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JUDICIAL INDEPENDENCE: THREATS FROM WITHOUT AND WITHIN

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INTRODUCTION: SHOULD THE JUDICIARY BE INDEPENDENT?

To present this 25th Annual Brennan Lecture on State Courts and Social Justice is a tremendous honor for me. It’s personally gratifying that the invitation came from my friends, Sam Estreicher, a

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fellow crusader in the cause to improve access to justice for the poor, and Troy McKenzie, another member of the American Law Institute Council Class of 2017.

Though the invitation came out of the blue, I had no hesitation in deciding to speak on judicial independence. It so happened that I had just been reading of the President's many denunciations of the judiciary: accusing courts of usurping power and judges of being politically motivated, warning of judicial tyranny undermining the Constitution, and then going to the extreme of calling for the impeachment of Supreme Court Justice . . . Samuel Chase. I was, in fact, reading Chief Justice Rehnquist's book, *Grand Inquests*, which recounts the Senate trial of Justice Chase.¹ And the President of whom I speak was Thomas Jefferson. He deplored the thought of judicial independence. "The Constitution," he wrote, "is a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please."² What a great tweet that would have made! Jefferson believed judges were no less immune from ambition and influence than other holders of power, and he wanted them to be directly answerable to the people, elected as other officials.

Jefferson makes President Trump look wishy-washy on the subject. President Trump has only called Justice Ginsburg "incompetent"; he hasn't yet called for her impeachment.³ He's said loudly and often that courts are unwise, embarrassing, dangerous, and political,⁴ but surely that's well shy of Jefferson's view of judges as usurpers and tyrants. Both President Trump and President Jefferson have been more outspoken than, say, President Obama, who, in his State of the Union Address, with members of the Supreme Court sitting directly in front of him, criticized *Citizens United*⁵ to their faces.⁶ But that was only one case. President Clinton called Judge Harold Baer's suppres-

¹ WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992).

² Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 15 *THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES* 16, 17 (J. Jefferson Looney ed., 2018).

³ Brent Kendall, *Trump Calls on Ginsburg to Resign from Supreme Court*, WALL ST. J. (July 13, 2016, 8:23 PM), <https://www.wsj.com/articles/trump-calls-on-ginsburg-to-resign-from-supreme-court-1468444857>.

⁴ See, e.g., *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUSTICE (June 5, 2017), <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts> (collecting examples of President Trump's critical statements about the Court).

⁵ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁶ President Obama stated, with Supreme Court members seated in front of him: "With all due deference to separation of powers, last week the Supreme Court reversed a century of law that, I believe, will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections." In response, Justice Samuel Alito mouthed the words, "Not true." Robert Barnes, *Alito's State of the Union Moment*, WASH.

sion of evidence in a prominent drug case “grievously wrong,” but he quickly backtracked and reaffirmed his belief in the independence of the judiciary.⁷ If any President opposed judicial independence more than President Jefferson, surely it was Franklin Roosevelt, who tried to pack the Supreme Court with Justices who would vote his way in New Deal cases.⁸

I THE PRESENT CONSENSUS: JUDGES ARE NOT INDEPENDENT

I come as no apologist. When I asked my friend, Sam Issacharoff, what I should talk about tonight, he said, “Just remember, we’re liberal.” What I have to say is for both the right and the left. Just now, they are agreed. When President Trump criticized a court ruling staying his executive order on asylum as coming from “an Obama judge” in the “unfair” Ninth Circuit,⁹ Chief Justice Roberts could take no more. “We do not have Obama judges or Trump judges,” he said. “What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”¹⁰ President Trump hit back: “Sorry Chief Justice John Roberts,” he tweeted, “but you do indeed have ‘Obama judges’ It would be great if the 9th Circuit was [sic] indeed an ‘independent judiciary,’ but if it is why are so many [cases opposing border security] filed there, and why are a vast number of those cases overturned?”¹¹ Rhode

POST: VOICES (Jan. 27, 2010, 11:58 PM), <http://voices.washingtonpost.com/44/2010/01/alito-mouths-not-true-at-obama.html>.

⁷ 4 *U.S. Judges Decry Clinton Intimidation*, WASH. POST (Mar. 29, 1996), <https://www.washingtonpost.com/archive/politics/1996/03/29/4-us-judges-decry-clinton-intimidation/5cf71d7e-1915-4227-8940-6fac6970212b>.

⁸ See Jamie L. Carson & Benjamin A. Kleinerman, *A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR’s Court-Packing Plan*, 113 PUB. CHOICE 301, 304 (2002) (describing the court-packing plan).

