quick example.



I follow the law, but I may make a comment that I think that the law is wrong. We terminate parental rights of poor people because they are poor. We put the children into a foster care system from hell. I am compelled to say that this is the law. It is not a law that is supported by any science. Somebody used to be a heroin addict, and we terminate their parental rights 20 years later because they had a dirty urine test for marijuana, while we are giving people medical marijuana licenses. That kind of bothers me.



We are in a unique situation where we can disagree with what precedent is. We can write it in our opinion. We can try to change the law, either by writing a law review article or we are allowed to importune the legislature in matters of justice to change the law. I am sure we have all done things like that. We can change the law. We really have.



We have a duty to dissent, I cannot speak for everyone, but if we do not agree with the applications of all the facts, we are going to have to disagree. If you are asking if we are going to submerge our strongly held personal opinions just to get along, well that is kind of insulting.



—If you don't use your humanity, your life experiences or whatever, then how do you reach a decision?

—Is humanity compatible with the independence of the judiciary?

—That is part of it.

—It has to be.

—That is how you are independent.



I think with all of these special interest groups, if you are afraid to say what you think, then they have won. They have backed you into doing that. I hope that all of us exercise our independence, and don't kowtow to get reelected. Am I going to do what the majority wants? What if the majority says "You can't practice Buddhism because we don't believe in it"? Well, the majority doesn't rule; the Constitution rules. A lot of these special interest groups, they don't care.



I think of child custody cases where technically the children should not be returned to the mother, but you have got to find something to hang your hat on just because it is the right thing to do. Maybe they didn't cross all of the Ts and dot all of the Is, but you have got to give

people something. It just tears your heart out that sometimes you just can't find that little piece of information that you can make a decision upon and allow the family to stay together. I think in my experience those are the most heart-wrenching cases. We have got to do what is right for the family even it is not technically legally the thing to do. I will find it if it is there.



I have been disturbed recently in our state by people who are seeking public office in the judiciary, making statements in their campaigns. In particular, one candidate recently said publically that, after outlining her conservative background and opposition actually to anything concerning labor, that she was not going to even go talk to the labor groups because she was going to stay true to her leanings. I said, "Judges aren't supposed to have leanings in the way that they decide their cases." That seems to be the dialogue now: "If you elect me, I am going to be true to these principles regardless." That seems to be gaining some momentum with the public.



I have witnessed it on my court, judges that I have watched for years and have known for years, I have seen them make decisions that are counter to anything they have ever done in their lives. When you trace this back it is because of political influence. Sometimes they will admit it, and other times they won't. I am really surprised at that. To be quite frank with you, I am very disappointed in it. When you sit on the court and when you see that decisions are made not for the right reason but for the political convenience of it, it is extremely bothersome. It really is.



I think a good judge goes back to Deuteronomy, goes back to the simple precepts of the Torah. I think justice has to be part of what we do.

Have judges in your state been voted off the bench because of their decisions?



Well, we have had some challenges. We have probably had some trial court judges who have been voted off for their decisions that made a local community angry, but nothing that was an organized effort.



We have had justices targeted for their opinions, but it didn't work. One opinion regarding the felony murder rule—which let a lot of murderers out of jail, I might add—lasted through three elections. I mean it was an issue in three different elections for people that voted in the majority in that particular case.



In our midwestern city, every two years, we have 70 people up for retention. Most voters (and most judges, for that matter) haven't a clue who these people are. It is a major problem. The fix they have proposed is to have judges go before a "blue ribbon" commission that will give them an up-or-down vote. The people who get a down vote would then be the ones up for retention. You would reduce it from 70 judges down to probably a dozen.



Retention elections are like steam valves. They allow the destruction of the individual judge to save the system as a whole. We have never had a serious attempt to move to election of judges since we went to a retention system.



In our southwestern state, the hottest button issue from a third party standpoint is DWI, and Mothers Against Drunk Drivers has the most political strength in judicial elections in our state. A few trial judges campaigned against them and they have been removed—not at the appellate level of course, but at the trial judge levels—based on their statistics in DWI cases and not being tough enough on DWI.



In our state, there is zero tolerance for a judge getting a DWI conviction. If you get a DWI, you are off the bench. That is how strong it is in our state. I don't think that is the same in most states. You are gone for getting just one DWI.



We had an excellent juvenile judge in our county. He banned the press from a certain juvenile proceeding, and newspapers and everybody else went after him. He was an excellent judge, a former law professor, but he was voted out.



They run these campaigns as they would any other political campaign. When you run these campaigns, you play to win. You take your opponent's weakest point, even if it is not a true weakness, and you expose it and you glorify it. Maybe most of it is true, maybe only a smidgen of it is true, but it doesn't really matter because it moves the polls. Unfortunately, that is why I am here, that is why I am talking to people about how we have to get rid of these judicial elections if we can. Not so much because it is not a good idea to hold judges accountable, but because of the chicanery that comes in from the outside groups and how those outside groups are trying to steal the judiciary and make it so it is no different really from the legislature.



If you allow one governor to select all the justices and judges, then all you have to do is buy one governor.



I have heard many judges who are in retention states say that they see it as even harder to retain a seat, because you are not running against another candidate—you are running against the perfect judge. You don't have anything that you can push back with, like "My opponent is funded by the demons of Satan," or something like that.



It's very political. We have a saying in our state that "A judge is a lawyer who once knew a governor."



—Worse things can happen. You make more money in private practice.

—And not live in a fish bowl.

—And get to take the cases you want to take and have fun.



I do not think it's just a couple of judges who get voted out. I actually reacted really strongly to that part of Professor Frost's article. She thinks that is just a few people. It is a lot of people. It affects not just the individuals but how every other judge thinks about what they do.



If I get voted out, I get voted out. That's it. I am not going to write a decision a certain way to keep my job. Because if I start doing that, then the whole system gets perverted.

What would “being a hero” mean on your court or in your state?



The term “hero” is rarely applied to an individual who consistently does his or her own job every day. Rather, it is the exception—someone who goes against the grain and exemplifies foresight. It is almost always judged retrospectively. It is not the judge who goes to work and implements the law as they read it every day, and does their best job. It is kind of the exception.



*It is almost impossible to judge these decisions contemporaneously. Only history is ultimately going to tell whether you were a jurist or a politician. You hear that a lot in the discussion about whether or not you are going to be on the right side of history. Looking back to *Brown v. Board of Education*, or the comparable state cases, the public outcry against those cases at the time was tremendous. Looking back now, you can say, “Yes, those people did the right*

things and faced tremendous opposition.” I think history has to judge whether you were a jurist.



—You have to be willing to follow the law as you see it, regardless of the impact that you know it is going to have.

—And get a good security system.



I think there are judges and justices who will recuse rather than face the firing squad. And I always tell the folks that come to me for advice about running for the judiciary, “Be prepared to lose, be prepared to maybe win and then you make a decision and you’re going to get ousted the next time around. Just have plan B, that’s just the way it is.”



I can think of one hero. It was the judge in the Terri Schiavo case. The circuit judge who ruled in that particular case was vilified by the public. I think his church excommunicated him and it was just horrible. The conference of circuit judges wanted to give him an award for being courageous. There was a debate among them about whether the legislature might cut their funding. All of the circuit judges at that time said, “This is ridiculous. If we are not going to support each other, who else will?” They did, they gave him the plaque. “Let it fall where it may. If this is going to kill us then we need to die.” If you lose your self-respect, you have nothing.



