

*Tension and Intention*

*The American Constitutions and the  
Shaping of Democracies Abroad*

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The Tanner Lecture is an occasion to think about human values. The value I address here is justice. Not divine justice. Not justice in the moral sense, but legal justice, justice embodied in the rule of law. “Justice,” said James Madison, “is the end of government. It is the end of civil society.”<sup>1</sup> But how is justice secured?

Increasingly, around the world there is one answer: justice, and with it a stable and prosperous society, is best obtained through a written charter of government that apportions public power, guarantees fundamental rights, and entrusts the ultimate protection of those rights to an impartial judiciary. Constitutional democracy, so defined, has become the world’s gold standard of government.<sup>2</sup>

The rise of constitutional democracy in our time is nothing short of remarkable. For nearly two hundred years, the United States stood in splendid isolation in its chosen form of government.<sup>3</sup> No longer. The United States has given the world much. But unquestionably, our most enduring contribution is the structure of government in which public power is divided, in which judges charged with the ultimate responsibility for enforcing a written charter are, in the words of the Massachusetts Constitution, “as free and impartial as the lot of humanity will admit.”<sup>4</sup>

Our democracy was forged from the eighteenth-century American colonial experience. That experience produced, again in the words of James Madison, a system of government that had “no model on the face of the globe.”<sup>5</sup> Now countries as diverse as Lithuania, South Africa, and Canada have staked their future on the promise of constitutional democracy. But we in the United States seem to be revisiting our foundational premises.

1. *The Federalist no. 51*, edited by Robert Scigliano (New York: Modern Library, 2001), 334.

2. According to Richard H. Pildes, “In the last generation, more new democracies, all constitutional, have been forged than in any comparable period. In regions ranging from South Africa to the former Soviet Union, Latin America, and parts of the Middle East, the renewed rise of democratic institutions has been a defining political development of the era” (*The Supreme Court Term 2003—Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 29 [2004]).

3. We remain the world’s “oldest continuous constitutional democracy” (Samuel Issacharoff and Richard H. Pildes, *Emergency Contexts without Emergency Powers: The United States’ Constitutional Approach to Rights during Wartime*, 2 Int’l J. Const. L. 296, 296 (2004)).

4. Ma. Const. pt. 1, art. 29. See, for example, Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev. 537, 558–61 (1988).

5. *The Federalist no. 14*, 85.

Have the concerns of the twenty-first century—a global economy, global terrorism, the breadth of modern technology—rendered inadequate the eighteenth-century fabric of American government? The very question brings a new urgency to our national conversation.

I join that conversation as a passionate advocate of constitutional democracy in the classic sense I have just described, namely, the separation of powers, a written charter of fundamental rights, and the fair and impartial application of laws. In my view, the case must be made again for this form of constitutional democracy, made with immediacy. That is because a convergence of potent developments is exerting significant pressures on our democracy. What are they? I will focus on three: attacks by politicians and others on the constitutional role of our courts to be free from political interference, the massive influx of special-interest money into judicial selection and retention procedures, and the loosening of ethical constraints on what judicial candidates may and may not say about cases likely to come before them. Individually, each of these developments may pose no great threat to our political arrangements. Combined, they make a toxic brew, for they put pressure on judges to act like politicians, substituting accountability to partisan interests for accountability to the Constitution. Former United States Supreme Court justice Sandra Day O'Connor recently voiced concern about “the efforts of those who would strong-arm the judiciary into adopting their preferred policies. It takes a lot of degeneration before a country falls into dictatorship,” she said, “but we should avoid these ends by avoiding these beginnings.”<sup>6</sup>

Constitutional democracy, although surely imperfect, is the best mechanism we have to date to ensure that debates about deeply divisive national issues will take place according to the rule of law and not the law of the ideologue or the law of the mob. We should not, we must not, ignore attempts to inject political calculation into judicial decision making, and to fuse together powers of government whose separation has been essential to our freedom and security as a people. Without an effective means to prevent the amassing of government power by one person or one group, without an effective means to mediate the ever present tension between the legitimate rights of individuals and the legitimate needs of the community, freedom does not flourish. But constitutional democracy, a human construct, is not self-perpetuating. It survives because people nur-

6. *Morning Edition: Nina Totenberg* (PBS television broadcast, March 10, 2006) (transcript on file with author). See Julian Borger, “Former Top Judge Says US Risks Edging Near to Dictatorship,” *Guardian*, March 13, 2006.

ture it. Can we assume that relentless attacks on the basic principles of our society do no harm?