⁹ See Jeremy Diamond & Ariane de Vogue, *Trump Rails Against 9th Circuit Court of Appeals in Wake of Asylum Ruling*, CNN (Nov. 20, 2018, 5:02 PM), <https://www.cnn.com/2018/11/20/politics/donald-trump-9th-circuit-court-of-appeals/index.html>; William Cummings, *US Does Have ‘Obama Judges’: Trump Responds to Supreme Court Justice John Roberts’ Rebuke*, USA TODAY (Nov. 21, 2018, 2:05 PM), <https://www.usatoday.com/story/news/politics/2018/11/21/john-roberts-trump-statement/2080266002> (discussing Chief Justice Roberts’s response to President Trump).

¹⁰ Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

¹¹ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 12:51 PM), <https://twitter.com/realDonaldTrump/status/1065346909362143232>; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 1:09 PM), <https://twitter.com/>

Island Democratic Senator Sheldon Whitehouse, rated one of the more liberal members of Congress,¹² agreed with the President, sort of: “In spite of my distaste for Trump’s attacks on our judiciary,” he wrote in an op-ed piece, “on this one, the facts are with Trump.”¹³ Except, he said, that the facts show that Republican judicial appointees in general, and those on the Roberts Court in particular, “show[] no respect for precedent, federalism, originalism or judicial restraint.”¹⁴ The left and right agree: Judges are not independent.

That is, they appear to take sides—by which I mean, judges are said to rule for reasons other than the law and the facts. Perhaps they have personal convictions that the country or state should take a different path and judicial pronouncements on the law can lead the way. Perhaps they see themselves as gods in the temple of justice rather than priests—possessed by the very ambition Jefferson so feared. Perhaps, in the state systems, judges are afraid of the political clamor over their decisions that can turn them out of office. But for whatever reason, lofty or lowly, judges are not seen as independent of the other two branches of their governments or from popular opinion and politics. They appear to take sides.

A. *Judges Are Not Independent of Criticism*

Of course, judges are not independent of criticism. President Clinton said: “I support the independence of the Federal judiciary. I do not believe that means that those of *us* who disagree with particular decisions should refrain from saying we disagree with them.”¹⁵ By “us” he meant the people, of course, and he was right. But for “us,” meaning the executive—and especially, the President—I think criticism of judicial decisions is different, as I will explain shortly. The First Amendment protects speech, even against judges, even when the speech is unfair and wrong.¹⁶ Criticizing public officials is a time-

realdonaldtrump/status/1065351478347530241; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 4:09 PM), <https://twitter.com/realdonaldtrump/status/1065351478347530241?lang=EN>.

¹² See, e.g., *2017 Report Cards*, GOVTRACK, <https://www.govtrack.us/congress/members/report-cards/2017/senate/ideology> (last visited June 29, 2019) (ranking Whitehouse as the sixteenth-most liberal senator based on 2017 votes).

¹³ Sheldon Whitehouse, Commentary, *Sen. Whitehouse: There’s a ‘Crisis of Credibility’ at the U.S. Supreme Court*, NAT’L L.J. (Feb. 15, 2019, 2:50 PM), <https://www.law.com/nationallawjournal/2019/02/15/sen-whitehouse-theres-a-crisis-of-credibility-at-the-u-s-supreme-court>.

¹⁴ *Id.*

¹⁵ Alison Mitchell, *Clinton Defends His Criticism of a New York Judge’s Ruling*, N.Y. TIMES (Apr. 3, 1996) (emphasis added), <https://www.nytimes.com/1996/04/03/us/clinton-defends-his-criticism-of-a-new-york-judge-s-ruling.html>.

¹⁶ U.S. CONST. amend. I.

honored tradition in this country. Judges are not, and should not be, exempt.

B. *Judges Are Not Independent of Accountability to the People*

Nor are judges independent of the accountability all public officials owe the people for their stewardship of power. Importantly, for the judiciary, the measure of fidelity is different. The executive and the legislature must uphold the Constitution, of course, but they must also answer for representing their constituents, for shaping and effectuating the popular will. Judges have no constituencies. They account to the people for their adherence to the rule of law. When judges follow the law, even against the popular will of the time—*especially* against the popular will of the time—they have done their job.

When judicial accountability is for fidelity to the rule of law, judicial accountability and judicial independence are, if not congruent, aligned. Independence satisfies accountability, and accountability rewards independence. But when accountability is measured by whether a judge decides cases the way people *like*, and what people *like* is different from what the law *is*, the pressure is on the judge to surrender independence, and the law, to popular will—to take sides.

C. *Taking Sides—Federal Confirmation*

That pressure usually evidences itself in judicial selection and retention. For federal judges, retention is practically off the table. Alexander Hamilton believed that life tenure for federal judges was essential to protect their independence.¹⁷ A judge could not be removed for an unpopular decision except by impeachment, which, as President Jefferson learned with Justice Chase's acquittal on all counts, was very difficult.¹⁸ And so, federal judicial accountability is focused on selection and confirmation.