You sometimes think, “Well, I could have done that.” The problem is, you didn’t.



I think by definition we are not supposed to think of ourselves as “heroes.” We are just supposed to do the job that we have been elected or appointed to do.



Sometimes you have no idea it is going to be controversial until it gets out there. It is the mundane thing that you write that all of a sudden somehow hits the note and ends up as the Trayvon Martin case. I don’t know why that became such a huge issue, because that type of thing happens everywhere. You get one case dealing with somebody who tortures a dog and everybody goes nuts about it. People are torturing children much worse than that and there are 15 other cases like that. I don’t know what draws somebody.



You knew it going into it. You are going to be expected to do something. It’s funny; somebody says, “We didn’t ask for this.” Yes, we did. Every one of us did. We have one of the best jobs.

Other than being a parent; there isn't a better job out there. You don't get better than this. We sign up for it.



As to that question about heroes and heroines amongst us, I think all of us who take that oath and follow it qualify because every day you make a decision that is a tough decision that impacts somebody's life, their business, and their finances. I think to the extent that we really hold that oath and every day we really honor it, it takes a lot to do that.



When you are elected, you really have to put yourself out there and say, "I am willing to let you judge not just me but what I think and what I write and everything about me. You can look at my family, my children, my dogs, just so I can do things that are going to tick people off."



—Every time somebody appears in court you have a 50 percent chance that somebody is going to be really angry with you.

—It is probably about 60 percent.



Maybe "hero" can be reserved for those judges who are facing extracurricular consequences other than loss of job, heat from the press, etc. Maybe some of the federal judges down in the south that made those civil rights decisions when their lives were being threatened. Maybe even the way Oliver Diaz conducted himself with professionalism and dignity when he was being prosecuted by the full force of the federal government. That is a little bit more than what we bought in for.



I don't think you should think in those terms. I think you do your job. You do what you think is right. That is the way it goes. Sometimes people are happy and sometimes they are not. I don't think "hero" is a useful concept for judges making decisions.



We view ourselves as doing what is right under the law, no matter what the consequences are. We do what is right. Usually right wins out.



The heroes of today aren't necessarily the heroes of tomorrow. Now looking back, we view them as heroes today, but people hated them then.



I think the primary example is the three judges who knew they were constrained to follow what they believed the Constitution required, and they knew they were taking the hit and probably going to pay. Is that judicial heroism? Is that executing your duty? Did they do it because they wanted to be heroes? I do not think so.



I have met some heroic judges, but most of them come from countries where their constitution has been dismantled because the military has taken over, and they are trying to apply the rule of law, and somebody else is trying to kill them. That is not what we face.

OTHER TOPICS OF DISCUSSION

Judicial outreach to the public



I came out of this morning's session with a rededication to going out on the road to the district from which I am selected. I think I need to get back out there on a monthly basis, in high schools, local groups that will let me come and talk about what we do and why. I am proud of our midwestern state's educational history. We haven't had the traditional testing mentality, other than what was mandated by the federal government, but I am appalled at what has happened to civics education. Even my own children's civics education was not the way I was educated. I think we are the ones who are going to have to go out and use our prestige to fill in that gap.



You want me to go out and talk to schools. You want me to do this and that. Well, let's see. I've got Inns of Court, so I will work on that because of young students and I want to mentor them, so that takes up time. I'm on the bar association board of directors, so I do that, and they want some CLE, so I work on that part. I'm with the local bar committee for diversity. And now you want me to do another thing. When will I do my judging work? I think it's great, and I want to be helpful, and to the extent that you can, I'm for it.



We have noticed that our Court's support among the public has gone up as we have done more to do outreach and do the educational types of things like Justice Lewis said they do in Florida. We are very active in things like special treatment courts, drug courts, truancy efforts, etc. We are getting out there, we are being visible to the public, we are listening, we are answering questions—and we do it with our robes on. They see the speaker as a judge. They begin to associate you. Some people might say that is politicking during a non-political

session, but it is really not. It is just a different view of what the judiciary is. We have got judges who disagree with that in our state, too. We are banking up credibility so that when these groups come in with their attacks you have a fund of credibility that you can go to, and the public is more likely to listen to you because you are that person that has been out there. You are associated with that group that has been out there helping.



For half the population of our city, if you mention the word “civics,” they’re going to ask you what it means. Don’t tell me you’re going to educate them on civics. Who are you going to educate? The educated?



In our southern state we have judges and lawyers from local communities going into school classrooms. We give them the material in advance, and they just have to pick one up and use it. One is a scavenger hunt on a subject, and then you have to give them a test. We also teach an institute where for one week teachers attend from all over the state, and all of the justices were involved in that. We gave presentations on various things, and then they were tested. You get a chance to put a face to who you are. Normally, the problem with most judges is that we are very introverted and cerebral, and we don’t really relate to people. You need to form relationships when you don’t need them. Then, when you do need them, you can call upon them.

Judicial outreach to the news media



—In our state the news media don’t cover the courts any more. Two years ago we started issuing press releases from our court administrative office for every one of our opinions, saying what that case is and what the decision is. They are written by the press office, and the whole panel has to agree on what is said about the case. We have had 100 percent pick-up from newspapers from one part of the state to the other. They publish the press releases.

—In our western state our news media would ignore all of those. They write it up the way they feel like—and they are looking for controversy.



—Having a relationship with the press is not a bad thing. We assumed they understood what we did, but they didn’t. We actually hold workshops that are off the record, just so we can get a better idea of what they need. We have modified a lot of the things we do in the court to meet some very simple needs the media had. They understand the constraints we are under when we cannot talk to them.

—Every couple of years we have a “Law School for Journalists.”

—What we notice is that the journalists tend to be less combative, and don’t try to set us up

as much. Most of these folks are working 12-hour days for very little money. When they were in college they thought it would be glamorous to be a journalist, and now they are finding out what the real world is: they are never going to be able to buy a new car.



The publishers and the owners of the TV stations want us to go so far as to have live streaming of all court proceedings. We are not doing that. We do live streaming of every oral argument that they want, and we DVD every oral argument.



—I think the judiciary could contact the media more aggressively, either doing it directly or through some administrative office.

—I am not shy.

—I have, and I am uncomfortable in the process. I am in the trial court situation that you described earlier with the high profile stuff. They report about one out of every 100 things that happen in the courtroom, and then only when they feel like coming. There is no consistent reporting, and the public judges you on whatever they report. When there are actual errors in the news story that are available in the public record that concern me, like an incorrect statement of what a sentence was or something of that degree, I might contact them. I have on a couple of occasions.



It is kind of scary, when the press wants to put a little dramatic spin on something, the power that they have. Locally we had a headline that said, “Judge’s Dog’s Life Worth More Than Hispanic Baby’s Life.” A judge had sentenced a father, who had tossed his baby onto the bed. The baby had hit something, and the baby died. That judge, who was an Hispanic judge, gave the father probation. In the other case, a defendant was sentenced for three crimes all at once. One of them was breaking into a judge’s home and putting the judge’s dog in the clothes dryer and killing it. That person got seven years in prison. The second crime was shooting up a house with an Uzi, and the third was a drug crime. It was a horrible headline. They didn’t even have the facts right. I tried to explain that to the person in the editorial section in the paper. I said, “This fellow was sentenced for three crimes. He got seven years total for the three offenses. He had priors. That is a really lousy headline to put in the paper.” But it got everybody to look at it.

