Oregon Law Review
Summer, 2001 – Volume 80, Number 2
Cite as 80 Or. L. Rev. 587 (2001)

ALARMING ATTACKS ON JUDGES: TIME TO DEFEND OUR CONSTITUTIONAL TRUSTEES

Bea Ann Smith [FNa1]

The United States Constitution is a sacred instrument, establishing core values to guide the American people and guaranteeing rights that should remain steadfast in a world of change. To ensure that these rights would not be subject to the whims of a monarchy or even of the people themselves, the authors of the Constitution placed these core values into a trust called the Bill of Rights. In a like manner, the founders established a federal judicial system that was free from interference from other governmental powers and from the people. Over time, the duty of defining the terms of the trust instrument fell to this independent judiciary, and the federal judiciary took on the role of trustee. In general, a trustee protects and preserves trust property, and ensures that the property is employed solely for the beneficiaries, in accordance with the directions contained in the trust instrument. [FN1] Likewise, an independent judiciary protects and preserves our core values and individual rights in accordance with the Constitution. The American people rely not only on the federal judicial system to serve as trustee; each state has its own judiciary charged with protecting these same values and individual rights. In its role as trustee, the judiciary--state and federal--has earned the confidence of the American public, who in turn peacefully accepts the judiciary's decisions in even the most contentious matters. This confidence, however, is in jeopardy.

We hear political attacks on our courts daily. The rhetoric is not respectful. And the attacks go beyond words. Well-funded special interest groups target judges whose constitutional decisions ***588** they consider adverse; state judges must respond by raising hundreds of thousands of dollars to survive a contested election. This leads them to seek funds from lawyers and powerful interests who will later appear before their courts. Other qualified judges are turned out of office solely because of their political party affiliation. Intense and prolonged scrutiny of federal judicial nominees appointed by the President amounts to political hazing that scares off qualified candidates and delays the confirmation of much-needed judges.

Judge bashing intensified as the political disputes surrounding the outcome of the 2000 presidential election headed to the place where we always resolve our disputes: the state and federal courts. Because the stakes were so high and the opposing camps so partisan, the critics of each decision grew more shrill and more irresponsible. In the end, the United States Supreme Court determined the winner of the election by its decision in Bush v. Gore; [FN2] a bare majority of the United States Supreme Court pronounced unconstitutional the Florida Supreme Court's order to manually recount certain previously uncounted ballots to determine the voter's intent. [FN3] Critics from the right characterized the Florida Supreme Court as irresponsible and critics from the left denounced the United States Supreme Court's opinion as partisan. By and large, the American public accepted the result and swore in its new president, although many people denounced the Supreme Court's opinion as partisan and continue to do so. The disrespectful attitude toward judges heightened by this dramatic conflict continues to reverberate and serves to undermine the faith and trust in the judiciary that made this resolution acceptable to the American public.

Whatever we think of the Bush v. Gore decision, or the outcome of the presidential election, we must not overlook the unique role that independent judges play in the constitutional form of government that we have chosen. Our Constitution explicitly separates the function of government into the executive, [FN4] legislative, [FN5] and judicial [FN6] branches, in part to allow judges to decide disputes free from interference by either the chief executive or the legislature. When judges are considered impartial and independent, ***589** the public will trust their decisions, and this confidence is essential to a well-ordered society. Additionally, by separating the powers of government, our Constitution confers exclusive functions on each branch that may not be performed by the other two. [FN7] This prevents any one branch from assuming too many functions and establishes a system to check an abuse of power.

Soon after the Constitution was adopted, it was considered necessary to amend it to place certain of our core political values in trust. The values that were considered so important that they needed to be protected from the

government itself and from any mob constituting a majority were placed in our Bill of Rights. This is the covenant that the founders made to the weak and powerless Americans as well as the strong and powerful: these rights belong to you and will be safeguarded for you. But the Bill of Rights has no meaning unless it is given the force of law. Only an independent judiciary can serve the role of trustee to preserve rights that are unpopular in the heat of the moment and to protect individuals who are in the minority. Serving as trustee, the judiciary--state and federal--has built up enormous capital by vigilantly and impartially protecting individual rights, even when the American public or its representatives had to be rebuked. Despite inevitable dissatisfaction with some of its unpopular decisions, the judiciary as a whole has garnered the respect of a public that generally accepts its role of declaring the law. Individual rights will be preserved for the intended beneficiaries only so long as there is a trustee who stands above the political fray and is not dependent on the will of the majority.

Political attacks on judges have grown in scope and intensity in the wake of Bush v. Gore, threatening to intimidate judges and demoralize the entire judiciary. They diminish public confidence in an impartial judiciary. We are in danger of depleting the store of capital amassed over the last two hundred plus years that has allowed judges to make impartial decisions and protect individual rights. An independent judiciary is essential to a constitutional democracy; without it we have no trustee capable of enforcing the terms of the constitutional trust instrument against the impulses of its intended beneficiaries. At our peril will we ignore that our judiciary is under siege.

***590** I

Protecting the Trust of Constitutional Rights

A. Formation of an Independent Judiciary

One of the grievances enumerated in our Declaration of Independence was that the English King George III "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." [FN8] For centuries in England, judges were removed from their positions when their decisions or actions displeased the king. [FN9] King James II, for example, dismissed thirteen judges during his four-year reign, four in one day in 1686. [FN10] Finally, in 1701 the English Parliament gave judges commissions to be served during good behavior, but this right was denied to judges in the American colonies. [FN11] King George III justified this decision to keep colonial judges dependent on the monarch by saying that the state of learning in the colonies was so low that it was difficult to find competent men to administer the judicial office. [FN12] In this climate, colonial litigants could have no confidence in the impartiality of judges who served at the whim of the English king.

How could our founders protect judges in their new government from this kind of monarchial, or executive, interference? In 1780, a group of citizens led by John Adams drafted a constitution for the colony of Massachusetts [FN13] that called for all judges to be appointed by the governor, subject to the consent of his council, and to serve during good behavior. [FN14] The historian Samuel Eliot Morison called this provision for life tenure for judges "one of John Adams's profoundest conceptions." [FN15] This profound conception was adopted seven years later in Philadelphia ***591** in the new Federal Constitution. In addition to separating governmental powers into three branches, the Constitution provided: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." [FN16] As a result, federal judges in this country may resolve disputes without fear of removal by the chief executive, or fear of monetary penalties by the legislature. This manner of securing judicial independence has proved to be a "mighty invention." [FN17]

Protecting judicial decision-making from external influences enables the independent judiciary to perform the unique role that judges have been given in our constitutional democracy. The Constitution embraces certain political and moral values; it provides individuals equal protection under the law [FN18] and gives them certain rights--freedom of speech, freedom of religion, and the right to a fair trial--that cannot be taken away by their government. [FN19] A document standing alone, however, cannot preserve these rights; an independent institution must decide when the majority or its representatives have violated these core values. When he introduced the amendments that were to become our Bill of Rights, James Madison envisioned judges as the keepers of the constitutional covenant:

[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of th[e]se rights;

they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights. [FN20]

In 1803, in Marbury v. Madison, the United States Supreme Court affirmed the federal judiciary's right to enforce the Constitution as law by striking down any legislative or executive act that violated a constitutional provision, a process we have come to call judicial review. [FN21] Armed with this power of judicial review, ***592** the independent judiciary assumed a special role as trustee of our inalienable rights. In addition to permitting the courts to interpret statutes and shape the common law, judicial review gives the courts the right to say no to the executive and legislative branches, and to the people themselves. Our founders placed these rights in trust because they knew the people had to be protected from their own impulses.

B. Role of the Independent Judiciary

A constitutional democracy relies on two countervailing principles. First, the will of the majority should govern. [FN22] Under this principle, the majority has the ultimate power to displace decision-makers and reject their policy. [FN23] In tension with this notion is the second principle that constitutional rights, placed in trust for the benefit of individuals and minorities, usually trump the majoritarian will. [FN24] "Democracy is not only majority rule. Democracy is also the rule of basic values, . . . values upon which the whole democratic structure is built, and which even the majority cannot touch," explained Aharon Barak, president of the Supreme Court of Israel. [FN25] There must be an institution that strikes the balance between majority rule and a principled rule of law that protects individual rights. "It must be an independent institution, not subject to the mercies of the majority or the minority. . . . [I]t must be the courts," announced Barak. [FN26]

Federal judges are in a position to protect these rights because they are placed beyond the direct control of the majority. Although appointed by a President and confirmed by senators who are placed in office by the majority, federal judges are insulated from the majority will with life tenure. [FN27] Many state judges, however, face direct election by the majority, and yet are expected to ***593** perform the same role as federal judges by also enforcing federal constitutional rights. [FN28] Nonetheless, all judges can discharge their functions, acting as trustees to preserve these constitutional rights, when they enjoy the respect and confidence of the people.

As trustees, judges protect these rights by interpreting the terms of the trust document, defining and applying core values. The trustee-judge enforces these terms against the momentary desires of the people for their own long-term benefit. Justice Hugo Black of the United States Supreme Court saw independent judges as "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement." [FN29]

The will of the majority prevails, but it must prevail only under the authority of the Constitution. [FN30] Robert Dahl, a leading democratic theorist, observed that "so far as I am aware, no one has ever advocated, and no one except its enemies has ever defined democracy to mean, that a majority would or should do anything it felt an impulse to do. Every advocate of democracy . . . includes the idea of restraints on majorities." [FN31] Judicial independence fosters democratic ideals in the United States and "strengthens ordered liberty, domestic tranquility, [and] the rule of law . . . ." [FN32] This constitutional model is our gift to the world: fundamental rights enforced by judges. [FN33] "At least in our political ***594** culture, it has proved superior to any alternative form of discharging the judicial function that has ever been tried or conceived." [FN34] Resentment of the non-majoritarian role of independent judges, however, is no doubt fueling some of the present vocal attacks on our courts. When the people's elected representatives encroach on the role of the judiciary, or politicians or others intimidate individual judges, the capital we have invested in the judiciary is diminished.