In 1916, President Woodrow Wilson nominated to the Supreme Court a strong supporter, a Boston lawyer in private practice, a Republican turned Democrat, a business lawyer turned rabid reformer: Louis Brandeis.¹⁹ Conservative Republicans, ABA presi-

¹⁷ THE FEDERALIST NO. 78 (Alexander Hamilton) ("If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices . . .").

¹⁸ REHNQUIST, *supra* note 1.

¹⁹ *On This Day, Louis D. Brandeis Confirmed as a Supreme Court Justice*, NAT'L CONST. CTR.: CONST. DAILY (June 1, 2019), <https://constitutioncenter.org/blog/louis-brandeis-confirmed-as-justice>; John Braeman, "The People's Lawyer" Revisited: Louis D. Brandeis Versus the United Shoe Machinery Company, 50 AM. J. LEGAL HIST. 284, 293 (2008–2010).

dents, and prominent newspapers lined up to oppose the nomination.²⁰ Their concerns were how he would rule—as a liberal—and who he was—Jewish.²¹ Years later, Justice William O. Douglas wrote: “Brandeis was a militant crusader for social justice He was dangerous because he was incorruptible The fears of the Establishment were greater because Brandeis was the first Jew to be named to the Court.”²² Brandeis’s nomination was so controversial that the Senate for the first time in history held a public hearing.²³ The confirmation process lasted an unprecedented four months.²⁴ It is impossible for us, accustomed as we are to confirmation consternation, to appreciate the upheaval in confirming Justice Brandeis. One newspaper editorialized:

The Supreme Court, by its very nature, must be a conservative body; it is the conservator of our institutions, it protects the people against the errors of their legislative servants, it is the defender of the Constitution itself. To place upon the Supreme Bench judges who hold a different view . . . , to supplant conservatism by radicalism, would be to undo the work of John Marshall and strip the Constitution of its defenses.

That newspaper was the *New York Times*.²⁵

Contemporaries thought the Brandeis nomination threatened an end to judicial independence.²⁶ Now, 102 years later, many think the same of the Kavanaugh nomination.²⁷ Both sides. Though the two nominees were very different, at a general level, the questions were the same, as they have been in many other confirmations: Who are the nominees personally, and how will they rule on particular issues? When judicial accountability turns on what side a judge is on, on whether a judge’s decisions are or will be popular, judicial indepen-

²⁰ *On This Day, Louis D. Brandeis Confirmed as a Supreme Court Justice*, *supra* note 19.

²¹ *Id.*

²² William O. Douglas, *Louis Brandeis: Dangerous Because Incorruptible*, N.Y. TIMES BOOK REV., July 5, 1964, at 3.

²³ *On This Day, Louis D. Brandeis Confirmed as a Supreme Court Justice*, *supra* note 19.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *Louis Brandeis*, CONST. L. REP., <https://constitutionallawreporter.com/previous-supreme-court-justices/louis-brandeis> (last visited June 23, 2019).

²⁷ See, e.g., Roger Cohen, Opinion, *An Insidious and Contagious American Presidency*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/trump-kavanaugh-confirmation-justice.html> (quoting University of Pennsylvania School of Law Professor Stephen Burbank as saying “Kavanaugh’s statements were so partisan and suggested so strongly an inability to be independent on any sort of issue salient to contemporary politics”).

dence is threatened. The judge must decide whether to adhere to the law or succumb to pressure.²⁸

Nominees almost always promise they will follow the law—they will be umpires “call[ing] balls and strikes.”²⁹ Skeptics accuse supporters of favoring the nominee because they think he will rule their way. Supporters accuse skeptics of opposing the nominee for the same reason. Does anyone in the hearing room really think the nominee will adhere to the law, ignore his own predilections, ignore politics, and do equal right to all? In the often abstract and hypothetical, often accusatory and combative, sometimes histrionic, and always contentious Senate confirmation hearings, the message is not lost on the American people: The judge will take sides, and it is important to know whose. Judges are not independent.

D. Judicial Retention a Threat to Independence—State Elections

The confirmation process for federal judges influences the processes for retaining state judges in that the participants in both, and the watching public, come to believe that the real issue is not whether the judge will be fair but whose side the judge will be on. In all but the three states where judges serve for life or until age seventy, that issue can be revisited periodically in the retention process.³⁰ In all but eight states, judicial retention involves some kind of popular election.³¹ In a few states, those elections for appellate judges are partisan, as if the candidate were running for legislative office.³² Texas is one.³³ If opposed, as they often are, judges and judicial candidates must campaign to win. To campaign—to take a message to voters—they must raise money, mostly from lawyers, but also from groups often bent on seeing judicial decisions go their way. And as the Supreme Court has told us, judges and candidates running for judicial office have the First Amendment right to speak out as freely as anyone on politics and

²⁸ See, e.g., Hon. Barbara J. Pariente & F. James Robinson, Jr., *A New Era for Judicial Retention Elections: The Rise of and Defense Against Unfair Political Attacks*, 68 FLA. L. REV. 1529 (2016).