Familiarity with the court system



I have to go around to see 80 committee members who decide who will be slated for one of the parties. I have seen 35 of them so far. I would say 20 of them didn’t have a clue what I did as an appellate court judge. One asked, “What is the last case you tried?” I said, “We don’t

try cases in the appellate court.” These are elected officials. Can you imagine what the public perception of us is? It is disheartening.



I sat by a couple of young ladies who are in their 30s on the airplane on the way out here. They asked what I did. I told them. Neither had a clue what a supreme court is or what an appellate court is. They are both educated young women. One works for Nike, the other is with Microsoft. All they want to know is about the Jodi Arias case. They don’t know anything. I thought, “How could you be that lacking in education?” So I was struck by the discussion of an adult education program.



We found people in the legislature who literally did not understand that the judiciary is a separate branch of government. They thought we were part of the executive branch.



Some of them think we are state agencies.



I checked into this hotel two days ago and at the reception desk something came out about me being on our state’s supreme court. The clerk said, “Well, how many supreme courts are there? I thought there was only one.” I said, “Well, each state has one, and those courts do most of the work. Those folks up there on the U.S. Supreme Court, they take about a hundred cases a year.”

Reporting of decisions



—Are all of your opinions reported? Do you have unreported?

—They are all reported.

—Ninety percent of ours are unreported—thank God, because the panels disagree.



You may not even be aware of a decision. They don’t circulate unreported decisions to all the judges. It is only if someone moves for reconsideration that you can find out about it.



A district neighboring ours issued two cases from separate panels, on the same facts, on the same day, with opposite results. The opinions were released the same day.



In our southern state, almost all of the intermediate appellate courts—maybe all of them—circulate all opinions a week before release to give all of the judges a chance to look at them. About 95 percent of our en banc requests come from our judges. We probably have five or six of those every year. With 15 judges, it just eats up judicial time.

Party Politics



Our state, to be fair, it is not Democrat and Republican. It is more nuanced than that. It is business-friendly or not business-friendly, which then translates into Republican or Democrat.



It is not Democrat and Republican. It is the U.S. Chamber of Commerce versus the trial lawyers. That is what is involved. In the instance of our state, it is who contributes to election campaigns. It is not the politics of Democrat or Republican or re-districting or some such.



On our intermediate court, I could not tell you, without going back and looking, who was a Democrat and who was a Republican. I have never known our court to decide any case or any issue based on anybody being a Democrat or Republican. It has just never been a part of that. I think there is more focus on the highest court.



In our state, although we are non-partisan, we are put in the position of being bipartisan pretty much in our campaigning and in other things that we choose to do. If I go to an American Constitution Society meeting, I need to go to a Federalist Society meeting. That regulates how many of these meetings I go to, because I am going to have to balance it. If I attend a Republican candidate's fundraiser and contribute (and sometimes I attend without contributing), I feel that I need to balance that by going to a Democratic candidate's fundraiser. We take an oath to represent the rich and the poor, and I think that includes the Democrats and the Republicans. We need to go to everything if we are going to go to anything. There is no appearance of impropriety in the sense that we are only seeing one side and going to one side.



I used to be a law clerk on my court many, many years ago. It was all Democrat except for one Republican. Then, when I got on the court, it was the opposite. The reality is, it is our state and our politics. Because of national politics, our state is targeted—and has gone red, by the way. Back in the day, everyone was a Democrat. The philosophy hasn't changed much in

our state—it is just the party that has changed. Whether you are Democrat or Republican, a lot of people carry guns. It is not a party issue in our state, though it may be in other states. And there is now a national endeavor to turn the state back to blue.



I know the people who are in the Chamber, and I know the trial lawyers, and I have gone around and tried to find out about these groups. They grade me and they grade the other judges on viability. The trial lawyers have a list of cases they look at every year. I got an award for “Outstanding Trial Judge of the Year” from the trial lawyers one year, but I did not get their endorsement when I ran. I did not get any money from them when I ran, because I ran as a Republican. So from one year to the next you cannot rely on any campaign things. I think one of the reasons our state has not adopted retention elections is that with an opponent you know who you are running against, you know who your target is, and the public has a clear choice. With retention elections, everybody is up for election. If people do not like incumbents, everybody can be tossed out and that is not something our judges want.



You can talk about Republican and Democrat, but I can tell you in my state, we have several judicial districts where you cannot get elected unless you are gay or lesbian.



When I was first on the court, I spent the first couple of years wondering what political views my colleagues had. I really didn’t know, other than that one of them had a husband who gave a lot of money to the Democrats. You certainly couldn’t tell by the decisions or by comments that were made. As time went on and we got to know each other better, I learned these things. I have never been affiliated with political parties since I have lived in our state, and my colleagues were like that. They had been judges for a long time.



There has been more disagreement on my all-Republican court than there was when we were mixed Democrats and Republicans.

Political consultants



When you get these \$100 million campaigns, the political consultants run those things. They really keep the whole thing operating because that is where they make their money. When they got done with it, you didn’t know which of the child molesters you wanted to vote for.



In our southern state we have a merit retention system, and we've never had an appellate judge who was not retained through the merit retention system. This last election, we had organized opposition to three of our supreme court justices, but they were overwhelmingly returned to office by the voters. The opposition was essentially mounted by political consultants, who made a lot of money by doing it. The opposition wasn't directed against particular opinions of the justice. It was a perceived philosophical bent that they didn't approve of. That's the public perception.



For years our state had two circuit judges who were just outstanding, that had been there forever. All of the cases coming out of state government came through that court. They really knew the stuff. A political consultant figured out that one of them was a little bit weak in the polls, so he got a candidate to run against him and ran the campaign and defeated him. He said afterwards the only reason he did it was because he wanted to create a new market for political consultants and judicial campaigns. A lot of times, it is not the decision that beats you, it is the way you treat the lawyers, the way you treat the public. I think that is a much bigger factor than any individual case. The decision is just what they run the campaign on.

The rule of law



I have traveled probably in 50 countries and I go to a lot of courts. If I am there, I will just show up in court one day, to see how they do business. The most respect that our country has comes from our rule of law. Wherever you go, people admire this country. They love it. That's the reason they want to come here—because of the rule of law.



I practiced law for a long time, and had a good life, and I walked away from it to go onto the court, all because of my granddaughter. I was convinced that if we didn't get hard-working people who were willing to work however many hours it takes, and to read the law and call it for what it is into the court system, then my granddaughter would not have the same life that I have enjoyed.

I think of Germany, but the same thing happened in Venezuela, the same thing happened in Columbia, where judges are down there getting shot. When you talk about public opinion, where was the public opinion in Egypt for Mohamed Morsi two months ago? The most popular guy around, and all of a sudden, some things change and all of a sudden half the people hate him. We cannot allow ourselves to be controlled by that.

Most citizens don't care what is going on. They don't know. It is up to people like us to be the guardians—to keep the federal government out of state issues, and for federal judges to ensure that the presidency does not become a kingship. You can go all the way back to pre-Reagan or whatever, I don't care about Republican and Democrat.