II

Depleting the Capital

A. Legislative Encroachment on Institutional Independence

The genius of our political system has been the concept of separating the power to govern into three independent branches. Institutional independence promotes an independent judiciary by guaranteeing that neither the executive nor the legislative branch will interfere in the courts' business of administering justice. [FN35] Through the Judicial Conference, the Administrative Office, and the Federal Judicial Center, the federal judiciary has grown into a cohesive branch of government, able to make policy, implement its own procedures, and train its own judges. [FN36] Each state judiciary ***595** has a similar structure. [FN37]

The courts must still rely on the goodwill of the legislature, however, for the funding required to administer justice. [FN38] Courts cannot order the legislature to pass adequate budgets to build and maintain courtrooms, pay judges and judicial staff, purchase computers, or otherwise fund the judicial system. [FN39] Some legislators may resent funding a supreme court that strikes down a major piece of legislation. [FN40] Other legislators have challenged a supreme court's ability to pass rules of legal procedure, arguing that general rules should only be enacted by the legislature. [FN41]

In an effort to make judges "accountable," legislatures have imposed performance standards on courts for handling their busy dockets [FN42] and have even scrutinized judges about how they spend their time. [FN43] In 1996, the Senate Judiciary Committee's Oversight Subcommittee sent a survey to all federal appellate judges, including justices of the Supreme Court, asking how much time they spent on teaching, lecturing, writing scholarly articles, and traveling to make presentations; the senators also wanted to know how much compensation the judges received from their extracurricular activities. [FN44] The survey results were then published, [FN45] and judges more publicly criticized for taking "judicial ***596** junkets." [FN46]

Such public scrutiny suggests that the United States Senate has the authority to police the professional activities of appellate judges. It has caused the federal judiciary at times to respond like an "agency" seeking to justify its existence to Congress: "Federal judges, nervous about the next questionnaire coming from Congress, appear ready to placate and to mollify." [FN47] The Executive Committee of the United States Judicial Conference responded to the Senate survey by explaining that "[f]ederal judges have a long and distinguished history of service to the legal profession through their writing, speaking, and teaching," and suggesting that the dialogue between judges, lawyers, and law students should be encouraged, not thwarted. [FN48] When the judiciary is treated like an agency that must justify its performance, it is in danger of losing its independence in administering justice. Institutional pressure can become so extreme that it cows judges into making safe decisions that will not offend the legislatures who fund the courts. Even more threatening is the direct political pressure increasingly used to intimidate judges, especially state judges who must face contested elections.

B. Political Encroachment on Decisional Independence

John Adams's profound conception for ensuring judicial independence was to give judges job security for life. [FN49] Life tenure removes judges from the majority will, enabling them to decide a case solely on the basis of their judgment about the facts and law, without consideration of any other interests. [FN50] This is the crown ***597** jewel of judicial independence embedded in Article III of our Federal Constitution. [FN51]

But Professor Judith Resnik warns us not to center our hope for judicial independence on this crown jewel. [FN52] One commentator estimates that fewer than three percent of the judges in our nation hold life tenure. [FN53] Of the more than 28,000 state judges, [FN54] only those in Rhode Island serve for life or good behavior. [FN55] Contrary to popular belief, not all federal judges enjoy this privilege. Resnik points out that as judicial needs have grown, Congress has chosen to create a large body of non- life-tenured statutory judges, rather than expand the number of Article III constitutional judges. [FN56] The numbers tell the story. [FN57] There are nine justices of the Supreme Court and some 265 appellate judges serving the thirteen circuits. [FN58] At the trial level, there are 919 district judges. [FN59] These 1,184 federal judges all have the constitutional protection of life tenure. [FN60] But there are

874 statutory judges who serve as bankruptcy or magistrate judges for fixed terms. [FN61] Bankruptcy judges are appointed by appellate judges ***598** for fourteen years; magistrate judges are appointed by district judges for eight years. [FN62] These federal statutory judges are nonetheless removed from the will of the majority, as they are appointed by life-tenured judges for a fixed term. [FN63]

Many state judges, however, must stand for contested or retention election, jeopardizing their independence. Elected state judges must enforce federal constitutional rights as well as rights under their state constitution. Litigants in state courts are entitled to a jury [FN64] and the right of confrontation. [FN65] Criminal defendants are afforded a speedy trial [FN66] and the right to remain silent. [FN67] Capital punishment in a state court may not be imposed in circumstances declared to be cruel and unusual under the federal constitution. [FN68] Enforcing the rights of a vicious criminal or an unpopular minority can make a state court judge vulnerable to ouster by a voting majority in some form of judicial election.

Although most states initially adopted some method of appointing judges, [FN69] a wave of anti-elitism in the nineteenth century nudged many states to embrace the popular election of judges. [FN70] Vermont, Georgia, and Indiana were among the first states to adopt an elective system for some judges. [FN71] During the Jacksonian period, a sweeping sentiment for more democratic access led to popular election of all judges in Mississippi in 1832. [FN72] Other states soon followed suit. [FN73] Between 1846 and 1958, all states joining the Union chose to elect judges, and many existing states amended their constitutions to elect some or all of their judges. [FN74] Ironically, this reform was intended to separate politics from the bench: "Proponents of popular election insisted that the appellate judiciary had suffered because governors and legislators had distributed judgeships on the basis of 'service to the party' rather than on the 'legal skills or judicial temperament' of ***599** appointees." [FN75]

One of the most articulate advocates for judicial elections in this era was Frederick Grimke, chief justice of the Ohio Supreme Court in the mid-nineteenth century. [FN76] In 1848, Grimke noted in The Nature and Tendency of Free Institutions that life tenure, once necessary to make judges independent of a monarch, was out of place in a republic where both the executive and legislative branch serve limited terms. [FN77] He suggested that electing judges for a term of years would be compatible with an independent judiciary, while giving judges a greater sense of responsibility. [FN78] He wrote:

> It is a great mistake to suppose that because the judges are called to expound the principles of an abstruse science that they should be insensible to the general movement of the age and country in which they are born; . . . . There is no public magistrate whose mind will not be enlarged and liberalized, whose views will not be rendered both more wise and just, by catching something from the influence of . . . public opinion . . . . [FN79]

Justice Grimke was persuaded that judges should submit their minds "to the healthful influence" of public opinion because the power of expounding and shaping the law was quite similar to the power of legislating. [FN80] Because life tenure was unacceptable for the legislature, it should not be granted to judges. [FN81]

The trend to "democratize" the judiciary has succeeded by a wide measure. Today, judges are elected in thirty-eight states; in twelve states most judges are appointed by the executive with some form of legislative confirmation. [FN82] Twenty-three states have judges standing for election initially and periodically for reelection. ***600**[FN83] Ten of these states have partisan judicial elections; thirteen have nonpartisan elections. [FN84] Fifteen states have some version of the merit plan, judges being appointed by the governor and then standing for periodic reelection, either for retention or against another candidate. [FN85]

Sadly, a trend to "politicize" judicial elections has followed. Today the genteel elections envisioned in the nineteenth century have been replaced by noisy and nasty judicial campaigns that are only one part of a concerted attack on individual judges and courts generally. Elected judges who strive to perform their role as trustees of individual rights and impartial decision- makers are unquestionably more vulnerable to attack than appointed judges. The late Otto Kaus, a California Supreme Court justice in the 1980s, coined a colorful metaphor for the dilemma he faced in deciding controversial cases while standing for reelection: "[I]t was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving." [FN86]

From the beginning, the founders of this nation understood the importance of an independent judiciary in preserving the rule of law under which we have chosen to live. John Adams favored life tenure with a guaranteed

salary. [FN87] But over the years, in their role as laboratories, the states have experimented with different selection methods to keep our judges both independent and responsive. In the nineteenth century, reformers like Justice Grimke sought to make judges more responsive to the people by removing life tenure. [FN88] In the Jacksonian period, it was thought that governors and legislators were appointing their political cronies to the bench and that the best way to remove judges from ***601** politics was to let the people elect them. [FN89] Now, more than a hundred years later, popular elections have become so politicized that we are pressed to seek new reforms to preserve an independent judiciary.

In a ringing condemnation of today's popular elections, Tom Phillips, the chief justice of the Texas Supreme Court, recently warned the Texas Legislature that popular election of judges has outlived its time: "Popular elections perhaps yielded more qualified and more independent judges as long as the judges were few, the candidates were all of one color, class, gender and political party, the electorate was informed, and the campaigns were inexpensive. Those days are gone." [FN90]

What has changed? Qualified judges are removed from office, for example, simply because of their political party affiliation. In Texas alone, a number of factors contributed to the defeat of more than two hundred judges at the polls in the last twenty years. [FN91] Judicial campaigning has become costly and contentious and highly partisan. [FN92] The only practical way to reach the public is through expensive media, especially television. [FN93] There are too many contested judicial races for the public to be adequately informed. [FN94] Further, well-funded special interest groups have organized to defeat judges who issue unpopular constitutional decisions. [FN95] Chief Justice Phillips asked the legislature, "[i]s it still a reform to make judges raise thousands, hundreds of thousands, or millions of dollars from the bar or other interested persons to run for office?" [FN96] I think not. A recent survey reports that eighty-three percent of Texans believe that campaign contributions have a significant effect on judicial decisions. [FN97] Beyond ***602** the expense of judicial campaigns, elected judges must face increasingly angry and well-organized special interest groups eager to intimidate and defeat judges on the basis of unpopular judicial decisions.

Attacks on judges take many forms. A state judge who reverses a death penalty, or suppresses evidence in a criminal case, or issues any decision touching on the right to abortion is subject to attack. She may face well-financed opposition in her next election. She may be vilified by a widespread campaign of distortion that extends not only to her but to her political supporters. The judge who strikes down any popular initiation measure knows that the same well-organized group that promoted the issue is capable of demoting a judge who restrains it. Politicians may denounce a judge for their own political gain, singling out individual decisions adverse to their interests. Even federal judges may be intimidated during their confirmation process or after they take the bench. Intimidation that interferes with how a judge enforces the rights our founders placed in trust gives control to the beneficiary instead of the trustee. The covenant to protect our core values for the long-term benefit of all the people cannot survive without independent trustee-judges.

Failure to affirm the death penalty has caused countless judges to be defeated or challenged. [FN98] For example, the chief justice and two other justices of the California Supreme Court were removed by a retention election in 1986 after the governor threatened to have them defeated if they did not uphold more death penalties. [FN99] They did not bow to his threats and he successfully organized a statewide campaign to oppose their reelection. [FN100]

Justice Penny White of the Tennessee Supreme Court joined her four colleagues in a unanimous opinion remanding a death penalty case for a new sentencing hearing because of evidence excluded in the first hearing; she did not author the opinion. [FN101] ***603** Before she knew what had happened, she was the target of a smear campaign that resulted in her defeat in a nonpartisan retention election in 1996. [FN102] One campaign brochure stated about Justice White: "Richard Odom was convicted of repeatedly raping and stabbing to death a 78 year old Memphis woman. However, Justice White felt the crime wasn't heinous enough for the death penalty--so she struck it down." [FN103] Noting this intimidation, Justice John Paul Stevens of the United States Supreme Court declared:

> [J]udges who covet higher office--or who merely wish to remain judges--must constantly profess their fealty to the death penalty. . . . The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III. [FN104]

This comment suggests that we are returning to the problem we intended to avoid when we drafted the Constitution.