²⁹ E.g., *Roberts: ‘My Job Is to Call Balls and Strikes and Not to Pitch or Bat,’* CNN (Sept. 12, 2005, 4:58 PM), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement> (quoting Chief Justice Roberts’s opening statement during his confirmation hearings).

³⁰ Those states are Massachusetts, New Hampshire, and Rhode Island. See *Methods of Judicial Selection*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited July 7, 2019).

³¹ Those states are Connecticut, Delaware, Hawaii, Maine, New Jersey, South Carolina, Vermont, and Virginia. *Id.*

³² Those states include Alabama, Louisiana, and North Carolina. Several other states have partisan elections for trial judges. *Id.*

³³ *Id.*

even issues that may come before the court, subject to recusal.³⁴ The judge and judicial candidate are thrust deeply into the political arena.

I have been elected to the Texas Supreme Court six times—more than anyone in history.³⁵ In my forty-five years as a lawyer, thirty-eight of them on the bench, I have done all I could to oppose the partisan election of judges. Texas elects almost two-thirds of its 3204 judges (most municipal judges are appointed).³⁶ Despite limits on contributions to, and expenditures by, judges and judicial candidates³⁷—limits my predecessor, Chief Justice Tom Phillips, and I pioneered voluntarily before they became law³⁸—the process can at times be free-wheeling. Instances of proven influence on judges are rare, but lawyers, and even judges themselves, believe that raising money and running with partisan labels give the appearance of outside influence.

Partisan judicial elections are the exception nowadays. The desire to preserve judicial independence has driven efforts to reform the methods for selecting and retaining judges in the states.³⁹ As a result, judges in roughly two-thirds of the states still face election to enter or remain in office, but the elections are either nonpartisan—with opponents but no partisan labels—or retention—with no opponents, a yes-or-no vote.⁴⁰ Neither has eliminated threats to judicial independence.

For example, in 1986, Rose Bird, Chief Justice of the California Supreme Court, was not retained in office because of her perceived

³⁴ See *Republican Party of Minn. v. White*, 536 U.S. 765, 771–73 (2002) (holding that a Minnesota law restricting the ability of judicial candidates to announce their views on “disputed legal or political issues” unconstitutionally restricted the candidate’s First Amendment rights).

³⁵ *Chief Justice Nathan L. Hecht*, TEX. JUD. BRANCH, <http://www.txcourts.gov/supreme/about-the-court/justices/chief-justice-nathan-l-hecht.aspx> (last visited June 23, 2019).

³⁶ See OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIAL SYSTEM—FISCAL YEAR 2018, at iv (Dec. 2018), <https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf> (showing that Texas has 18 judges on its two high courts, 80 on intermediate appellate courts, 469 on district courts, 517 on county courts, 803 on justice of the peace courts, and 1317 on municipal courts); RYAN KELLUS TURNER & W. CLAY ABBOTT, *THE MUNICIPAL JUDGES BOOK I-37* n.205 (7th ed. 2018) (estimating that about five percent of Texas’s municipal judges are elected).

³⁷ *Judicial Campaign Fairness Act*, TEX. JUD. COUNCIL, <http://www.txcourts.gov/media/1441211/jcfa-one-pager-march-2018.pdf> (last visited June 23, 2019).

³⁸ See OFFICE OF COURT ADMIN., ANNUAL REPORT OF THE TEXAS JUDICIAL SYSTEM: FISCAL YEAR 2004, at 2 (2004), <http://www.txcourts.gov/media/454897/Annual-Report-2004-Final.pdf> (“[W]hen justices on the Court were under attack for taking large campaign contributions . . . , Tom Phillips placed a voluntary limit on the size of donations to his campaign. His limit was adopted by several other successful candidates and, in 1995, became law . . .”).

³⁹ See, e.g., ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, *CHOOSING STATE JUDGES: A PLAN FOR REFORM 2* (2018), https://www.brennancenter.org/sites/default/files/publications/2018_09_JudicialSelection.pdf (articulating one such plan for reforming judicial selection to preserve judicial independence).