Congress has abdicated its responsibility in appointment of federal judges. Instead of selecting the best judge available, they want somebody like them. One senator has said that specifically. I met him because he used to come to our state all the time. He would say, "We have got to get so-and-so."

We are the guardians of this country through the constitutions of our states and the United States Constitution. If we don't do it right, even at the price of losing our jobs, then we are going to lose.



POINTS OF AGREEMENT

In the discussion groups, the moderators were asked to seek out consensus—to the extent that it could be achieved—on issues raised in the Forum. At the closing plenary session of the Forum, these points of agreement were summarized. Most, but not all, of the standardized discussion questions were mentioned, and several other relevant topics not covered specifically in the standardized questions also received attention.

- Political interest in the courts is on the rise. There is less political interest in the intermediate appellate courts than in the state supreme courts.
- Campaign fundraising presents ethical concerns.
- Appellate judges feel beleaguered or attacked mainly by the U.S. Chamber of Commerce, and they agree that campaigning, also known as “educating the community,” is a necessary ingredient of judges’ responsibility—including campaigning and educating the legislature.
- Judges cannot ignore politics. They must keep fingers on the social pulse from their own campaign and education committees, and identify and reach out to the community to form effective responses.
- There’s a wide variety of systems, but none are safe from political influence. So far the primary focus of politicization has been at the state supreme court level.
- Courts are “political institutions,” but only with a “little p,” and should never be “capital P” political institutions.
- Intermediate appellate courts are subject to less scrutiny and controversy.
- With judicial elections, it is preferable that they be regional, since a statewide election is prohibitively expensive.
- There is a need for greater civic engagement through public education.
- Politics is inherently involved in the judiciary, both in elections and appointments. Essentially all agree that personal views/politics have some effect on judicial decision making, filling interstitial spaces in the law.
- There is no real conflict between judicial campaigning and judicial ethics. Do what’s right, and say you did it.
- Appellate courts decide major questions of social policy all the time.
- When issuing difficult decisions that may be unpopular, explaining the legal issue to be decided expressly is important and can help keep emotional response to the decision in check.
- There is no perfect system for selecting judges.
- It is very difficult to counter attacks regarding decisions; it’s best to ignore them.
- It’s important to mention in opinions that there are different views.
- We should value judges who make the hard choices.
- The idea of being a hero is not a valid concept for judges. Doing what is right *is* valid.
- All judges in states with elections know judges who have been voted off the bench.

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- Most judges in one group thought election results were based on things other than their decisions.
 - When judges face hard cases, they just follow the law.
 - In cases in which the law is at odds with the judge's personal philosophy, the judge should follow the law—and perhaps state that legislative action is appropriate.
 - Public opinion (as distinct from public policy) should never be part of the consideration in making decisions.
 - We've lost judges in almost every state due to targeting by special-interest groups.
 - Public opinion should not play an overriding role in a decision.
 - The length of a judge's term of service should not compromise his or her judicial independence.
 - Judges in one group did not accept the term or spirit of "popular constitutionalism" and questioned how one could determine what popular opinion is.
 - The judge's job is to uphold the law even if it is contrary to his or her personal views.
 - It is a violation of judicial ethics to answer a campaign question on how the judge voted or will vote on particular issues.

APPENDICES

FACULTY BIOGRAPHIES

Paper Presenters and Moderator

Professor Charles G. Geyh is the John F. Kimberling Professor of Law at the Indiana University Maurer School of Law. He is the author of *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (University of Michigan Press 2006), and *Judicial Disqualification: An Analysis of Federal Law* (2d ed. Federal Judicial Center 2010). He is also coauthor (with Alfini, Lubet and Shaman) of *Judicial Conduct and Ethics* (Fourth ed., Lexis Law Publishing 2007) and coauthor (with Raven-Hansen) of *UNDERSTANDING CIVIL PROCEDURE* (Fifth ed., Lexis Law publishing, forthcoming 2013), and editor of *What's Law Got To Do With It?: What Judges Do, Why They Do it, and What's at Stake* (Stanford University Press, 2011). His work on judicial independence, accountability, administration, and ethics has appeared in over sixty books, articles, book chapters, and reports.

Professor Geyh has served as an expert witness in the Senate impeachment trial of Federal District Judge G. Thomas Porteous; director of and consultant to the ABA Judicial Disqualification Project, and as reporter to four ABA commissions (the Joint Commission to Evaluate the Model Code of Judicial Conduct, the Commission on the 21st Century Judiciary, the Commission on the Public Financing of Judicial Campaigns, and the Commission on the Separation of Powers and Judicial Independence). He has likewise served as director of the American Judicature Society's Center for Judicial Independence; consultant to the Parliamentary Development Project on Judicial Independence and Administration for the Supreme Rada of Ukraine; assistant special counsel to the Pennsylvania House of Representatives on the impeachment and removal of Pennsylvania Supreme Court Justice Rolf Larsen; consultant to the National Commission on Judicial Discipline & Removal; and legislative liaison to the Federal Courts Study Committee.

Professor Geyh received his B.A. in political science from the University of Wisconsin in 1980 and graduated from the University of Wisconsin law school in 1983, after which he clerked for the Honorable Thomas A. Clark on the United States Court of Appeals for the Eleventh Circuit, worked as an associate at the Washington D.C. law firm of Covington & Burling, and served as counsel to the United States House of Representatives Committee on the Judiciary, before beginning his teaching career in 1991.

Professor Amanda Frost received her A.B. and J.D. degrees from Harvard. She writes and teaches in the fields of federal courts, civil procedure, statutory interpretation, judicial ethics, and transparency in government. Her articles have appeared in the *Duke Law Journal*, *Northwestern Law Review*, *UCLA Law Review*, and *Virginia Law Review*, among others. Her non-academic writing has been published in *Slate*, the *National Law Journal*, and the *Los Angeles Times*, and she authors the "Academic Round-Up" column for SCOTUSblog. Before entering academia, Professor Frost clerked for Judge A. Raymond Randolph of the U.S. Court of Appeals for the D.C. Circuit and spent five years as a staff attorney at Public Citizen, where she litigated cases at all levels of the federal judicial system. She has also worked for the Senate Judiciary Committee and spent a year as a Fulbright Scholar studying transparency reform in the European Union. Professor Frost has been a visiting professor at Harvard Law School, UCLA Law School, and the Johannes Gutenberg University in Mainz, Germany.

Kathryn H. Clarke (Forum Moderator) is the president of the Pound Civil Justice Institute (2011-13). She is an appellate lawyer and complex litigation consultant in Portland, Oregon. She focuses on medical negligence, products liability, punitive damages, and constitutional litigation in both state and federal courts. She received her undergraduate degree from Whitman College and her law degree from the Northwestern School of Law of Lewis and Clark College. She has served as president of the Oregon Trial Lawyers Association and is a governor of the American Association for Justice.

Luncheon Speaker

Oliver E. Diaz, Jr. received his B.A. degree from the University of South Alabama, his J.D. degree from the University of Mississippi School of Law, and an LL.M. degree from the University of Virginia School of Law. He served in the Mississippi House of Representatives from 1988 to 1994, with positions on the Insurance Committee, the Judiciary Committee, and the Ways and Means Committee, and as secretary for the Constitution Committee. He also served as city attorney for the City of D'Iberville for four years. He was elected to the Mississippi Court of Appeals in November 1994 and was appointed to the Mississippi Supreme Court in 2000, later winning election to an eight-year term beginning January 2001.