A justice of the Mississippi Supreme Court, James Robertson, was defeated in 1992 by a "law and order" opponent for expressing, in a concurring opinion, his belief that the Constitution did not permit the death penalty for rape when there was no loss of life. [FN105] Twelve years earlier the United States Supreme Court had found that the imposition of the death penalty in such cases was cruel and unusual punishment. [FN106]

Any judge, state or federal, who suppresses evidence obtained in violation of the Fourth Amendment will encounter political enemies and be labeled "soft on crime." In 1996, Senator Robert Dole called for the impeachment of Judge Harold Baer, who suppressed cocaine and heroin seized by New York police officers. [FN107] Not wanting to be perceived as soft on crime, the Clinton White House suggested it would ask for the judge's resignation if he did not reverse the ruling. [FN108] Judge Baer reversed himself. [FN109]

The politically cowed trial court judge may be lax in guaranteeing the rights of criminal defendants or requiring competent ***604** counsel, parts of the every day administration of justice. One of the most embarrassing examples comes from Texas, where the Texas Court of Criminal Appeals failed to reverse a judgment imposing the death penalty even though the defendant's attorney slept through major portions of the trial. [FN110] No other recent case has so undermined the public's trust in the judiciary, causing something akin to gallows laughter at the expense of the judges. [FN111]

Abortion decisions also provoke heated controversy. As Laurence Tribe, a law professor and frequent appellate advocate, has explained:

> [T]he depth of the division between the pro-choice and pro-life tendencies appears to reflect not simply different perspectives on the value of fetal life but different orientations toward matters of tradition, change, sex, and power. Such differences in turn reflect class and culture in ways that cut across the divide between Democrats and Republicans in our political life. [FN112]

As states have passed parental consent bills, partial-birth abortion bills, guidelines for judicial permission in lieu of parental ***605** consent, restraints on funding abortions for welfare mothers, and other measures impinging on the right to abortion, judges have declared certain of these measures unconstitutional, [FN113] but always at a high cost to themselves.

When the Florida Supreme Court struck down a statute requiring parental consent for abortion in 1989, [FN114] the judges who joined that opinion were targeted for defeat by powerful pro-life coalitions in that state. [FN115] Justice Leander Shaw, the first African-American chief justice to preside over the court, authored the opinion. [FN116] He had to raise and spend $300,000 to escape defeat in his 1990 retention election. [FN117] Justice Rosemary Barkett, who joined the opinion, was opposed two years later by the same right-to-life forces and by an organized coalition of prosecutors and police, unhappy that she had dissented in one controversial death penalty case--no matter that she had voted to affirm over two hundred death penalties during the previous nine years! [FN118] Justice Barkett raised and spent $230,000 to retain her seat on the court. [FN119] After she was confirmed for an appointment to the Eleventh Circuit in 1994, Senator Dole included Judge Barkett in his "Judicial Hall of Shame." [FN120]

Highly charged judicial politics have become issues in other political races. Michael Huffington challenged Dianne Feinstein for her United States Senate seat from California, attacking her for voting to confirm Judge Barkett's nomination to the federal appellate bench. [FN121] His full-page advertisements included distortions of real cases, similar to the tactics used against Justice White in Tennessee: [FN122] "Jacob Dougan brutally killed a teenage boy . . . [and] sent a tape to the boy's mother describing her son's murder. . . . [A] judge named Rosemary Barkett voted to spare Dougan the death penalty. Judge Barkett believed that a lifetime of discrimination explained Dougan's actions--so she let ***606** him off the hook." [FN123] In Tennessee, Bill Frist successfully used the same judge-bashing technique to defeat Senator Jim Sasser. [FN124] Frist appeared at a news conference with the sister of a murder victim, complaining that Sasser had nominated the federal judge who had granted habeas corpus relief to the murderer. [FN125] In addition, Frist lambasted Sasser for voting to confirm Judge Barkett, saying this showed that he "still hasn't learned his lesson." [FN126]

Another matter of concern for the judiciary is the popular initiative, a process whereby the people can propose and vote on a legislative matter directly when they feel their legislators have been unresponsive. [FN127] Former Chief

Justice Warren Burger noted that initiatives are entitled to no greater deference than statutes: "[T]he voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." [FN128] But the judge who strikes down an initiative faces a highly organized and well-funded group ready to unseat him at the next opportunity. When Justice David Lanphier of the Nebraska Supreme Court authored a unanimous opinion striking down a term limits initiative, its sponsors quickly organized to raise $200,000 to defeat him in 1996. [FN129] He became the first justice of the Nebraska Supreme Court ever to be removed by the voters. [FN130] The populist movement that bred initiatives threatens to impose even more direct pressure on judges who reject their proposals.

Those who employ tactics of distortion, directly and indirectly attacking particular judges for particular opinions, acknowledge that their efforts are aimed at removing judges who disagree with ***607** their views and intimidating other judges who wish to remain on the bench. When the California Supreme Court considered its own statute guaranteeing the right of privacy in 1996, right-to-life forces rattled their sabers in an attempt to influence two new justices on the court. [FN131] Former United States Attorney General Ed Meese spoke for the Parents Rights Coalition: "The judges ought to know that the public is watching their actions. That's why they come up for election every 12 years." [FN132] More menacingly, Tom DeLay, a congressman from Texas, has advocated the impeachment of federal judges who do not follow his view of the law, saying point-blank that the judges "'need to be intimidated." ' [FN133]

Nearly two hundred years ago we denounced this political use of the impeachment process when Congress rejected Thomas Jefferson's attempt to impeach Chief Justice Samuel Chase for his judicial opinions. [FN134] In 211 years, the House of Representatives has impeached only thirteen federal judges and only seven of those have been convicted by the Senate, [FN135] all for crimes such as bribery, tax evasion, and racketeering--never for the content of their judicial opinions. [FN136] Political sentiments to reverse this tradition in the name of intimidation are troublesome: "An intimidated judge is a worthless judge." [FN137]

It is irresponsible to mischaracterize a judge's ruling for political gain, or to attack one judge for the purpose of bullying those who remain on the bench. Those are the tactics that put a crocodile in every judge's bathtub. Even one federal judge with life tenure was shaken by the attacks of Senator Dole and others. Judge H. Lee Sarokin, who resigned from the United States Court of Appeals for the Third Circuit, explained: "[T]he first moment I considered whether or how an opinion I was preparing would be used [politically] was the moment I decided that I could ***608** no longer serve as a federal judge." [FN138] We no longer have an independent judiciary capable of safeguarding our rights when judges can be defeated because of an unpopular decision or can be coerced into reversing their rulings or resigning their office. When the beneficiary can remove or control the trustee, the trust instrument fails its intended purpose.

III

Testing Confidence in the Judiciary: Bush v. Gore

Throughout our history, judicial independence has been a core political value in the United States. [FN139] Courts are not perceived as instruments of the state. There is a cultural expectation that judges behave independently, that they decide cases according to principles of law, not partisanship, and that public officials and private interests are not to tamper with judicial decision-making. [FN140] Justice Stephen Breyer has celebrated this expectation: "[J]udicial independence is a matter of expectation, habit, and belief among not just judges, lawyers, and legislators, but millions of other citizens." [FN141] A 1998 Gallup poll revealed that seventy-eight percent of Americans expressed more confidence in the judicial branch than in either of the other two branches of government. [FN142]

In the ultimate test of the public's confidence in the judiciary, the American people were willing to have the outcome of the 2000 presidential election be determined by the United States Supreme Court. Alexis de Toqueville explained that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." [FN143] In this democracy, nine appointed justices with life tenure substituted their decision for the decision of the electorate, which to most observers was too close to call. Many urged the Court to intervene: ***609** "The Supreme Court . . . [can] put its imprimatur on the best way to decide who shall occupy the presidency. And the vast majority of Americans would readily accept the decision." [FN144] After the Court made its decision,

many observers feared that the Court had squandered the people's trust with an essentially political act that found no support in the law. I would like to review part of the drama of that extraordinary decision before commenting on its impact on judicial independence.

A. The Conflict

Out of some six million votes cast in Florida, George W. Bush's lead was so razor-thin that Al Gore looked for election irregularities that might have influenced the outcome. [FN145] Unfortunately, there were many. First, the confusing "butterfly" ballot in Palm Beach County, listing candidates to the left and right of the voting spaces, caused many voters to vote twice, or to vote for the wrong candidate. [FN146] There were also protests that thousands of votes had not been counted by voting machines because the "chad" indicating voter preference had not been completely perforated from the ballot. [FN147] These were the "undervotes," [FN148] which fell into several categories such as "hanging chads" (those partially perforated and hanging from one corner) and "pregnant chads" (those with an indentation indicating an unsuccessful attempt to perforate the ballot). [FN149] Additionally, there were complaints of organized attempts to remove African- American voters from the voting rolls and to intimidate others who attempted to vote. [FN150] Finally, there were massive attempts to validate or invalidate overseas ballots in various counties, resulting in disparate procedures for accepting or rejecting ballots with late postmarks or no postmark at all. [FN151]

***610** Manual recounts were called for in four large counties, [FN152] but the process was slow. [FN153] As recounts continued on November 14, the date set for certifying Florida's vote, Florida Secretary of State Katherine Harris threatened to certify Bush the official winner. [FN154] The Florida Supreme Court issued an injunction, however, preventing her from certifying the results until further order from that court. [FN155] On November 21, the Florida Supreme Court interpreted its own law and extended the deadline for certifying the Florida vote until November 26, adding twelve days to allow the recounting to be completed. [FN156] On November 26, Harris certified the vote, which at that point gave Bush a 537- vote lead. [FN157]

Gore challenged the November 26 certification, complaining about the manner in which the manual recounts were being conducted and especially that Miami- Dade County had discontinued recounts. [FN158] He asked a Florida trial court judge to throw out the ***611** certification and start the recounting over. [FN159] The circuit court refused to invalidate the certified outcome and Gore appealed to the Florida Supreme Court. [FN160] That court reversed, ordering the circuit court to commence tabulating undervotes in Miami-Dade County and to implement other statewide relief, strongly advising that the circuit court order a recount of all undervotes statewide, estimated to include some 75,000 ballots. [FN161]

The Bush team responded with unusually personal and disrespectful attacks on the Florida Supreme Court. The speaker of the Florida House of Representatives railed that the justices "sent a message that . . . they don't respect us and they don't respect the voters of Florida." [FN162] Even Bush himself accused the judges of using the bench "to change Florida's election laws and usurp the authority of Florida's election officials." [FN163]

The recounts started again all over Florida, but not for long. Bush appealed to the United States Supreme Court, which accepted the appeal the very next day. This surprised many court observers who never expected the Court to involve itself in such a highly political dispute. [FN164] Then, in a stunning five to four decision, the justices stopped the vote counting in Florida, pending their decision on the merits. [FN165] Gone was the Court's characteristic civility. Each side warned that the other was casting a cloud of illegitimacy over the presidential election. [FN166]