⁴⁰ *Id.* at 3.

personal opposition to the death penalty—she had voted to overturn convictions in sixty-four of the sixty-four death penalty cases that had come to the court.⁴¹

In 2010, three of the five justices of the Iowa Supreme Court who had voted unanimously the year before to strike down the state's prohibition of gay marriage as unconstitutional were not retained in office.⁴² Most Iowa voters opposed gay marriage.⁴³ Over one million dollars were spent to reject the justices, who chose not to enter the political fray.⁴⁴ "Our hope," Justice Martha K. Ternus later explained, "was that the bar association and others would come to our aid. They did, but not with the vigor and money that was required to counteract the emotionally laden and factually inaccurate television ads that ran incessantly for the three months prior to the election."⁴⁵ Two years later, public opinion had changed. Most Iowans opposed a constitutional amendment prohibiting gay marriage.⁴⁶ The chief justice, who had joined the court's gay marriage opinion, was retained in 2016.⁴⁷ The almost inescapable conclusion is that the retention or non-retention of the Iowa justices depended on popular views of their decision in one case.⁴⁸

In 2012, the three justices of the Florida Supreme Court up for retention were opposed as having "undermined property rights, education, and fair elections."⁴⁹ Specifically, opponents were upset over

⁴¹ Lloyd Billingsley, *When Voters Cleaned House at the State Supreme Court*, ORANGE CTY. REG. (Oct. 28, 2016, 12:00 AM), <https://www.oregister.com/2016/10/28/when-voters-cleaned-house-at-the-state-supreme-court>.

⁴² A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <https://www.nytimes.com/2010/11/04/us/politics/04judges.html>.

⁴³ See *Iowa Polls Show Shifting Attitudes on Same-Sex Marriage*, DES MOINES REG. (Apr. 28, 2015, 7:18 PM), <https://www.desmoinesregister.com/story/news/politics/iowa-poll/2015/04/28/gay-marriage-iowa-poll-supreme-court/26543751> (discussing polling showing that support for same-sex marriage increased in Iowa from twenty-three percent in 2003 to thirty-two percent in 2008, with only thirty-two percent of Iowans in 2011 favoring the supreme court's decision permitting same-sex marriage).

⁴⁴ Mallory Simon, *Iowa Voters Oust Justices Who Made Same-Sex Marriage Legal*, CNN (Nov. 3, 2010, 1:13 PM), <http://www.cnn.com/2010/POLITICS/11/03/iowa.judges/index.html>.

⁴⁵ Matthew W. Green, Jr. et al., *The Politicization of Judicial Elections and Its Effect on Judicial Independence*, 60 CLEVELAND ST. L. REV. 461, 484 (2012).

⁴⁶ *Iowa Polls Show Shifting Attitudes on Same-Sex Marriage*, *supra* note 43 (explaining that as of February 2012, fifty-six percent of Iowans opposed a constitutional ban on gay marriage).

⁴⁷ Sarah Boden, *State Supreme Court Justices Win Retention*, IOWA PUB. RADIO (Nov. 9, 2016), <https://www.iowapublicradio.org/post/state-supreme-court-justices-win-retention#stream/0>.

⁴⁸ See Pariente & Robinson, *supra* note 28, at 1547 (discussing the electoral reaction to the Iowa Supreme Court's decision on same-sex marriage).

⁴⁹ RestoreJustice2012, *Florida Supreme Court: Justices Pariente, Quince and Lewis*, YOUTUBE (Sept. 30, 2012), <https://www.youtube.com/watch?v=9dx5uTXRYpg>.

the court's decision to remove from the 2010 ballot a constitutional amendment challenging the individual mandate of the Affordable Care Act.⁵⁰ The justices fought back vigorously, assisted by the state bar, and were retained.⁵¹

In 2014, retention of three justices of the Tennessee Supreme Court was opposed by the lieutenant governor, who called the justices "soft on crime" and "anti-business."⁵² They, too, fought back, supported by lawyers who felt the entire profession was under attack, and were retained.⁵³ But their opponents claimed victory. "Any decision that they make going forward," one prominent group proclaimed, "they know they have conservative groups that will hold them accountable."⁵⁴

For most of this decade, Kansas has been experiencing perhaps the most remarkable interbranch struggle of any state. Private groups, the governor, and the legislature have made repeated, organized efforts to defeat retention of justices of the Kansas Supreme Court over its decisions on abortion, the death penalty, public school finance, and administrative control of court operations.⁵⁵ At one point, the legislature threatened to defund the entire judiciary if any court held a particular statute unconstitutional.⁵⁶ The supreme court did so anyway, the legislature backed down, and the warring subsided a little.⁵⁷ But the idea that judges should be punished for not deciding cases one way or another remains. "For now," said one group, "we can only hope the judges have learned a powerful lesson"⁵⁸

Arkansas selects and retains judges in nonpartisan elections.⁵⁹ Last year, an incumbent justice on the state supreme court was vigorously opposed by a nationally funded advocacy group, reported to

⁵⁰ Pariente & Robinson, *supra* note 28, at 1549.

⁵¹ *Id.* at 1550.

⁵² *Id.* at 1551.

⁵³ *Id.* at 1551–52.

⁵⁴ *Id.* at 1552.

⁵⁵ *Id.* at 1552–59.

⁵⁶ Lincoln Caplan, *The Political War Against the Kansas Supreme Court*, NEW YORKER (Feb. 5, 2016), <https://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court>.