Panelists

David T. Biderman practices with Perkins Coie in San Francisco and Los Angeles, focusing his practice on mass tort litigation and consumer class actions and heading the firm's mass tort/toxic tort defense group. He received his B.A. degree from Emory University and his J.D. from the University of Virginia School of Law, where he was articles editor of the *Virginia Journal of Natural Resources Law*. He has published articles in the *National Law Journal*, the *Los Angeles Daily Journal*, and for publications of the Defense Research Institute and the Washington Legal Foundation. He also speaks and writes regularly on class action issues, and he has served the courts through the Civil Litigation Subcommittee of the California Judicial Council, on special committees formed by the state courts to address toxic tort litigation. He is a fellow of the American Bar Foundation and a member of the ABA's American Jury Project.

James Bopp, Jr. received his B.A. degree from Indiana University and his J.D. degree from the University of Florida. He practices in Terre Haute, Indiana, specializing in First Amendment, constitutional, campaign-finance, and election matters in both trial and appellate courts. He successfully argued the *Republican Party of Minnesota v. White* case in the U.S. Supreme Court, which held that the First Amendment protects the right of judicial candidates to announce their views on disputed legal and political issues. He serves as general counsel of the James Madison Center for Free Speech, general counsel of the National Right to Life Committee, and special counsel to Focus on the Family. He is a commissioner of the National Conference of Commissioners of Uniform State Laws, a past member of the United States National Commission for UNESCO, and a member of the Federalist Society for Law & Public Policy Studies. A longtime governor of the Republican National Lawyers Association, he was awarded the association's 2009 Republican Lawyer of the Year award. This year the National Law Journal recognized Mr. Bopp as one of its "100 Most Influential Lawyers in America."

Honorable Russell Carparelli received his B.S. degree from the U.S. Air Force Academy, a J.D. degree from the University of Denver College of Law, and an LL.M. from the University of Virginia School of Law. He has been a judge of the Colorado Court of Appeals since February 2003. Before joining the court, he served on

active duty in the U.S. Air Force, retiring with the rank of lieutenant colonel, and, thereafter, was in private practice in Denver. In February 2007, Judge Carparelli co-founded the *Our Courts* adult public education project with U.S. District Court Judge Marcia Krieger. Since its founding, *Our Courts* has given more than 400 presentations and addressed more than 12,000 audience members. In February 2010, the American Bar Association Coalition for Justice awarded the *Our Courts* project its 2010 national award for public education regarding the role of fair and impartial courts.

Judge Carparelli is also an active leader in projects regarding attorney professionalism and civility. He is a member of the Colorado Chief Justice's Commission on the Legal Profession, a member of the Colorado Bar Association and Denver Bar Association Professionalism Coordinating Council, a designer and drafter of content for the Learning Center at Colorado's Ralph Carr Colorado Judicial Center, and a member of the Justice at Stake committee on public education about the courts. In October 2012, he received the American Bar Association Dispute Resolution Section Civility and Law Award.

Praveen Fernandes is director of Federal Affairs & Diversity Initiatives at Justice at Stake, a nonpartisan national partnership of legal and civic organizations formed to support fair and impartial courts and to protect courts from encroachments on their independence. He is a graduate of the University of North Carolina (Chapel Hill) School of Law, has a master's degree in Public Health from the University of North Carolina School of Public Health and holds a B.A. in biomedical ethics from Brown University. After law school, he counseled clients at Patton Boggs LLP and Ropes & Gray LLP on regulatory, legislative, and public policy matters, with a focus on health care and Food and Drug Administration issues. He then spent six years at the American Constitution Society for Law & Policy (ACS), becoming director of programs for National Security, Technology, Labor, and the Environment. Mr. Fernandes has also served as a lobbyist and legislative lawyer for the Human Rights Campaign, where he worked on judicial nominations, relationship recognition, appropriations, HIV/AIDS, and other LGBT equality issues. The National LGBT Bar Association named Mr. Fernandes to its 2010 "Top 40 under 40" list, which recognizes LGBT lawyers under the age of 40 who have distinguished themselves through their work for LGBT equality. He joined Justice at Stake in March of 2012.

Honorable R. Fred Lewis was appointed to the Supreme Court of Florida on December 7, 1998. A native of West Virginia, he moved to Florida in 1965 to attend Florida Southern College, and he graduated in 1969 with the NCAA Post-Graduate Grant as one of the top fifteen scholar athletes in the United States. He then attended the University of Miami School of Law, where he was a member of the law review and an officer in the student bar association.

After serving in the military, Justice Lewis entered private practice in Miami and specialized in civil trial and appellate litigation until his appointment to the Florida Supreme Court. While in private practice, he was heavily involved in providing counseling to families with children having impairments, and he provided pro bono legal services and counseling for cancer patients seeking proper treatment for multiple conditions.

Justice Lewis is the founder of Justice Teaching, a program that has placed over 3,900 active volunteers from the legal profession in all of Florida's public schools and over 350 private schools. The program has been adopted in many other states, the most recent being Oklahoma. In addition to many other awards for public service, Justice Lewis has been recognized for his dedication to children, the disabled, the ill and infirm, the elderly, and the disadvantaged. For that and many other activities, he was selected as Florida's Citizen of the Year in 2001 by the Florida Council.

Patrick A. Malone practices law in Washington, D.C., specializing in medical malpractice and products liability litigation. He graduated summa cum laude from the University of Kansas, then worked as a journalist for United Press International, *The Washington Post*, and *The Miami Herald*, where he was a Pulitzer Prize finalist for a series he co-authored on medical malpractice. After graduating from Yale Law School, he clerked for U.S. District Judge Gerhard Gesell in Washington, D.C., before beginning his personal injury law practice. Mr. Malone is the co-author (with Rick Friedman) of *Rules of the Road: A Plaintiff’ Lawyer’s Guide to Proving Liability*, and a book for medical patients, *The Life You Save: Nine Steps to Finding the Best Medical Care—and Avoiding the Worst*. He is a member of the International Academy of Trial Lawyers and the American Association for Justice and a fellow and trustee of the Pound Civil Justice Institute.

Honorable David Wiggins has been a member of the Iowa Supreme Court since 2003, participating in more than 1,000 published cases and authoring more than 200 published opinions. He earned his bachelor’s degree from the University of Illinois in Chicago in 1973, and he graduated with honors and Order of the Coif from Drake University Law School in 1976. While in law school, he served as associate editor of the *Drake Law Review*. Justice Wiggins practiced law in West Des Moines, Iowa, for 27 years before to his appointment to the court and served as a governor of the Iowa State Bar Association and president of the Iowa Trial Lawyers Association. He also served as chair of the Iowa Judicial Qualifications Commission from 2000 until he joined the court. He is a master emeritus of the C. Edwin Moore American Inn of Court and a lifetime fellow of the Iowa Academy of Trial lawyers. He has presented numerous lectures on trial practice, appellate advocacy, and ethics. In his non-legal life, he volunteers with Habitat for Humanity.