I begin on a personal note. I speak to you as a state court justice, as a woman, as an immigrant. I speak to you as one whose devotion to the rule of law originates in personal experience of the arbitrary, often brutal, abuse of official power. Those of you who grew up in the United States may take for granted the concept of a just government. I never can. I grew up under the apartheid regime in South Africa, a government of lawlessness. Yes, there were duly-enacted statutes and a sophisticated network of executive agencies and courts to implement and enforce those statutes. But apartheid South Africa's laws had one primary aim: to protect and consolidate the power of the powerful. I know all too well how such laws can rend the fabric of a society, morally disfiguring both the powerful and the disempowered. I share with you one brief anecdote that crystallizes the South Africa of my childhood.

I was born in an isolated village, in what Nobel Prize winner Nadine Gordimer called the "rigidly racist and inhibited colonial society" of small-town, provincial South Africa.<sup>7</sup> My childhood years were secure, comfortable, far different from the lives of the majority of South Africans, black South Africans, those who waited on and worked for us, whose ghettos ("townships") lay beyond the confines of my comfortable home. My parents were empathetic, my father helping people in times of trouble, my mother treating everyone, black and white, with kindness. But we—the white community, the government, the law—existed in a kind of existential blindness, blinding ourselves to reality because seeing it would make life too painful. It was a moral opacity that had us address a black woman servant as "Mary" because her given name was too difficult for us to remember. It was a willful unknowing that left us ignorant of the suffering that surrounded us.

Existential blindness enveloped us like a cocoon. But not always. I am perhaps eight years old. It is a typical Sunday afternoon. After church, our family drives to a hotel in the surrounding mountains, where my mother and father drink tea on the veranda while my siblings and I play on the grounds.

The trip to the hotel was not long, the road wide open, with few cars, all driven by whites. On this particular Sunday, the car ahead of ours

7. Gordimer, speech at the Nobel Banquet, December 10, 1991 (transcript available at <http://www.nobelprize.org>).

slowed down as it approached a man on a bicycle, a black man. He was pedaling on the shoulder, well out of the car's path. As it pulled alongside the black cyclist, the car ahead accelerated slightly. A white hand holding a long leather whip (a *sjambok* we called such whips) emerged from the car window, brutally whipping the cyclist, who fell to the ground. The car sped off. We drove past the injured black man lying beside the road. We drove past, in silence.

Legally, if not morally, the assault I witnessed that Sunday afternoon was a nonevent. No South African prosecutor would bring the assailant to bar; no court would award the injured black man any damages. To the extent that he had any access to South African justice, the black cyclist would literally have had to enter the courthouse through a separate door.

The existential blindness of apartheid was banal, quotidian—but not total. Many South Africans, black and white, spoke up for freedom, at great peril to themselves and their families. Their insistence that all people have rights, that we are all cloaked in dignity, was the pinprick of light that shone through my existential blindness. Those who spoke out for freedom created the “tiny ripples of hope” that Senator Robert F. Kennedy spoke about in his momentous trip to South Africa. “Each time a man stands up for an ideal,” Senator Kennedy said, “or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current which can sweep down the mightiest walls of oppression and resistance.”<sup>8</sup>

I was in the audience when Senator Kennedy delivered that address to the National Union of South African Students in Cape Town on June 7, 1966. I was one of the student leaders who greeted him. How did the sheltered child from small-town South Africa end up in that place, in that time? How did the child's discomfort at seeing a black man whipped by the roadside grow to political activism? The explanations go beyond autobiography.