⁵⁷ *Id.*

⁵⁸ Kathy Ostrowski, *Kansas Activist Judges Narrowly Survive Pro-Life Ouster*, KANSAS FOR LIFE BLOG (Nov. 9, 2016), <https://kansansforlife.wordpress.com/2016/11/09/kansas-activist-judges-narrowly-survive-pro-life-ouster> (quoting Kansas for Life Executive Director Mary Kay Culp).

⁵⁹ *Methods of Judicial Selection*, *supra* note 30.

have spent over one million dollars on a barrage of dark-money ads to defeat her.⁶⁰ She fought back and was nevertheless re-elected.⁶¹

There are many good reasons to change from the partisan election of judges to nonpartisan elections or to merit appointment with retention elections. But a 2012 empirical study convincingly concludes that nonpartisan elections and merit appointment do not necessarily reduce the threat to judicial independence and may even increase it.⁶² “[R]etention elections,” the study concludes, “create pressure for judges to cater to public opinion on ‘hot-button’ issues that are salient to voters. Moreover, this pressure can be as great as that in contestable elections.”⁶³

I have given a few high-profile examples of efforts to pressure state supreme court justices in the retention process. There are many others, but they are all a tiny fraction of the thousands of instances in which state judges have been elected and retained, routinely and quietly. Even in the examples I have given, judges were most often retained. My point is this: Even when judges have survived political pressure, the belief that judges are, can be, or even should be independent is in doubt.

E. The Threat from Within

Federal judicial confirmation proceedings and state judicial retention election campaigns—whether with partisan opponents, nonpartisan opponents, or no opponents—support statements by executives, legislators, advocacy groups, and the media that judges should answer not just for their adherence to the rule of law but for whose side they are on. This view threatens the separation of powers and the perceived integrity of what must absolutely be impartial decisionmaking. As Justice Brennan wrote in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, “[t]he Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.”⁶⁴ Justice Brennan, having come to the Supreme Court from the New Jersey state courts, would have said the same of

⁶⁰ John Moritz, *Dark Money Hangs over Arkansas Judicial Races*, ARK. DEMOCRAT GAZETTE (Nov. 11, 2018, 4:30 AM), <https://www.arkansasonline.com/news/2018/nov/11/dark-money-hangs-over-races>.

⁶¹ *Id.*

⁶² Brandice Canes-Wrone, Tom S. Clark & Jee-Kwang Park, *Judicial Independence and Retention Elections*, 28 J.L. ECON. & ORG. 211, 229 (2010).

⁶³ *Id.* at 211.

⁶⁴ 458 U.S. 50, 58 (1981).

state judiciaries. “[T]he independence of the Judiciary,” he said, must “be jealously guarded.”⁶⁵

But guarded not so much against any *external* threat, at least at this point in our history. Raucous though the process can sometimes be, federal nominees are being confirmed at a fast pace, and the Senate promises acceleration.⁶⁶ Criticism of federal judges, even from President Trump and Senator Whitehouse, poses no threat to life tenure. In all but a few instances, state judges have been re-elected or retained despite overwhelming opposition to particular decisions and vicious personal attacks. Measured by the number of judges obtaining and retaining office, criticism has not so much as dented judicial independence.

But that is not the only measure of the threat. Of greater concern is how the federal confirmation process and state retention processes, and their influence on an already sympathetic populace, affect judges themselves.⁶⁷ Are they more convinced that their personal convictions should trump the law? Are the pressures of today’s politics forcing more state judges to yield to the temptation to always be looking over their shoulders for how a decision will be perceived? Even when some judges have won, have others, as opponents have said, learned their lesson? If only one in a thousand people walking along a street is shot at, you still think about taking another street. As I have warned in my last two State of the Judiciary Addresses to joint sessions of the Texas legislature, “when partisan politics is the driving force, and the political climate is as harsh as ours has become, judicial elections make judges more political, and judicial independence is the casualty.”⁶⁸ “Make no mistake,” I said; “a judicial selection system that continues to sow the political wind will reap the whirlwind.”⁶⁹

The argument is simple: Criticism of judges in the federal confirmation process and in state retention elections insists that judges take sides. So why not? Go with the flow, lest you lose an election. Or go the other way, following personal convictions and satisfying sup-

⁶⁵ *Id.* at 60.

⁶⁶ Carrie Johnson, *Trump’s Judicial Appointments Were Confirmed at Historic Pace in 2018*, NPR (Jan. 2, 2019, 5:00 AM), <https://www.npr.org/2019/01/02/681208228/trumps-judicial-appointments-were-confirmed-at-historic-pace-in-2018>.

⁶⁷ Canes-Wrone, Clark & Park, *supra* note 62, at 228 (“Perhaps no question about the design of courts is as consequential as how the method of selection affects the independence of judges.”).

⁶⁸ Hon. Nathan L. Hecht, Chief Justice, Tex. Supreme Court, *The State of the Judiciary in Texas*, Address to the 85th Texas Legislature (Feb. 1, 2017), <https://www.txcourts.gov/media/1437101/soj-2017.pdf>.