Edward H. Zebersky received his Bachelor of Business Administration degree from the University of Wisconsin at Madison and his J.D. degree from the University of Miami, where he was a member of the Order of the Coif and an editor of the *Inter-American Law Review*. He practices in Ft. Lauderdale, Florida, specializing in class action, insurance coverage disputes, torts, products liability, and wrongful death and personal injury matters in both state and federal Court. Mr. Zebersky is a governor of the American Association for Justice, a member of the American Board of Trial Advocates (ABOTA), a past president of the Academy of Florida Trial Lawyers, a member of the Public Justice Foundation, and a Fellow of the Pound Civil Justice Institute. He also serves as a volunteer lobbyist regarding insurance issues and writes amicus briefs for the Florida Medical Association on insurance issues affecting the medical profession. He has received the Florida Bar Chair’s Choice Pro Bono Service Award, and the Florida Justice Association’s Legacy and Legislative “Shoe Leather” Awards.

Discussion Group Moderators

Jennie Lee Anderson received her B.A. degree from the University of Wisconsin-Madison and her J.D. degree from the Hastings College of the Law. She is a partner in the law firm of Andrus Anderson LLP in San Francisco. Her practice focuses on employment, products liability, consumer, civil rights, antitrust, and mass tort cases, and she has been appointed lead counsel in multiple state and nationwide class actions. She has also represented indigent inmates on California’s death row through the Habeas Corpus Resource Center. She is a governor of the American Association for Justice and a trustee of the Pound Civil Justice Institute.

Sharon J. Arkin is a certified appellate specialist specializing in plaintiffs’ appeals and law and motion matters. She received her law degree from Western State University School of Law, and she has been certified by the California State Bar’s Board of Legal Specialization as an appellate specialist since 2001. Ms. Arkin is

a former President of the Consumer Attorneys of California and was selected by the Consumer Attorneys Association of Los Angeles as its current Appellate Attorney of the Year. She received the American Bar Association's 2007 "Pursuit of Justice" award. She is a fellow of the American Bar Foundation, a member of the American Association for Justice, and secretary of the Pound Civil Justice Institute.

Michael D. Brown is the Managing Partner of Rainey and Brown, LLC, in Spartanburg, S.C. He received his B.A. degree from Alabama A&M University, an M.P.A. degree from the Ohio State University, and his J.D. from the University of South Carolina School of Law. Following law school, he clerked on the circuit court for the Honorable Donald W. Beatty, now associate justice of the South Carolina Supreme Court. He specializes in nursing home abuse cases, catastrophic injuries, wrongful death cases, products liability, and transportation cases, and criminal defense. Mr. Brown has served with a number of private and public entities, and presently is vice chairman of the Spartanburg County Council, where he chairs the Public Safety and Judiciary Committee and is a member of the Economic Development and Livability Committees. His bar activities include the presidency of the South Carolina Black Lawyers Association and chairing the Minority Caucus of the American Association for Justice. He is an Aspen Global Leadership Fellow, and has participated in Aspen programs in Jordan and China. In August of this year, he will begin an LLM program in criminology and criminal justice from the University of London. He is a fellow and trustee of the Pound Civil Justice Institute.

Simona Farrise is the founder of the Farrise Law Firm, P.C., in Los Angeles. She received her J.D. degree from Golden Gate University School of Law, whose Distinguished Alumnus Award she received in 2007. She also holds an LL.M in Social Justice from the University of California, Boalt Hall School of Law. Her practice has primarily involved representing plaintiffs diagnosed with asbestos-related terminal cancer. In addition to asbestos cases, she has litigated other complex products liability, insurance bad faith, and employment actions.

William A. Gaylord is a shareholder in the Portland, Oregon, law firm of Gaylord Eyerman Bradley, PC. He has represented plaintiffs in products liability and medical negligence litigation for 38 years and was the lead trial counsel in *Williams v. Philip Morris*, a punitive damages case decided by the U.S. Supreme Court in 2009. He received his undergraduate degree from Oregon State University and his law degree from the Northwestern School of Law of Lewis and Clark College. Mr. Gaylord has chaired the Oregon Uniform Trial Court Rules Committee and the Oregon Council on Court Procedures. He is a past president and current governor of the Oregon Trial Lawyers Association, a former governor of the American Association for Justice (AAJ), a member of AAJ's Amicus and Legal Affairs committees, a board member the Public Justice Foundation, and is the immediate past president of the Pound Civil Justice Institute.

Shawn J. McCann received his B.S. degree from Villanova University and his J.D. degree from Loyola Law School, Los Angeles, where he served on the Entertainment Law Review. He practices with the firm of Girardi Keese in Los Angeles, specializing in personal injury, wrongful death, professional malpractice, products liability, and environmental contamination. He teaches and lectures on trial skills and discovery at CLE programs and serves on the board of governors of the Consumer Attorneys of California and on the Los Angeles County Bar Association's Judicial Election Evaluation Committee. He is a member of ABOTA and serves on the executive committee of the New Lawyers Division of the American Association for Justice. He is a fellow and trustee of the Pound Civil Justice Institute.

Elizabeth Ann "Betty" Morgan received her B.A. degree from the University of Florida and her J.D. degree from Emory University School of Law. She was board certified by the Florida Bar as a specialist in business

litigation from 1997 to 2007 and is certified in intellectual property law through 2013. She is admitted in Florida and Georgia, has significant jury trial experience in state and federal court, and has handled cases in many different states. She is experienced in alternative dispute resolution and is a registered mediator in Georgia. Ms. Morgan teaches trial techniques at Emory University School of Law, has taught trademarks and trade secrets as adjunct faculty at the University of Miami School of Law, and has lectured extensively on intellectual property and employment issues.

Ellen Relkin is of counsel to Weitz & Luxenberg, P.C., in New York City and Cherry Hill, New Jersey, where she represents plaintiffs in pharmaceutical products liability and toxic tort cases. She holds a law degree from Rutgers School of Law and an undergraduate degree from Cornell University, and she is certified by the New Jersey Supreme Court as a Civil Trial Attorney. She was law clerk to the Honorable Sylvia Pressler, former presiding judge of the New Jersey Superior Court, Appellate Division. She has been a speaker on scientific evidence and mass tort issues and has published articles on the subject in the *Hofstra Law Review*, *Cardozo Law Review*, and *Dickinson Journal of Environmental Law and Policy*. Ms. Relkin is an elected member of the American Law Institute, the American Association for Justice (AAJ), the New York State and New Jersey Trial Lawyers Associations, and the New Jersey, New York, and American Bar Associations. She is a governor of the New Jersey Association for Justice and a former chair of AAJ's Section on Toxic, Environmental, and Pharmaceutical Torts. She is a member of the Sedona Conference's Working Group on Mass Torts and Punitive Damages and is a fellow and trustee of the Pound Civil Justice Institute.

Earl Landers "Lanny" Vickery is a sole practitioner in Austin, Texas, specializing in civil trial and appellate law. He received his undergraduate degree from Dartmouth College and his law degree from the University of Texas at Austin. He has been board certified in civil appellate law by the Texas Board of Legal Specialization since 1995. For most of the past decade, pharmaceutical litigation has consumed most of his law practice, especially with respect to legal issues such as federal preemption. He has played a significant role in formulating and coordinating the amicus strategy in Supreme Court cases such as *Wyeth v. Levine*, *PLIVA v. Mensing*, and *Mutual Pharmaceutical Co. v. Bartlett*, and he has spoken at several continuing legal education seminars on topics including preemption and the effective use of amicus briefs on appeal. Mr. Vickery served for many years as the chair of the Preemption Law Litigation Group of the American Association for Justice, as well as the chair of its Legal Affairs Committee and co-chair of its Amicus Curiae Committee. Recently, he has become affiliated with Genformatic, LLC, an Austin-based company engaged in the business of genome sequencing and analysis. Mr. Vickery wrote an amicus brief addressing whole genome sequencing in *Association for Molecular Pathology v. Myriad Genetics, Inc.*, in which the Supreme Court recently held that human genes were not patentable.