In the meantime, one deadline loomed. The Electoral College ***612** would meet to formally elect the President on December 18. [FN167] But electors not certified before December 12 were not guaranteed a "safe harbor," meaning Congress could challenge the slate of electors. [FN168] In retrospect, we know that twenty states failed to meet the December 12 deadline for certifying electors without jeopardizing their slates, but the outcome of the election was not disputed in any of those states. [FN169]

Against this background, the United States Supreme Court moved with untoward speed, receiving briefs on a Sunday, hearing oral argument on Monday, and issuing a sixty-five page decision on Tuesday. [FN170] The timing

of the decision seemed especially cynical, coming as it did two hours before midnight on December 12, a date the majority of the court held was the absolute deadline for certifying Florida votes. [FN171]

In another five to four decision that drew bitter dissent, the majority held that allowing the recounts to proceed under Florida's vague "intent-of-the- voter" standard violated the due process and equal protection rights of voters in that state. [FN172] Ironically, this "equal protection" rationale was posited by the five conservative justices who have generally rejected constitutional arguments grounded in equal protection. [FN173] Further, those same justices, who traditionally champion state's rights, [FN174] were unwilling to defer to the Florida Supreme Court's interpretation of its state law concerning the deadline for certifying votes. [FN175] Chief Justice Rehnquist and Justices Scalia and Thomas said the Florida court violated its own state law in ordering the recount. [FN176] Finally, the majority concluded there was not time to remand for a constitutional recount using a uniform standard because Florida law required the completion of all vote counts by December 12, a deadline that would expire less than two hours ***613** after the opinion was announced. [FN177]

Four dissenting opinions issued. Two dissenters, Justices Breyer and Souter, shared the majority's concerns about the unequal standards employed for recounting ballots in the various counties, but they rejected the notion that either Florida law or federal law made December 12 an absolute deadline for certifying Florida votes. [FN178] Justice Souter wrote, "There is no justification for denying the State the opportunity to try to count all disputed ballots." [FN179] Both Justices Breyer and Souter cited federal law that required the counting of votes certified before the true deadline of December 18 and would have remanded with instructions for the recount to proceed according to some uniform standard and to be certified before the Electoral College convened. [FN180] Two dissenters, Justices Stevens and Ginsburg, rejected Bush's equal protection claims altogether. [FN181]

Harsh language issued from the dissenters on the Court. Justice Breyer warned that the majority risked "a self-inflicted wound--a wound that may harm not just the Court, but the Nation." [FN182] Justice Stevens charged that the majority opinion "can only lend credence to the most cynical appraisal of the work of judges throughout the land." [FN183] Even more withering was his comment, "Although we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." [FN184]

B. The Aftermath

Attacks on the judiciary were particularly harsh immediately following Bush v. Gore. Over time, however, the criticism has splintered. Harsh denunciation of the United States Supreme Court has evolved into a mostly thoughtful critique while critics continue to censure the Florida Supreme Court. The repercussions ***614** for other courts are less clear, although the reputation of the judiciary is plainly affected by the events.

1. The United States Supreme Court

Not all criticism of Bush v. Gore was negative. Some commentators praised the Court for saving the country from a constitutional crisis. [FN185] Most of its supporters contended it was the only institution with the legitimacy to bring this partisan struggle to an end. [FN186] One asserted that if the Supreme Court had not intervened, the political tension would have "created a train wreck." [FN187] Indeed, following the December 12 decision, a majority of Americans, sixty-one percent, said they preferred having the high court resolve the election. [FN188] According to a CNN/USA Today/Gallup poll, seventeen percent trusted Congress to decide the election, nine percent preferred the Florida Supreme Court, ***615** and seven percent the Florida legislature. [FN189]

Many critics, however, asserted that the Supreme Court had undermined its legitimacy and damaged the reputation of judges all across the nation. [FN190] These critics took two stances: that the Supreme Court acted politically, [FN191] and that the majority decision was unprincipled. [FN192] The critics explained that the Supreme Court has never decided that ballots, not counted with absolute precision, should not be counted at all. [FN193] "[E]ven more chilling," others suggested, is the intrusion on states' rights. [FN194] Some of those praising the Supreme Court for stepping into the fray criticized the Court's legal analysis. Robert Bork, a former conservative Supreme Court nominee, argued that reliance on the Equal Protection Clause raises serious difficulties. He stated that the disparities

the majority said raised equal protection problems "have always existed within states under our semi-chaotic election processes. By raising that to the level of a constitutional violation, the court federalized state election laws." [FN195]

***616** An associate law professor at Georgetown University, Neal Kumar Katyal, predicted four dire consequences likely to be visited on the Court. [FN196] First, he contended the Senate would most certainly block attempts to fill vacancies on the court. [FN197] Second, he feared lower court judges may begin to dismiss what the Supreme Court says in its decisions. [FN198] Third, he predicted a new academic movement dedicated to exposing the Supreme Court's political biases. [FN199] Finally, he expected that Supreme Court practitioners, traditionally sophisticated legal advocates, will have to behave more like lobbyists. [FN200]

The United States Supreme Court, however, has moved beyond Bush v. Gore. Justice Ginsburg, one of the dissenters, was among the first to urge the critics to overcome their initial cynicism: "Whatever final judgment awaits Bush v. Gore . . . I am certain that the good work and good faith of the U.S. federal judiciary as a whole will continue to sustain public confidence at a level never beyond repair." [FN201] One Bush observer explained that the Supreme Court was not in jeopardy of losing "its well-deserved reputation as the guardian of the rule of law" unless the justices themselves or legal analysts perpetuate or encourage "the sinister notion of judgment by partisan affiliation by airing their frustrations in exaggerated dissent or commentary." [FN202] One of the Court's harshest critics [FN203] admits that the justices have responded in their subsequent opinions this term with moderate views that demonstrate their attempt at nonpartisanship. [FN204]

Several justices have undertaken surprising positions in otherwise predictable opinions. Justice Scalia abandoned his disdain ***617** for privacy rights by writing for the majority in Kyllo v. United States, [FN205] which held that the police could not use a thermal imaging device to detect marijuana growing in a home. [FN206] Justice Breyer, who reliably supports separation of church and state, agreed with conservative justices that a public school must open its doors to after-hours religious activities. [FN207] Justice Souter wrote an opinion allowing the police to arrest and search a "Texas soccer mom" whose children were not wearing seat belts, [FN208] even though he is normally sensitive to the need to control the discretion of police. [FN209] Alan Dershowitz explained it this way: "As surprising as these votes and decisions may be, they all show a common direction. Bush v. Gore seems to have exerted a gravitational pull toward the center for at least some of the justices." [FN210]

Just as the Supreme Court justices have attempted to dispel a partisan image, critics have backed down from any widespread call to reprimand an overreaching court. [FN211] We hear "[n]o clamors for impeachment or curtailing the jurisdiction or powers of the high court. . . ." [FN212] One commentator explained, "passions in the wake of Bush v. Gore have cooled." [FN213]

2. The Florida Supreme Court

As for the Florida Supreme Court, criticism remains harsh and conservative groups are currently seeking to oust the three supreme court justices who face the most immediate retention elections. ***618**[FN214] The criticism in Florida, however, has gone beyond words with actual attempts to undermine the authority of the Florida Supreme Court. Although the court has been lauded as "one of the best state supreme courts in the country," [FN215] "enjoy[ing] an excellent reputation," [FN216] some critics threatened that "[i]mpeachment is too good for the Gang of Seven. Arrest, indictment and trial are the best response to the court's misuse of judicial office to facilitate the attempted theft of a presidential election," stated one nationally syndicated columnist. [FN217] This critic urged Republicans to "muster the courage to put the judiciary in its place before judges usurp representative democracy in the United States." [FN218] Another reporter blamed the Florida Supreme Court for the deep division in the country, "precisely because four naive and activist judges on [that court] interrupted with judicial adventurousness the nation's process of accepting the election outcome." [FN219]

The criticism seems meek compared to other actions taken. Prior to the election, the Florida legislature attempted to undermine the Florida Supreme Court's authority, [FN220] unhappy with the court for decisions affecting the legislators' management of the budget and striking down efforts to speed up imposition of the death penalty. [FN221] The legislature attempted to purge all judicial nominating commissioners named by the predecessors of Governor Jeb Bush, to pack the court by increasing its membership from seven to nine, and to strip the court of

death penalty cases by establishing a statewide court of criminal appeals. [FN222] During the spring following Bush v. Gore, the "Florida legislature has gone to war with state judges," attempting to give the governor ***619** total control of judicial appointments, to strip the court of some jurisdiction, and again, to add two seats. [FN223]

Meanwhile, two Republican-led groups have begun attempts to unseat three Florida Supreme Court justices. [FN224] The Emergency Florida State Supreme Court Project [FN225] has sought donations to oust Chief Justice Charles T. Wells along with Justices Leander J. Shaw Jr. and Harry Lee Anstead, all three Democratic appointees facing retention elections in 2002 and 2003. [FN226] In a fund-raising letter, the Republican county commissioner in Palm Beach County called the court's behavior "an outrageous, arrogant, power-grab by a left-wing court which is stuck in the liberal 60's." [FN227] The commissioner lambasted all three even though two of the three, Chief Justice Wells and Justice Shaw, dissented from the Florida Supreme Court's four to three ruling ordering the statewide hand count, which was reversed by the United States Supreme Court in Bush v. Gore. [FN228] A third group, Balance to the Bench, wants to raise about $1 million to oust Justice Anstead. [FN229]

Observers in Florida are concerned that these efforts are undermining the judicial independence of Florida courts. A Democrat who campaigned for Bush said he would form a committee to help the judges beat the recall effort because "the effort to unseat the justices [is] an unnecessary intrusion of politics into the judiciary." [FN230] Lois Frankel, the minority leader in the Florida House stated, "When you drag the courts into the political arena, you are ensuring that they will be political. . . . This violates the whole principle of separation of powers." [FN231]

3. Other Courts

Once the judiciary became involved in the 2000 presidential election, the media began "mentioning the previous party affiliations of the various judges sitting on the multitudinous lawsuits." ***620**[FN232] This trend has continued. [FN233] But as Abner Mikva explained, such a practice, though understandable, is dangerous.