⁶⁹ Hon. Nathan L. Hecht, Chief Justice, Tex. Supreme Court, *The State of the Judiciary in Texas*, Address to the 86th Texas Legislature (Feb. 6, 2019), <https://www.txcourts.gov/media/1443500/soj2019.pdf>.

porters. But one way or the other, take sides. The real threat is not from without but from within. The threat is not that judicial independence will be taken away but that it will be surrendered.

What can be done to protect judicial independence from this internal threat?

II

THE JUDICIARY'S RESPONSIBILITY

Judges must demonstrate—prove—that they are above the fray. Federal judges know they must be non-political, but do they show it? Who is right? President Trump, that Ninth Circuit judges are biased against him and his cases?⁷⁰ Senator Whitehouse, that Republican Presidents' appointees have an agenda?⁷¹ Chief Justice Roberts, that there are no Trump judges or Obama judges, but only judges trying to do equal right by all?⁷² If Chief Justice Roberts is not right, shouldn't he be, and shouldn't we insist that he is? Must not the judiciary distance itself from its critics and claim the higher ground? We need more outspoken examples.

State judges must set their own example. The November partisan judicial election in Texas saw many Democratic judges swept into office as voters in urban areas chose Beto O'Rourke over Ted Cruz for United States Senator.⁷³ Cruz won, but hundreds of incumbent judges running as Republicans, having chosen the wrong party label, lost.⁷⁴ Many have predicted that the changes in judges' party label will result in significant changes in the law.⁷⁵ But one Democratic judge newly elected to the appellate court told the press, "There are not Republican or Democratic ways to decide a breach of contract dispute or a car wreck case."⁷⁶ His message should win the day.

⁷⁰ See *supra* notes 9, 11 and accompanying text.

⁷¹ Whitehouse, *supra* note 13.

⁷² Liptak, *supra* note 10.

⁷³ Emma Platoff, *Texas Democrats' Biggest Win on Election Night May Have Been the Courts*, TEX. TRIB. (Nov. 8, 2018, 12:00 PM), <https://www.texastribune.org/2018/11/08/texas-courts-appeals-2018-midterms-beto-orourke>.

⁷⁴ See Paul Cobler, *Chief Justice Urges Nonpartisan Contests*, SAN ANTONIO EXPRESS-NEWS, Feb. 7, 2019, at A006 ("During the 2018 midterm elections, more than 400 Democratic judges unseated incumbents around the state as turnout surged and a majority of voters opted for the 'straight-ticket' voting option.").

⁷⁵ See, e.g., Mark Curriden, *Substantive Changes Coming to Courts of Appeals in Austin, Dallas & Houston*, TEX. LAWBOOK (Nov. 12, 2018), <https://texaslawbook.net/substantive-changes-coming-to-courts-of-appeal-in-austin-dallas-houston> (providing several brief interviews about potential changes stemming from the change in judicial composition).

⁷⁶ *Id.*

Judges should approach decisionmaking with what Justice Scalia termed modesty⁷⁷—or I would say humility: the idea that the judiciary is but one part of the government, that separation of powers works both ways, to keep the judiciary out of the other branches' affairs as well as the other branches out of the judiciary's, and that the judiciary should eschew the political fray when it can. Justice Scalia was criticized for not following his own advice,⁷⁸ but, regardless of whose side you take, the advice is sound. Whenever a case requires a court to wade into politically charged waters, the court should do so with reluctance rather than glee.

Recognizing the political nature of a case should be front and center in the court's opinion. The "hot-button" case requires the judge to write to convince, not merely to decide. The Texas Supreme Court has held the public school finance system unconstitutional four times,⁷⁹ never encountering more than *pro forma* remonstrance from the legislature. One reason, I think, is that the court's opinions were so detailed, so carefully reasoned, so deeply grounded in authority, that it was hard to argue that the court was being political. Even the staunchest opponents of change had to concede the facts and the analysis of the constitutional issues. I will not criticize other court decisions here, but I will say that the "you're-wrong-they're-right" opinion that dusts off serious arguments prompts criticism of the judiciary. An umpire who justifies his call because he's the umpire is not as well respected as the umpire who explains why any umpire would have made the same call.

State judges still make policy decisions in defining the contours of the common law. Those decisions, too, must draw on history, address changed circumstances, balance competing interests, reason carefully, and craft the common law to last. Common law decisions cannot merely be edicts and must recognize that legislatures can respond and choose differently.

⁷⁷ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting) ("[C]ompare this Nietzschean vision of us unelected, life-tenured judges . . . whose very 'belief in themselves' is mystically bound up in their 'understanding' of a Court that 'speaks before all others for their constitutional ideals'—with the somewhat more modest role envisioned for these lawyers by the Founders.").