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Court of Civil Appeals
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ABOUT THE POUND CIVIL JUSTICE INSTITUTE

What is the Pound Civil Justice Institute?

The Pound Civil Justice Institute is a legal think tank dedicated to the cause of promoting access to the civil justice system through its programs, publications, and research grants. The Institute was established in 1956 to build upon the work of Roscoe Pound, Dean of Harvard Law School from 1916 to 1936 and one of law's greatest educators. The Pound Institute promotes open, ongoing dialogue between the academic, judicial, and legal communities, on issues critical to protecting and ensuring the right to trial by jury. At conferences, symposiums, and annual forums, in reports and publications, and through grants and educational awards, the Pound Civil Justice Institute initiates and guides the debate that brings positive changes to American jurisprudence and strives to guarantee access to justice.

What Programs Does the Institute Sponsor?

Annual Forum for State Appellate Court Judges—Since 1992, Pound's Forum for State Appellate Court Judges has brought together judges from state supreme courts and intermediate appellate courts, legal scholars, practicing attorneys, legislators, and members of the media for an open dialogue about major issues in contemporary jurisprudence. The Forum recognizes the important role of state courts in our system of justice, and deals with issues of responsibility and independence that lie at the heart of a judge's work. Pound Forums have addressed such issues as rule making, electronic discovery, mandatory arbitration, secrecy in the courts, judicial independence, and the civil jury. The Forum is one of the Institute's most respected programs, and has been called "one of the best seminars available to jurists in the country."

Howard Twigg Memorial Lecture on Legal Professionalism—Founded in 2010 to honor attorney Howard Twigg, a legal giant, consummate professional and champion of justice for Americans, this lecture series trains attorneys on ethics and professionalism in the legal field. Lectures have been delivered by Justice James Kitchens of the Supreme Court of Mississippi, Justice R. Fred Lewis of the Supreme Court of Florida, attorney Oliver Diaz, formerly of the Supreme Court of Mississippi, and attorney Mark Mandell of Rhode Island.

Academic Symposia—One of the primary goals of the Pound Civil Justice Institute is to provide a well-respected basis for challenging the claims made by entities attempting to limit individual access to the civil justice system. To this end, the Institute inaugurated the Law Professor Symposium, which offers an alternative to the "law and economics" programs being cultivated on law school campuses by tort reformers; it seeks to develop a new school of thought emphasizing the right to trial by jury and to provide a fertile breeding ground for new research supportive of the civil justice system. The Institute held its first Symposium on the subject of mandatory arbitration in conjunction with Duke University Law School in October, 2002. The papers from the 2002 Symposium appear in a special issue of the Duke law journal, 67 *LAW & CONTEMPORARY PROBLEMS* (2004). The Pound Institute held its Symposium in 2005 on medical malpractice at Vanderbilt Law School, and the papers from that program appear in 59 *VANDERBILT LAW REVIEW* (2006).

Papers of the Pound Institute—Pound has an expansive collection of research resulting from its Judges Forums, Warren Conferences, academic research grants, Academic Symposia, Roundtable discussions, and other sponsored publications. Reports of these activities, called *Papers of the Pound Civil Justice Institute*, are available via Pound's website (www.poundinstitute.org) or by contacting the Pound Institute.

Fellows Receptions—Members of the Pound Institute, called Fellows, gather twice annually to celebrate the work of the Institute. Invited guests include the Officers and Trustees of the Pound Institute, Pound Fellows, legal academics, and judges.

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PAPERS OF THE POUND CIVIL JUSTICE INSTITUTE

Reports of the Annual Forums for State Appellate Court Judges

(All Forum Reports or academic papers are available for full viewing at www.poundinstitute.org.)

2013 • The War on the Judiciary: Can Independent Judging Survive?

Charles Geyh, Indiana University Maurer School of Law, *The Political Transformation of the American Judiciary*

Amanda Frost, American University, Washington College of Law, *Honoring Your Oath in Political Times*

2012 • Justice Isn't Free: The Court Funding Crisis and Its Remedies

John T. Broderick, University of New Hampshire School of Law, and Lawrence Friedman, New England School of Law, *State Courts and Public Justice: New Challenges, New Choices*

J. Clark Kelso, McGeorge School of Law, *Strategies for Responding to the Budget Crisis: From Leverage to Leadership*

2011 • The Jury Trial Implosion: The Decline of Trial by Jury and its Significance for Appellate Courts

Marc Galanter, University of Wisconsin Law School, and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*

Stephan Landsman, DePaul University College of Law, *The Impact of the Vanishing Jury Trial on Participatory Democracy*

Hon. William G. Young, Massachusetts District Court, *Federal Courts Nurturing Democracy*

2010 • Back to the Future: Pleading Again in the Age of Dickens?

A. Benjamin Spencer, Washington and Lee University School of Law, *Pleading in State Courts after Twombly and Iqbal*

Stephen B. Burbank, University of Pennsylvania Law School, *Pleading, Access to Justice, and the Distribution of Power*

2009 • Preemption: Will Traditional State Authority Survive?

Mary J. Davis, University of Kentucky College of Law, *Is the "Presumption against Preemption" Still Valid?*

Thomas O. McGarity, University of Texas School of Law, *When Does State Law Trigger Preemption Issues?*

2008 • Summary Judgment on the Rise: Is Justice Falling?

Arthur R. Miller, New York University School of Law, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*

Georgene M. Vairo, Loyola Law School, Los Angeles, *Defending against Summary Justice: The Role of the Appellate Courts*

2007 • The Least Dangerous but Most Vulnerable Branch: Judicial Independence and the Rights of Citizens

Penny J. White, University of Tennessee College of Law, *Judicial Independence in the Aftermath of*

Republican Party of Minnesota v. White

Sherrilyn Ifill, University of Maryland School of Law, *Rebuilding and Strengthening Support for an Independent Judiciary*

2006 • The Whole Truth? Experts, Evidence, and the Blindfolding of the Jury

Joseph Sanders, University of Houston Law Center, *Daubert, Frye, and the States: Thoughts on the Choice of a Standard*

Nicole Waters, National Center for State Courts, *Standing Guard at the Jury's Gate: Daubert's Impact on the State Courts*

2005 • The Rule(s) of Law: Electronic Discovery and the Challenge of Rulemaking in the State Courts

Report of the thirteenth Forum for State Appellate Court Judges. Discussions include state court approaches to rule making, legislative encroachments into that judicial power, the impact of federal rules on state court rules, how state courts can and have adapted to the use of electronic information, whether there should be differences in handling the discovery of electronic information versus traditional files, and whether state courts should adopt new proposed federal rules on e-discovery.