Since the media are always looking for shorthand terms to describe complicated ideas, labeling by party is almost unavoidable. But of all the efforts to simplify the complex, none is more mischevious than the willingness to reduce judges to their party registration or the political affiliations of their appointers. [FN234]

Despite this clear danger, even politicians and legal scholars play the partisan card. California Governor Gray Davis announced that judges he appoints should vote his way on the death penalty, abortion, and gay marriage, and if they do not, they should resign. [FN235] And legal scholars, "who should know better," accused the Florida Supreme Court of acting "lawlessly, for purely partisan motives." [FN236]

Mikva pointed out that the judiciary has internal checks; for example, judges who are outspoken about preconceived notions are subject to recusal when a relevant case comes up. [FN237] Indeed, this happened to the first judge who was asked to rule on the Palm Beach County disputes because he had expressed strong views about the Clinton White House. [FN238] Mikva explained that in most cases, judges do not have the opportunity to act on highly charged political questions, but rather "spend a lot of time addressing the minutia of statutory interpretation, into which the sweep of party platforms offers little or no insight." [FN239]

One law professor suggested that it is appropriate to criticize the reasoning of judges in particular cases, but there is a clear difference between critical analysis and accusations of bias. [FN240] ***621** The critics may be right if "the only credential judges bring to [a] dispute is a party label." [FN241] But judges bring far more to the table. Allowing courts "to play their allocated role in our tripartite system-that of applying neutral principles to resolve disputes-then even using litigation to determine the winner of an election is the way to go." [FN242]

Conclusion

Because of the political stakes at risk in the resolution of the legal disputes surrounding the 2000 presidential election, the media and the public vociferously attacked adverse judicial opinions as mere partisan statements. Nothing will undermine the rule of law more than dismissing judges as politicians in black robes. Even before Bush v. Gore, state judges have been facing unprecedented political pressure to conform their decisions to the will of the

people rather than the rule of law. This demonstrates a total disregard for the unique role an independent judiciary has been assigned in our constitutional democracy.

Although it may serve the short-term political objectives of some interest groups to destroy respect for judges and their decisions, such behavior tears asunder the separation-of-powers framework devised by our Founders to preserve our core values. No one has ever devised a better plan for protecting individual rights than separating the government into two branches wholly responsive to the majority and one branch protected from the majority so it can safeguard the liberty and rights of the unpopular and powerless.

Well-intentioned and reasonable judges may differ in applying the law. That does not reduce their decisions to partisan policy-making. To uphold the confidence that we have placed in our courts, we must restore the view that judges decide disputes by applying respected legal principles, not by following political agendas. Even when contravening legal principles lead judges to different results, we should be criticizing the legal principles at issue, not attacking the judge as a partisan.

The press and the public need to understand that while judges have discretion in interpreting the language of statutes and constitutional provisions, in finding facts and fashioning remedies, judges exercise their considerable power subject to significant ***622** constraints. Precedent weighs heavily in shaping judicial decisions: the manner in which disputes have been decided in the past compels reaching the same result in the present unless the facts or the law can be distinguished. Judges serve with other judges, who either review their work on appeal or participate in consensual decision-making. [FN243] Barring a constitutional impediment, if the judicial interpretation of a statute is considered wrongheaded, it can be rewritten by the legislature. Whether a judge adopts a strict textual approach or a more dynamic approach to statutory interpretation, language as written by the legislature or an agency imposes meaningful restraints on judicial decision- making.

Judges are also constrained by respect: respect for the law and our constitutional system, their own self-respect, their desire to be respected by their peers and the legal community, and their understanding that they must earn the respect of the people they serve. Courts can only resolve disputes peaceably if judges enjoy the trust and confidence of the public. To accept unpopular decisions, the people must have confidence that judges are applying legal principles as they honestly understand them.

Nothing undermines public trust and confidence more than dismissing unpopular judicial opinions as partisan agendas or attacking judges as politicians. Judges, lawyers, journalists, and responsible citizens must decry this growing abuse of judges. [FN244] One judge who has spoken out in defense of principled judicial decision-making is Alex Kozinski: "Woe be to us when that trust in the judiciary is lost." [FN245] Judge Kozinski continues, "The signs are on the horizon and ought not be ignored. Throwing judges out of office because of how they voted on cases, rather than reservations about qualifications or personal integrity, seems to me a very serious cause for alarm." [FN246]

Justice Breyer has called our history of confidence in our ***623** courts "a public treasure." [FN247] The political fallout from Bush v. Gore initially appeared to threaten this confidence. Justice Stevens warned in his dissent, "It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence . . . inflicted by today's decision." [FN248] Time does seem to be healing any wound that the Supreme Court may have suffered by issuing such a politically charged decision. That Court appears to have retained or regained its voice of authority and the people's sense of trust as the justices have turned to the rest of the business of the term.

But other judges, especially state court judges, remain vulnerable to the disrespectful rhetoric and the political attacks. Abraham Lincoln was right: "Public opinion in this country is everything." [FN249] If judges are not held in high regard, if they are perceived as deciding cases to promote political agendas rather than to honor legal principles, our independent judiciary cannot survive. John Adams's "profound conception" [FN250] of separating the powers of government and removing all political actors, including the people, from interfering with the deliberations of the judiciary will be lost. There will be no trustee to enforce the rule of law; there will be no trustee to protect individual rights from the will of the majority.

Attention must be paid. "It would be folly to squander this priceless constitutional gift to placate the clamors of

benighted political partisans." [FN251] Judges exercise great power. Out of respect for their role as trustees of such valuable constitutional gifts, judges are constrained by legal principles and must explain those principles in their decisions. Those who disagree with judicial opinions must recognize and criticize the underlying legal principles, not attack and abuse the judges or the courts. Commentators must explain and we must accept that two judges or two courts can arrive at different legal conclusions and both be guided by sound legal principles. Such differences do not warrant campaigns to slander courts generally or remove individual judges from office.

***624** Once we understand the unique role bestowed upon judges in this constitutional democracy, we must denounce every effort to replace public confidence in judges with distrust and disdain. Highly partisan elections, contentious confirmation ordeals, vicious political attacks on judges who have the courage to make unpopular decisions--all diminish the independence of the judiciary and the separation of powers deemed necessary to preserve individual rights and the rule of law. By placing certain core values in trust for the benefit of all people for all times, the drafters of our constitution created a need for trustees to define and defend those values. This role they entrusted to judges. And they made sure that judges could deliberate and decide without interference by the executive or the legislature or the majority. Now special interest groups and television broadcasters and narrow-minded politicians are clamoring to interfere with judicial decision-making. We who are the intended beneficiaries of this grand experiment must defend, not attack our trustees. The whole scheme rests on the confidence we place in our judiciary.

[FNa1]. The Honorable Bea Ann Smith, Justice, Texas Court of Appeals for the Third District at Austin. The author wishes to thank her law clerk, Karen Monsen, for her valuable contributions to this paper.

[FN1]. Black's Law Dictionary 1519 (7th ed. 1999).

[FN2]. Bush v. Gore, 531 U.S. 98 (2000).

[FN3]. Id. at 110.

[FN4]. U.S. Const. art. II.

[FN5]. Id. at art. I.

[FN6]. Id. at art. III.

[FN7]. Id. at arts. I-III; see also Marbury v. Madison, 5 U.S.(1 Cranch) 137, 176 (1803).

[FN8]. The Declaration of Independence para. 11 (U.S. 1776).

[FN9]. See Bernard Schwartz, The Roots of Freedom: A Constitutional History of England 121-23, 150, 190-91 (1967).

[FN10]. C.H. McIlwain, The Tenure of English Judges, 7 Am. Pol. Sci. Rev. 217, 223-24 (1913).

[FN11]. See William M. Millard, Note, Eroding the Separation of Powers: Congressional Encroachment on Federal

Judicial Power: CFTC v. Schor, 53 Brook. L. Rev. 669, 678-79 (1987).

[FN12]. McIlwain, supra note 10, at 224.

[FN13]. See Benjamin Kaplan, Address Inaugurating a Scholarly Colloquium on the History of the Massachusetts Supreme Judicial Court (Oct. 26, 1990), in The History of the Law in Massachusetts: The Supreme Judicial Court 1692-1992, at 4 (Russell K. Osgood ed., 1992).

[FN14]. Mass. Const. of 1780, ch. III, art. I (1780).

[FN15]. Kaplan, supra note 13, at 4 (citing S.E. Morison, A History of the Constitution of Massachusetts 23 (reprinted from the Manual for the Constitutional Convention of 1917)).

[FN16]. U.S. Const. art. III, § 1.

[FN17]. Kaplan, supra note 13, at 4.

[FN18]. U.S. Const. amend. XIV, § 1.

[FN19]. Id. at amends. I-X.

[FN20]. 1 The Founders' Constitution 484 (Philip B. Kurland & Ralph Lerner eds., 1987).

[FN21]. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

[FN22]. Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 701-02 (1995).

[FN23]. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 27 (1986).

[FN24]. See Croley, supra note 22, at 701-02 (noting that these principles are "incompatible at the extreme and in real tension at the least").

[FN25]. Anthony Lewis, Why the Courts, 22 Cardozo L. Rev. 133, 137 (2000) (quoting Remarks of Aharon Barak, President of the Supreme Court of Israel, in Democracy in Our Times, Remarks at the Hebrew University 1 (June 7, 1998) (transcript on file with Anthony Lewis)). Israel was established in 1948 without a written constitution; the fundamental rights implicit in its declaration of a democratic state have been developed by its Supreme Court. Id. at 137-38.

[FN26]. Id.

[FN27]. U.S. Const. art. II, § 2, cl. 2.

[FN28]. See infra text accompanying notes 64-68.

[FN29]. Chambers v. Florida, 309 U.S. 227, 241 (1940).

[FN30]. Bruce Fein & Burt Neuborne, Why Should We Care About Independent and Accountable Judges? 84 Judicature 58, 60 (2000) ("[T]he Founders did not always desire popular majorities to prevail, recognizing that tyranny by the majority is tyranny nonetheless.... If federal judges were mere mouthpieces of popular sentiment, cherished constitutional limitations would largely vanish.").

[FN31]. Robert A. Dahl, A Preface to Democratic Theory 36 (1956).

[FN32]. Fein & Neuborne, supra note 30, at 64.

[FN33]. Anthony Lewis notes with pride the growing number of nations who have adopted our model:
The constitution of the Fifth French Republic is interpreted by judges. The German republic that rose from the ashes of the Nazi state has a constitution guaranteeing individual rights and a strong constitutional court to enforce them. Canada has a new Charter of Rights. The high courts of Hungary, India, Australia, and other countries play a constitutional role. The peaceful transition to the new South Africa was made possible by agreement on a constitution with a bill of rights, enforced by a constitutional court that has already held a number of actions by the post-Apartheid government invalid. Perhaps the most striking recent development has been in Britain, where later this year the European Convention on Human Rights will become part of domestic law. That is, British courts will have to consider whether acts of Parliament violate the Convention just as American courts measure governmental acts against the Constitution. That is a remarkable change given the long-standing totem of Britain's political structure--absolute parliamentary sovereignty.
Lewis, supra note 25, at 138.

[FN34]. Fein & Neuborne, supra note 30, at 64.