⁷⁸ See, e.g., Ethan Bronner, *A Dissent by Scalia Is Criticized as Political*, N.Y. TIMES (June 27, 2012), <https://www.nytimes.com/2012/06/28/us/scalias-immigration-dissent-is-criticized-as-political.html> (describing a critique by Judge Posner, among others, of Scalia's opinion as likely to be "quoted in campaign ads").

⁷⁹ *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 754 (Tex. 2005); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 493 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 492–93 (Tex. 1991); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989).

III

THE LEGAL PROFESSION'S RESPONSIBILITY

When attacked, the judiciary cannot effectively defend itself. Its self-interest in doing so calls its motives into doubt. Its resources for such a campaign are entirely inadequate. And self-defense necessarily draws the judiciary into the very political arena it seeks to avoid, as the Iowa justices believed.⁸⁰ Even when judges have actively defended attacks on their independence, they have been effective only with the assistance of the legal profession.⁸¹

Judicial independence is not readily understood, especially in a culture as lacking in civics education as ours. The legal profession best knows and appreciates how essential to our democracy is the fair and impartial administration of the law by judges free of the influences of executives and legislators, popular opinion and politics, and even judges' own personal opinions. The burden of jealously guarding judicial independence—Justice Brennan's words—falls to the legal profession.⁸²

The profession's efforts were probably most responsible for defending judges in Florida, Tennessee, and Kansas, though efforts fell short in Iowa.⁸³ The American Board of Trial Advocates (ABOTA), comprised of trial lawyers on all sides of legal issues—plaintiffs and defendants, business and personal injury—has been especially active. The national organization has developed a “Protocol for Responding to Unfair Criticism of Judges” for use by each regional chapter.⁸⁴ The Texas chapter has a standing committee to ensure a strong, published response to personal attacks on judges and their integrity that threaten judicial independence.⁸⁵ The most effective defense is always the one seemingly against interest: the defense of the judge with whose decision you disagree. The responsible lawyer can express disappointment in a ruling and vow to see it overturned

⁸⁰ Pariente & Robinson, *supra* note 28, at 1547.

⁸¹ See, e.g., *id.* at 1550 (discussing the successful campaigns of incumbent Florida judges who received support from the Florida Bar).

⁸² N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982).

⁸³ See *supra* notes 42–61 and accompanying text.

⁸⁴ *Protocol for Responding to Unfair Criticism of Judges*, AM. BOARD TRIAL ADVOC., <https://www.judges.org/wp-content/uploads/UnfairCriticismofJudges.pdf> (last visited June 27, 2019).

⁸⁵ TEX. CHAPTER OF AM. BD. OF TRIAL ADVOCATES, BYLAWS OF TEX-ABOTA OF THE AMERICAN BOARD OF TRIAL ADVOCATES 7 (2015), <https://tex-abota.org/wp-content/docs/2015-Final-Bylaw-TEX-ABOTA-signed.pdf>.

without maligning the judge's integrity. This is a goal of the ABOTA protocol.⁸⁶

Certainly, as President Clinton noted, people are perfectly free to criticize judicial decisions with which they disagree.⁸⁷ But leaders in the executive and legislative branches have loud voices, augmented by the media's, and especially social media's, megaphone. The legal profession must be similarly effective in cautioning the public against public officials' denigrations of the third branch that, if successful, will deny people the protections of an independent judiciary.

CONCLUSION: JEFFERSON WAS WRONG

Once or twice each year, I am visited by judicial delegations from foreign countries—from Europe, Africa, Southeast Asia, and elsewhere. One question is always asked: What happens when a judge's ruling is unpopular or goes against the government? The judge may be criticized, I say, but generally the profession and the people believe in and defend an independent judiciary. I was explaining this to a delegation from Iraq. One judge sat quietly, her eyes filling with tears. Her colleague explained: While she was on this trip, her father, also a judge in her hometown, was killed because of an unpopular ruling.

I think that alone proves President Jefferson was wrong. But the prosecution never rests, and so neither can the defense. Public discourse today is intense, to say the least. The verbal brawl long ago abandoned the Marquess of Queensberry rules.⁸⁸ Judicial independence cannot be a casualty. The legal profession—and, I think, especially the academy—must defend it, and judges must prove they deserve it.

⁸⁶ *Protocol for Responding to Unfair Criticism of Judges*, *supra* note 84 (expressing a goal to “[m]aintain and support public confidence in the judiciary by providing timely assistance to members of the bench in responding to adverse publicity, misinformation, or unwarranted criticism of an individual judge or the judiciary”).

⁸⁷ See Mitchell, *supra* note 15.

⁸⁸ These are a code of rules first published in 1867 that specify the guidelines for a fair fight, typically applied to boxing. *Marquess of Queensberry Rules*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/sports/Marquess-of-Queensberry-rules> (last visited June 27, 2019).