2004 • Still Coequal? State Courts, Legislatures, and the Separation of Powers

Report of the twelfth Forum for State Appellate Court Judges. Discussions include state court responses to legislative encroachment, deference state courts should give legislative findings, the relationship between state courts and legislatures, judicial approaches to separation of powers issues, the funding of the courts, the decline of lawyers in legislatures, the role of courts and judges in democracy, and how protecting judicial power can protect citizen rights.

2003 • The Privatization of Justice? Mandatory Arbitration and the State Courts

Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law.

2002 • State Courts and Federal Authority: A Threat to Judicial Independence?

Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc., the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, and the relationship between state courts and legislatures and federal courts.

2001 • The Jury as Fact Finder and Community Presence in Civil Justice

Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact-finders, and possible future approaches to trial by jury in the United States.

2000 • Open Courts with Sealed Files: Secrecy's Impact on American Justice

Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests.

1999 • Controversies Surrounding Discovery and Its Effect on the Courts

Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery.

1998 • Assaults on the Judiciary: Attacking the "Great Bulwark of Public Liberty"

Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses by judges, judicial institutions, the organized bar, and citizens.

1997 • Scientific Evidence in the Courts: Concepts and Controversies

Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence.

1996 • Possible State Court Responses to American Law Institute's Proposed Restatement of Products Liability

Discussions include the workings of the American Law Institute's (ALI) restatement process; a look at provisions of the proposed restatement on products liability and academic responses to them; the relationship of its proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts.

1995 • Preserving Access to Justice: Effects on State Courts of the Proposed Long Range Plan for Federal Courts

Discussions include the constitutionality of the federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan.

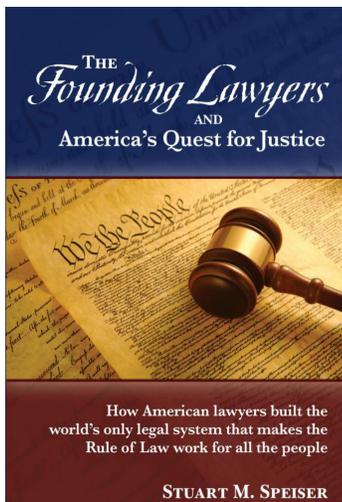
1993 • Preserving the Independence of the Judiciary

Discussions include the impact on judicial independence of judicial selection processes and resources available to the judiciary.

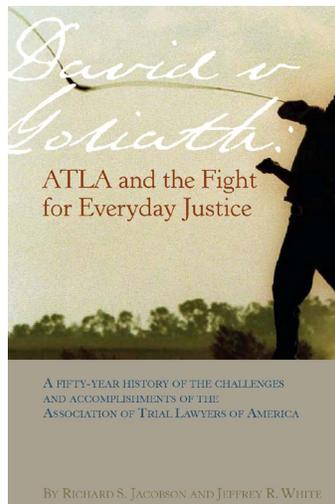
1992 • Protecting Individual Rights: The Role of State Constitutionalism.

Report of the first Forum for State Court Judges. Discussions include the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal.

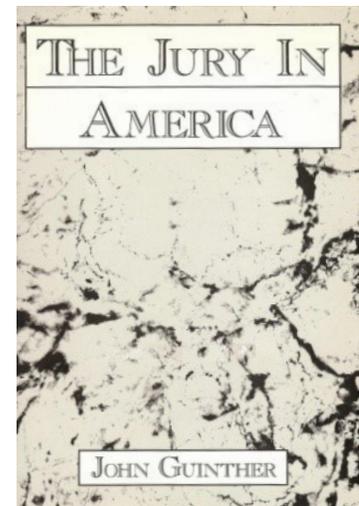
Books distributed by the Pound Civil Justice Institute



The Founding Lawyers and America's Quest for Justice
by Stuart M. Speiser (2010)



David v. Goliath: ATLA and the Fight for Everyday Justice
by Richard S. Jacobson & Jeffrey R. White (2004)
(Free viewing and downloading at www.poundinstitute.org.)



The Jury In America
by John Guinther (1988)

Reports of the Chief Justice Earl Warren Conferences on Advocacy

- 1989 • Medical Quality and the Law**
- 1986 • The American Civil Jury**
- 1985 • Dispute Resolution Devices in a Democratic Society**
- 1984 • Product Safety in America**
- 1983 • The Courts: Separation of Powers**
- 1982 • Ethics and Government**
- 1981 • Church, State, and Politics**
- 1980 • The Penalty of Death**
- 1979 • The Courts: The Pendulum of Federalism**
- 1978 • Ethics and Advocacy**
- 1977 • The American Jury System**
- 1976 • Trial Advocacy as a Specialty**
- 1975 • The Powers of the Presidency**
- 1974 • Privacy in a Free Society**
- 1973 • The First Amendment and the News Media**
- 1972 • A Program for Prison Reform**

Reports of Roundtable Discussions

1993 • Justice Denied: Underfunding of the Courts.

Report on the 1993 Roundtable, examining the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court.

1991 • Safety of the Blood Supply.

Report on the Spring 1991 Roundtable, written by Robert E. Stein, a Washington, D.C., attorney and an adjunct professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV and litigation involving blood products and blood banks.

1990 • Injury Prevention in America.

Report on the 1990 Roundtables, written by Anne Grant, lawyer and former editor of *Everyday Law* and *TRIAL* magazines. Topics include “Farm Safety in America,” “Industrial Safety: Preventing Injuries in the Workplace,” and “Industrial Diseases in America.”

1988-89 • Health Care and the Law III.

Report on the 1988–1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue,” “Health Care Providers and the New Questions of Life and Death,” and “Medical Providers and the New Era of Assessment and Accountability.”

1988 • Health Care and the Law.

Report on the 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Hospitals and AIDS: The Legal Issues,” “Medicine, Liability and the Law: Expanding the Dialogue,” and “Developing Flexible Dispute Resolution Mechanisms for the Health Care Field.”

1988 • Health Care and the Law II—Pound Fellows Forum.

Report on the 1988 Pound Fellows Forum, “Patients, Doctors, Lawyers and Juries,” written by John Guinther, award-winning author of *The Jury in America*. The forum was held at the Association of Trial Lawyers Annual Convention in Kansas City and was moderated by Professor Arthur Miller of Harvard Law School.

Research Monographs

Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts.

This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from the Pound Foundation, traces the pattern of punitive damages awards in U.S. products cases. It tracks all traceable punitive damages verdicts in products liability litigation for a quarter century and provides empirical data on the relationship between amounts awarded and those actually received.

The Pound Connective Tissue Injury Research Project: Final Report, by Valerie P. Hans, Ph.D. Each year, automobile accidents account for a substantial number of deaths and other personal injuries nationwide. Lawsuits over injuries suffered in auto accidents constitute the most frequent type of tort case in the state courts. The Pound Institute supported a series of research studies on the public’s views of whiplash and other types of soft tissue and connective tissue injuries within the context of civil lawsuits. The 2007 final report presents and integrates key research findings and identifies some of their implications for trial practice.

The American Lawyer’s Code of Conduct, Revised Draft. Available at www.poundinstitute.org.

Pound’s Civil Justice Digest

A quarterly newsletter on current and emerging legal trends. Distributed 1994-2003 to judges, law school professors, and attorneys. Back issues available at www.poundinstitute.org.



For information on how to obtain copies of any of these publications, contact:

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