[FN35]. See Erwin Chemerinsky, When Do Legislative Actions Threaten Judicial Independence?, in Assaults on the Judiciary: Attacking 'The Great Bulwark of Public Liberty,' Report of the 1998 Forum for State Court Judges 49, 51 (Roscoe Pound Found. ed., 1999) [hereinafter Assaults on the Judiciary].

[FN36]. In the 1920s Congress created the body now known as the Judicial Conference of the United States; twenty-seven judges, presided over by the chief justice of the Supreme Court, adopt official policy for the judiciary. See Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838 (current version at 28 U.S.C. § 331 (1994)). In 1939 Congress created the Administrative Office of the United States Courts, which collects data, creates budgets, and operates facilities for the federal court system. See Act of Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223 (current version as amended at 28 U.S.C. § § 601-612 (1994)). In 1967 Congress created the Federal Judicial Center to focus on judicial education. See Act of Dec. 20, 1967, Pub. L. No. 90-219, § 6101, 81 Stat. 664 (current version as amended at 28 U.S.C. § § 620-629 (1994)). See Judith Resnik, Judicial Independence and Article III: Too Little and Too Much, 72 S. Cal. L. Rev. 657, 663 (1999).

[FN37]. Frances Kahn Zemans, The Accountable Judge: Guardian of Judicial Independence, 72 S. Cal. L. Rev. 625, 628 (1999); see, e.g., 1998-1999 Texas Judicial Council Annual Report, available at http://www.courts.state.tx.us/jcouncil/ar99/.

[FN38]. See Chemerinsky, supra note 35, at 53; see also Resnik, supra note 36, at 667.

[FN39]. See Stephen Wermiel, Remarks at the 1998 Forum for State Court Judges (July 11, 1998), in Assaults on the Judiciary, supra note 35, at 76 ("[N]o one suggests that the judicial branch should have a blank check to fund its own operations, or that we should do away with the time-honored appropriations processes. However, legislative micromanagement of the number of judges, the construction of new courthouses, the kinds of facilities available in the courthouses once they are built, and the size of the budget and other administrative matters can become a very direct and deliberate threat to the judiciary.").

[FN40]. See infra text accompanying notes 221-24.

[FN41]. See Chemerinsky, supra note 35, at 54.

[FN42]. See, e.g., Tex. Gov't Code Ann. § § 72.081-.086 (West 1998). This subchapter is entitled "Court Performance Standards."

[FN43]. See Ruth Bader Ginsburg, Remarks on Judicial Independence: The Situation of the U.S. Federal Judiciary, Address to the University of Melbourne Law School in Australia (Feb. 1, 2001), in Press Release, Ruth Bader Ginsburg, Remarks on Judicial Independence: The Situation of the U.S. Federal Judiciary 11-12 (Feb. 1, 2001) (on file with author) (citing Staff of Senate Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary, 104th Cong., Report on the Jan. 1996 Judicial Survey, pt. 2, app. A, at 2 (1996)).

[FN44]. See id.

[FN45]. See Letter from the U.S. General Accounting Office to Sen. Charles E. Grassley, Chairman, Subcomm. on Admin. Oversight of the Courts, Federal Judiciary: Information on Noncase-Related Travel of Art. III Judges in 6 Cirs. and 34 Dists. (Mar. 9, 1998).

[FN46]. Senator Charles E. Grassley of Iowa, who chaired the subcommittee, was among the critics. See Robert Schmidt, Federal Judges in the Jet Set, Legal Times, Apr. 6, 1998, at 6.

[FN47]. Resnik, supra note 36, at 667.

[FN48]. Response of the Exec. Comm. of the Judicial Conf. of the United States to the Judicial Survey Conducted by the Subcomm. on Admin. Oversight of the Courts 19 (Feb. 26, 1996) (on file with the Admin. Office of U.S. Courts).

[FN49]. See Kaplan, supra note 13, at 4.

[FN50]. Chemerinsky, supra note 35, at 51 ("[T]he need for judges to please the voters in elections is seen as a serious threat to decisional independence."). Chemerinsky adds that the distinction between decisional and institutional independence "adds relatively little to the understanding of judicial independence." Id. He explains that legislative reprisals and accountability at elections may threaten both decisional and institutional independence. Id.

[FN51]. See Chief Justice William H. Rehnquist, Keynote Address at the Centennial Celebration of the Washington College of Law at American University (Apr. 9, 1996), in Symposium on the Future of the Federal Courts, 46 Am. U. L. Rev. 267, 274 (1996).

[FN52]. See Resnik, supra note 36, at 658.

[FN53]. Mira Gur-Arie & Russell Wheeler, Judicial Independence in the United States: Current Issues and Relevant Background Information, in Guide to Judicial Independence 86. Only 1,184 federal judges enjoy life tenure. See 1999 Annual Report of the Director of the Admin. Office of the United States Courts (1999).

[FN54]. Gur-Arie & Wheeler, supra note 53, at 84.

[FN55]. Id. at 86.

[FN56]. Resnick, supra note 36, at 658.

[FN57]. See 1999 Annual Report of the Director of the Admin. Office of the United States Courts, supra note 53.

[FN58]. Id. at 42 (including eighty-six senior judges who participated in appeals dispositions but not including twenty-four vacancies).

[FN59]. Id. (including 273 senior judges but not including thirty-eight vacancies).

[FN60]. Id.

[FN61]. Id. Furthermore, there are some 1,400 administrative law judges (ALJs) serving federal agencies such as the Social Security Administration, the Securities and Exchange Commission, and the Equal Employment Opportunity Commission. See Resnik, supra note 36, at 659 n.10. These ALJs have a docket comparable to the federal constitutional judges. Id. at 659. There is yet another layer of some 2000 hearing officers not classified as ALJs under the Administrative Procedure Act. Id. They have been called the "hidden judiciary," and they decide important matters such as immigration cases for the Justice Department, and disputes arising in the Department of Health and Human Services and the Department of Veterans Affairs. Id. at 659 n.13.

[FN62]. See 28 U.S.C. § 152(a)(1), (b) (1994); id. § 631(a), (e).

[FN63]. Resnik, supra note 36, at 658.

[FN64]. Duncan v. Louisiana, 391 U.S. 145 (1968).

[FN65]. Klopfer v. North Carolina, 386 U.S. 213 (1967).

[FN66]. Pointer v. Texas, 380 U.S. 400 (1965).

[FN67]. Malloy v. Hogan, 378 U.S. 1 (1964).

[FN68]. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).

[FN69]. See Larry C. Berkson, Judicial Selection in the United States: A Special Report, 64 Judicature 176, 176 (1980).

[FN70]. See Croley, supra note 22, at 714-15.

[FN71]. See id. at 715.

[FN72]. See id. at 716.

[FN73]. See id. at 716-17.

[FN74]. See id.

[FN75]. Chief Justice Thomas R. Phillips, Address to the Seventy-Seventh Legislature (Feb. 13, 2001), in State of the Judiciary, Feb. 13, 2001, at 10 n.10 (quoting Kermit L. Hall, Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920, 1984-85 Am. B. Found. J. 345, 348).

[FN76]. Frederick Grimke, The Nature and Tendency of Free Institutions, in Judicial Independence and Accountability: Preparatory Readings 30 (Paul D. Carrington & Christopher Rae eds., 1998).

[FN77]. Id.

[FN78]. Id.

[FN79]. Id. at 36.

[FN80]. Id. "[T]he functions of the judge, do what we will or turn the question in whatever aspect we please, are compelled to bear a very close analogy with those of the law-making power." Id. at 37.

[FN81]. Id. at 38.

[FN82]. See Croley, supra note 22, at 725.

[FN83]. Id.

[FN84]. Id.

[FN85]. Id. at 726. A compromise "merit plan" crafted by Albert Kales and blessed by the American Bar Association provided for a judicial nominating commission to supply names of qualified judicial appointees, for the governor to appoint a judge from this list, and for the judge after a period of time to stand for retention election. Id. at 724.

[FN86]. Gerald F. Uelmen, Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization, 72 Notre Dame L. Rev. 1133, 1133 (1997).

[FN87]. See supra text accompanying notes 13-15.

[FN88]. See supra text accompanying notes 13-15.

[FN89]. See supra text accompanying note 75.

[FN90]. Phillips, supra note 75, at 10.

[FN91]. Id. at 11.

[FN92]. See Uelmen, supra note 86, at 1150-51.

[FN93]. Phillips, supra note 75, at 11.

[FN94]. See id.

[FN95]. See Uelmen, supra note 86, at 1152-53.

[FN96]. Phillips, supra note 75, at 11; see also Uelmen, supra note 86, at 1152 (noting that incumbent judges in Texas had spent $1 million in recent years to keep their seats).

[FN97]. Supreme Ct. of Tex. Jud. Campaign Fin. Study Comm., Report and Recommendations, Feb. 23, 1999, at 4 (1999). Recommendations to improve judicial elections include conducting elections in a nonpartisan manner, lengthening judicial terms, and lengthening terms before initial elections for judges appointed to fill vacant positions. Press Release, Call to Action, Statement of the National Summit on Improving Judicial Selection (Jan. 25, 2001), in Supreme Ct. of Tex. Jud. Campaign Fin. Study Comm., Report and Recommendations, Feb. 23, 1999, supra, at app. D at 4.

[FN98]. See Uelmen, supra note 86, at 1135-44.

[FN99]. See Robert S. Thompson, Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986, 61 S. Cal. L. Rev. 2007, 2037-42 (1988).

[FN100]. See Stephen B. Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges From Office for Unpopular Decisions?, 72 N.Y.U. L. Rev. 308, 320-21 (1997).

[FN101]. Id. at 314; see also State v. Odom, 928 S.W.2d 18 (Tenn. 1996).

[FN102]. See Bright, supra note 100, at 310.

[FN103]. Id. at 314.

[FN104]. Harris v. Alabama, 513 U.S. 504, 519-20 (1995) (Stevens, J., dissenting).

[FN105]. See Bright, supra note 100, at 316-18; Leatherwood v. State, 548 So. 2d 389, 406 (Miss. 1989) (Robertson, J., concurring).

[FN106]. Coker v. Georgia, 433 U.S. 584, 592 (1977).

[FN107]. Bright, supra note 100, at 310-11.

[FN108]. Id. at 311.

[FN109]. Id.

[FN110]. Ex Parte Burdine, 901 S.W.2d 456, 456 (Tex. Crim. App. 1995) (denying application for writ of habeas corpus). On habeas appeal to the Fifth Circuit, the federal appellate panel affirmed the death penalty by a vote of two to one. Burdine v. Johnson, 231 F.3d 950, 964 (5th Cir. 2000) (holding that the court would not presume that an attorney's sleeping through trial was prejudicial because the court was unable to determine whether the attorney slept during a critical stage of defendant's trial). Justice Benavides rejected the majority's conclusion, "I simply cannot agree with the majority's statement that counsel's attentive participation during the admission of evidence against a defendant on trial for capital murder was irrelevant to the quality of Burdine's defense." Id. at 969 (Benavides, J., dissenting). The case was reargued to the en banc court, which has now vacated the defendant's capital murder conviction. Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001).

[FN111]. "The court-appointed lawyer who represented Mr. Burdine at his trial... slept through significant portions of the trial. That might have been a problem elsewhere but not in Texas." Bob Herbert, Editorial, In America: The Death Factory, N.Y. Times, Oct. 2, 2000, at A27. In questioning whether Burdine's attorney slept through prejudicial jury argument because he did not object when the prosecution argued that "sending a homosexual to a penitentiary certainly isn't a very bad punishment for a homosexual," the New York Times noted, "This is what passes for justice in Texas.... Much of the process is a crapshoot." Id.; see also Don Joel, Letter to the Editor, Sleeping Attorney, L.A. Times, June 9, 2000, at B8 ("If this were not a deadly serious situation, the Texas attorney general's office's position [that Burdine had shown no grounds for reversal] would be laughable.... Perhaps if the Texas lawyers had slept on [the constitutional question of due process], they would have come to the right result.").

[FN112]. Uelmen, supra note 86, at 1144-45 (quoting Laurence H. Tribe, Abortion: The Clash of Absolutes 238 (1990)).

[FN113]. See id. at 1145-46.

[FN114]. In re T.W., 551 So. 2d 1186 (Fla. 1989).

[FN115]. See Uelmen, supra note 86, at 1145-46.

[FN116]. In re T.W., 551 So. 2d 1186 (Fla. 1989).

[FN117]. Uelmen, supra note 86, at 1145.

[FN118]. See id.

[FN119]. See id.

[FN120]. Bright, supra note 100, at 316 (citing Robyn Blumner, Dole's Slap at the 'Purist Jurist,' St. Petersburg Times, Apr. 28, 1996, at D1).

[FN121]. See id. at 315.

[FN122]. See id. at 316-18.

[FN123]. Id. at 315-16.

[FN124]. See id. at 322-23.

[FN125]. Id. at 322.

[FN126]. Id. at 324.

[FN127]. See K.K. DuVivier, By Going Wrong All Things Come Right: Using Alternative Initiatives to Improve Citizen Lawmaking, 63 U. Cin. L. Rev. 1185, 1189 (1995).

[FN128]. Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981).

[FN129]. Uelmen, supra note 86, at 1148.

[FN130]. Id. Twenty-four states have an initiative process. Initiative and Referendum Institute, States with Direct (DA) and In-direct (IDA) Initiative Amendments; Direct (DS) and In-direct (IDS) Initiative Statutes and Popular (PR) Referendum, at http://www.iandrinstitute.org/factsheets/fs1!2.htm (last visited Jan. 11, 2001). All but two of these states require their supreme court justices to face elections. Am. Judicature Soc'y, Judicial Selection in the States Appellate and General Jurisdiction Courts (rev. ed. 2000), available at http://www.ajs.org/JudicialSelectionCharts.pdf.

[FN131]. See Uelmen, supra note 86, at 1146.

[FN132]. Id. (quoting Parents' Group Hits Teen Abortion Action, UPI, July 24, 1996, LEXIS, News Library, UPI File).

[FN133]. Ginsburg, supra note 43 at 7, n.39 (citing Joan Biskupic, Hill Republicans Target 'Judical Activism'; Conservatives Block Nominees, Threaten Impeachment and Term Limits, Wash. Post, Sept. 14, 1997, at A1).

[FN134]. See Fein & Neuborne, supra note 30, at 59.

[FN135]. Sambhav N. Sankar, Note, Disciplining the Professional Judge, 88 Calif. L. Rev. 1233, 1249 (2000) (citing Mary L. Volcansek, Judicial Misconduct: A Cross-National Comparison 89 (1996)).

[FN136]. See id. at 1249 n.93.

[FN137]. Bob Herbert, Editorial, A Plan to Intimidate Judges, N.Y. Times, Dec. 4, 2000, at A29.

[FN138]. Bright, supra note 100, at 312 (quoting Letter from Third Circuit Judge H. Lee Sarokin to President William Jefferson Clinton 1 (June 4, 1996) (on file with the New York University Law Review)).

[FN139]. Gur-Arie & Wheeler, supra note 53, at 84.

[FN140]. Id. at 85.

[FN141]. Id. (citing Stephen G. Breyer, Liberty, Prosperity, and a Strong Judicial Institution, 61 Law & Contemp. Probs. 3, 5 (1998)).

[FN142]. Id. at 96 (citing David W. Moore, Public Trust in Federal Government Remains High (Gallup Org., Princeton, N.J.), Jan. 8, 1999, available at http://www.gallup.com/poll/releases/pr990108.asp).

[FN143]. Alexis de Tocqueville, Democracy in America 280 (Henry Reeve trans., Phillips Bradley ed., Vintage Classics 1990) (1835).

[FN144]. Ginsburg, supra note 43, at 6 (citing William Safire, Fight to the Finish, N.Y. Times, Nov. 16, 2000, at A35).

[FN145]. Id. at 3.

[FN146]. Don Van Natta Jr., Counting the Vote: Palm Beach County; Gore Set to Fight Palm Beach Vote, N.Y. Times, Nov. 25, 2000, at A1.

[FN147]. See Gore v. Harris, 772 So. 2d 1243, 1248 (Fla.), rev'd, Bush v. Gore, 531 U.S. 98, 101 (2000).

[FN148]. Id. at 1258.

[FN149]. Don Van Natta & Rick Bragg, Counting the Vote, N.Y. Times, Nov. 13, 2000, at A20.

[FN150]. Dana Canedy, Rights Panel Begins Inquiry Into Florida's Voting System, N.Y. Times, Jan. 12, 2001, at A20.

[FN151]. David Barstow & Don Van Natta Jr., Examining the Vote: How Bush Took Florida; Mining the Overseas Absentee Vote, N.Y. Times, July 15, 2001, at A1.

[FN152]. Manual recounts were requested in Broward, Miami-Dade, Palm Beach, and Volusia Counties. See Gore v. Harris, 772 So. 2d at 1258 n.16.

[FN153]. Miami-Dade County's Canvassing Board suspended the recount because it could not complete the recount in the time it was given to do so. See id. at 1267 (Wells, C.J., dissenting).

[FN154]. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1226-27 (Fla. 2000), vacated & remanded, Bush v. Palm Beach County Canvassing County Bd., 531 U.S. 70 (2000).

[FN155]. Id. at 1227.

[FN156]. Id. at 1240. Bush appealed this decision to the U.S. Supreme Court, and the Court accepted the appeal and

heard argument on December 1, 2000. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 1004 (2000). Many observers thought the court would dismiss the appeal given that Bush had been declared the winner on November 26. See Linda Greenhouse, Counting the Vote: The Legal Battle; G.O.P. Campaign Urges End to 'Capricious' Florida Counting, N.Y. Times, Nov. 23, 2000, at A1.

Many legal experts regard intervention by the justices as unlikely, given the state-law issues at the heart of the dispute and the court's general deference to the states in matters of election law. A power struggle between a state's legislature and its high court over an interpretation of state law would not present the justices an inviting target. Id.

Instead, the court vacated the Florida Supreme Court's decision and remanded it to that court instructing it to clarify how federal statutory and constitutional provisions affect its decision. Bush v. Palm Beach County Canvassing County Bd., 531 U.S. 70 (2000). On remand, the Florida Supreme Court held that these provisions did not change the result. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1290-92 (Fla. 2000).

[FN157]. Gore v. Harris, 772 So. 2d 1243, 1247 (Fla.), rev'd, Bush v. Gore, 531 U.S. 98, 101 (2000).

[FN158]. Id.

[FN159]. See id.

[FN160]. Id.

[FN161]. Id. The circuit court was "directed to enter such orders as are necessary to add any legal votes to the total statewide certifications...." Id. at 1261.

[FN162]. Evan Thomas & Michael Isikoff, Settling Old Scores in the Swamp, Newsweek, Dec. 18, 2000, at 36, 39-40 (quoting Speaker Tom Feeney).

[FN163]. Ramesh Ponnuru, The Judicial-Activist State, Nat'l Rev., Dec. 18, 2000, at 20.

[FN164]. See, e.g., Pamela S. Karlan, Editorial, The Court Casts Its Vote, N.Y. Times, Dec. 11, 2000, at A31 ("The Supreme Court's incursion into the Florida case is entirely different. There was no reason to jump in immediately.... Self-government may be messy, time-consuming and partisan. But in the Florida recount case, the political actors are vigorous and functioning.").

[FN165]. Bush v. Gore, 531 U.S. 1046 (2000).

[FN166]. "Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election." Bush v. Gore, 121 S. Ct. 512, 555 (2000) (Stevens, J., dissenting). "The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election." Id. at 554 (Scalia, J., concurring).

[FN167]. Linda Greenhouse, Bush Prevails; By Single Vote, Justices End Recount, Blocking Gore After 5-Week Struggle, N.Y. Times, Dec. 13, 2000, at A1.

[FN168]. 3 U.S.C. § 5 (1994).

[FN169]. See Linda Greenhouse, Election Case a Test and a Trauma for Justices, N.Y. Times, Feb. 20, 2001, at A1.

[FN170]. See Greenhouse, supra note 169.

[FN171]. See id.

[FN172]. Bush v. Gore, 121 S. Ct. 525 (2000).

[FN173]. See Linda Greenhouse, Another Kind of Bitter Split, N.Y. Times, Dec. 14, 2000, at A1.

[FN174]. See E.J. Dionne Jr., So Much for States' Rights, Wash. Post, Dec. 14, 2000, at A35.

[FN175]. Bush v. Gore, 121 S. Ct. at 532.

[FN176]. Id. at 539 (Rehnquist, C.J., concurring).

[FN177]. Id. at 530-31, 533. The five judges joining this per curiam opinion were Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas.

[FN178]. Id. at 545-46 (Souter, J., dissenting); id. at 551 (Breyer, J., dissenting).

[FN179]. Id. at 546 (Souter, J., dissenting).

[FN180]. Id. at 545-46 (Souter, J., dissenting); id. at 551 (Breyer, J., dissenting).

[FN181]. Id. at 540-41 (Stevens, J., dissenting); id. at 550 (Ginsburg, J., dissenting).

[FN182]. Id. at 557 (Breyer, J., dissenting).

[FN183]. Id. at 542 (Stevens, J., dissenting).

[FN184]. Id.

[FN185]. Robert Novak, From Legacy to Footnote, Chi. Sun-Times, Dec. 14, 2000, at 43; Charles Krauthammer, Defenders of the Law..., Wash. Post, Dec. 15, 2000, at A41.

[FN186]. "[T]he United States Supreme Court may be the only institution left that enjoys the legitimacy to bring the partisan struggle over the presidential election to a final, if not infallible, conclusion." John Yoo, The Right Moment for Judicial Power, N.Y. Times, Nov. 25, 2000, at A19 (Yoo notes that even though the question turns on the meaning of state law, "the nation now needs the Supreme Court's intervention.... [T]he Supreme Court could finally bring an end to the destructive partisan struggle over the presidential election, and would do it in a way whose legitimacy could be accepted by the nation."); William Kristol, Crowning the Imperial Judiciary, N.Y. Times, Nov. 28, 2000, at A29 ("Commentators, liberal and conservative, have both largely agreed with the politicians. In their view, only the courts, especially the United States Supreme Court, have the political legitimacy to resolve the struggle over the presidency."); Michael Kelly, Democracy Rescued, Wash. Post, Dec. 14, 2000, at A35 ("[T]he Supreme Court of the United States has done democracy, and the republic that rises from democracy, a great and historic service."); see also Rudolph Kass, Editorial, Courts Make Calls Pols Won't Touch, Boston Herald, Nov. 28, 2000, at O27 (explaining that it is no surprise that the "climactic scene of the hairbreadth presidential election is about to be played out in the U.S. Supreme Court").

[FN187]. Krauthammer, supra note 185. A few observers felt like only the Supreme Court could rein in the "runaway Florida supreme court." Phyllis Schlafly, Separating Spin from Reality in Bush v. Gore (Jan. 3, 2001), at http://www.eagleforum. org/column/2001/jan01/00-01-03.shtml ("[S]omeone (thank you, U.S. Supreme Court) had to stop the runaway Florida supreme court that gave us two textbook cases on the evils of judicial activism."); see also Robert H. Bork, Sanctimony Serving Politics: The Florida Fiasco, 19 New Criterion 4 (Mar. 2001), at http:// www.newcriterion.com/archive/19/mar01/bork.htm ("Bush v. Gore was a valiant effort, legitimate in law, to rein in runaway political passions and a lawless state court those passions had captured.").

[FN188]. See Morton M. Kondracke, 'Rule by Judge' Means U.S. System is Not Working, Roll Call, Dec. 14, 2000.

[FN189]. Id.

[FN190]. See David R. Dow, Biggest Loser is the Supreme Court's Legitimacy, Houston Chron., Dec. 14, 2000, at A47 ("[J]udicial legitimacy, like one's reputation, is a fragile thing; it is established over time and can be easily and suddenly lost.... The biggest loser in the 2000 election is not Al Gore; it is the court's legitimacy--and it is therefore all of us."); Akhil Reed Amar, Supreme Court; Should We Trust Judges?, L.A. Times, Dec. 17, 2000, at M1 ("What will I tell my law students in the aftermath of Bush v. Gore... ? It will be my painful duty to say, 'Put not your trust in judges." '). More than five hundred distinguished law school professors signed a full-page ad in the New York Times declaring, "It is Not the Job of a Federal Court to Stop Votes From Being Counted." It is Not the Job of a Federal Court to Stop Votes From Being Counted, N.Y. Times, Jan. 13, 2001, at A7.

[FN191]. See Margaret A. Burnham, A Cynical Supreme Court, Boston Globe, Dec. 14, 2000, at A23 ("The Supreme Court... places the undiluted ideological nature of the hyper-activist Rehnquist court on naked display."); Neal Kumar Katyal, Politics Over Principle, Wash. Post, Dec. 14, 2000, at A35 ("By elevating politics over principle, the court revealed itself to be no better than any other institution or actor that touched this election.").

[FN192]. See Katyal, supra note 191 ("The unsigned majority opinion can be summed up simply: It is lawless and unprecedented."); Anthony G. Amsterdam, The Law is Left Twisting Slowly in the Wind, L.A. Times, Dec. 17, 2000, at M5 ("It is that the court finally has revealed unmistakably what it does all the time and usually gets away with: masking result-driven, political, unprincipled decisions in the guise of obedience to rules of law which the justices feel completely free to twist and retwist to suit their purposes.").

[FN193]. Katyal, supra note 191.

[FN194]. Id.; Dionne, supra note 174; Greenhouse, supra note 173.

[FN195]. Bork, supra note 187. Bork, instead, urged that the concurrence offered a better rationale. Id.; see also Kondracke, supra note 188 (Kondracke complains that the "activism by the High Court's conservative majority is defensible only because it saved the nation from runaway activism by four liberal justices on the Florida Supreme Court.... When an activist conservative High Court trumps an activist liberal state court, it may be legal, but it's not in the spirit of the Constitution.").

[FN196]. Katyal, supra note 191.

[FN197]. Id.

[FN198]. Id. ("[W]hy should lower court judges give respect to a nakedly political court?").

[FN199]. Id.

[FN200]. Id.

[FN201]. Ginsburg, supra note 43, at 9.

[FN202]. Douglas W. Kmiec, The Court's Decision is Law, Not Politics, L.A. Times, Dec. 14, 2000, at B11.

[FN203]. See Alan M. Dershowitz, Supreme Injustice: How the High Court Hijacked Election 2000 (2001).

[FN204]. Alan M. Dershowitz, Curious Fallout from Bush v. Gore, N.Y. Times, July 4, 2001, at A15; see also Tony Mauro, The Court Decided More Than Bush v. Gore, Tex. Law., July 2, 2001, at 4 ("'After Bush v. Gore, they rolled up their sleeves and worked hard to put it behind them,' says Drake University law Professor Thomas Baker, once an aide to Chief Justice William H. Rehnquist.").

[FN205]. 121 S. Ct. 2038 (2001).

[FN206]. See Dershowitz, supra note 204.

[FN207]. Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093 (2001) (Breyer, J., concurring in part); see Dershowitz, supra note 204.

[FN208]. Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

[FN209]. Dershowitz, supra note 204.

[FN210]. Id.

[FN211]. See Larry D. Kramer, The Supreme Court v. Balance of Powers, N.Y. Times, Mar. 3, 2001, at A13 (urging that, in light of this history, "[w]e need to hear from our political leaders"). Indeed, our history includes other attempts to punish the Supreme Court. Id. During Thomas Jefferson's presidency, Congress delayed the Supreme Court's term for a year, threatened to impeach judges, and ordered the justices to travel around the country to hear minor disputes. Id. Presidents Andrew Jackson and Abraham Lincoln ignored what they considered unsupportable decisions. Id. President Franklin Roosevelt attempted to increase "the size of the court to dilute an errant five-member majority." Id.

[FN212]. Bruce Fein, Misguided Detractors, Wash. Times, Dec. 19, 2000, at A15.

[FN213]. Jeffrey Rosen, A Majority of One, N.Y. Times Mag., June 3, 2001, at 32.

[FN214]. See Abner Mikva & William S. Sessions, Guarantee the Independence of All Judges, L.A. Times, Mar. 12, 2001, at B7.

[FN215]. Jan Pudlow, Russomanno Urges Lawyers to Take the Lead, Defending Judicial Independence, Fla. B. News, Jan. 15, 2001, at 1.

[FN216]. Id.; see Stephen Gillers, The Court Should Boldly Take Charge, N.Y. Times, Nov. 21, 2000, at A25.

[FN217]. Paul Craig Roberts, An Enabling Act for the Judiciary?, Wash. Times, Nov. 28, 2000, at A15.

[FN218]. Id.

[FN219]. Jim Wooten, A Changed Landscape: Unwarranted Judicial Activism Has Hurt, Divided the Nation, Atlanta J. & Const., Dec. 13, 2000, at A22.

[FN220]. See Jo Becker & Charles Lane, Florida's Top Court Has Been GOP Target, Wash. Post, Nov. 15, 2000, at A18.

[FN221]. Martin Dyckman, A Trustworthy State Supreme Court, St. Petersburg Times, Nov. 21, 2000, at 17A.

[FN222]. See id.

[FN223]. Frank J. Murray, Florida Politicians, Judges Fan Their Feud; Memory of Recount Leaves Bitter Taste, Wash. Times, Apr. 10, 2001, at A1.

[FN224]. See Dexter Rilkins, The 43rd President: Florida Republican Group Seeks to Unseat Three Justices, N.Y. Times, Dec. 20, 2000, at A31.

[FN225]. The second group is called the "Committee to Take Back Our Judiciary." Id.

[FN226]. See id.

[FN227]. Id.

[FN228]. See id.

[FN229]. See id.

[FN230]. Id.

[FN231]. Id.

[FN232]. Abner J. Mikva, Party Animals? This Harping on Whether They're Democrats or Republicans Completely Mischaracterizes What Judges Do, Legal Times, Dec. 4, 2000, at 78.

[FN233]. See, e.g., Laylan Copelin, Redistricting Vote to Put GOP in Driver's Seat, Austin Am.-Statesman, July 24, 2001, at A1 ("Democrats and others will attack the plans in court, probably on questions about minority voting rights, but that is an uphill battle. Republicans are the majority among the final decision makers--the Texas and U.S. [S]upreme [C]ourts.").

[FN234]. Mikva, supra note 232.

[FN235]. Stuart P. Jasper, Governor Oversteps His Bounds, L.A. Times, Mar. 19, 2000, at B21.

[FN236]. Barry Friedman, The Glib Critics of the Courts, N.Y. Times, Nov. 24, 2000, at A47.

[FN237]. Mikva, supra note 232.

[FN238]. See id.

[FN239]. Id.

[FN240]. Friedman, supra note 236.

[FN241]. Mikva, supra note 232.

[FN242]. Id.

[FN243]. Appellate judges work in panels. Consensus is required to issue an opinion of the court. The scrutiny of judges other than the author provides additional integrity to judicial decision-making. This process is just one example of the traditional methods courts use to ensure they issue well- reasoned, principled decisions.

[FN244]. See Mikva & Sessions, supra note 214 ("We need citizens who will denounce those special interests that would subvert justice for their own political or financial gain.").

[FN245]. Alex Kozinski, What I Ate for Breakfast and Other Mysteries of Judicial Decision Making, in Judges on Judging 71, 75 (David M. O'Brien, ed., 1997). Judge Kozinski serves on the United States Court of Appeals for the Ninth Circuit.

[FN246]. Id.

[FN247]. Bush v. Gore, 121 S. Ct. 525, 557 (2000) (Breyer, J., dissenting).

[FN248]. Id. at 542 (Stevens, J., dissenting).

[FN249]. Abraham Lincoln, Speech at Columbus, Ohio (Sept. 16, 1859), in Abraham Lincoln: Speeches and Writings 1859-1865, at 57 (1989).

[FN250]. See supra text accompanying note 15.

[FN251]. Fein & Neuborne, supra note 30, at 64.

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