My first tutor in the principles of justice was religion—or, more specifically, religious leaders of inestimable courage. Our Anglican (Episcopal) congregation was led by Bishop Ambrose Reeves, a white man unusual for his time. Bishop Reeves was one of a very small cadre of white South

8. Kennedy, Day of Affirmation address at the University of Cape Town, South Africa, June 7, 1966, in Josh Gottheimer, ed., *Ripples of Hope: Great American Civil Rights Speeches* (New York: Basic Civitas Books, 2003), 288. Information on Senator Kennedy's visit to South Africa, including contemporary accounts, is available at <http://www.rfksa.org>.

African clergy who spoke out for the equality of all people. In 1979, Oliver Tambo, then president of the African National Congress, said of Bishop Reeves: “No good cause, no suffering individual, no frightened victim of some government policy hesitated to seek help from this man, whose great energy and wisdom sparked and guided and challenged.”<sup>9</sup> Apartheid South Africa did not tolerate religious freedom. In 1960 Bishop Reeves was forcibly deported from South Africa. I was fortunate to have him as my spiritual leader, to spark in me the idea that things should be better, fairer, than they were.

My second influence: education. I attended an all-girls high school, for white students only, of course. But the school was progressive for its time. The headmistress arranged occasional visits to our school of black students from the notorious ghettos surrounding Johannesburg. These were awkward affairs—black and white teenagers sitting across from each other, with nervous smiles and little to say. But that mutual awkwardness itself was a lesson in our common humanity.

Perhaps my most fateful lesson in the promise of equality occurred when I was seventeen. I came to the United States—Wilmington, Delaware—as a high school exchange student through a program organized by the American Field Service. I arrived in the United States at a time of immense national turmoil and uncertainty. In 1962, the civil rights movement was at its height. Nuclear war with the Soviet Union was a real possibility. President John F. Kennedy inspired the nation. There was a clash of perspectives from every segment of society.

I was astonished to find that the day’s great issues were fervently and openly debated, to be in a land where people disagreed without apology and without fear of punishment. In Wilmington, I could read books that had been outlawed at home. The daily newspapers arrived whole and complete, no sections blackened or torn out by censors. In Wilmington, I could watch television; the South African government allowed no television, to foreclose any influence of the offensive societal values of the United States and England. I saw images of black and white protesters being set upon by police. I saw footage of Ku Klux Klan rallies, and of civil rights marches. I read Alan Paton’s *Cry, the Beloved Country*, and for the first time learned of the long struggle for freedom of the majority of people in my own country. I visited Congress and the United States Supreme Court. Here the law of

9. Tambo, speech at the Meeting of the British Anti-Apartheid Movement to Celebrate the 80th Birthday of Dr. Ambrose Reeves, December 10, 1979 (transcript available at <http://www.anc.org.za/ancdocs/history/people/reeves.html>).

the powerful was not supreme: judges could order governors, and legislators, to conform their actions to constitutional principles. In this country, for the first time in my life, I was free to roam through the marketplace of ideas, to expand my horizons, to speak my mind. I was free to change my mind. All of this was exhilarating—and morally profound. The social arrangement of apartheid, the lens through which I had been taught to view all social relations, revealed itself as a distorting prism of terror and fear.

By the time I entered the University of the Witwatersrand in Johannesburg, soon after I returned to South Africa, it felt right to join the anti-apartheid student movement, despite my family's concerns. National student politics brought me in touch with students from around the country, including black students. For the first time in my native land I was able to speak with black South Africans as my peers. At that time in South Africa, in the early 1960s, with information heavily censored and opposition political parties outlawed, universities were among the few places available for meaningful political protest. Universities always are. But they were hardly safe havens. Professors and students who confronted the apartheid regime could be, were, spirited away in the middle of the night by the state police, jailed, tortured, or banished to remote areas.

Outside the university courageous South Africans continued to speak out, to act, at tremendous personal cost. Their sacrifices made it easier for me to do what I could—mostly little things, like driving the wives of black political prisoners to visit their husbands in the remote penitentiaries to which they had been confined, or attending the funeral of Chief Albert Luthuli, one of South Africa's greatest leaders.

In 1960, Chief Luthuli was awarded the Nobel Prize for Peace.<sup>10</sup> In a rational society he might have been prime minister. In apartheid South Africa he was labeled “a terrorist,” an enemy of the state, and banned to a remote region, where he died in 1967. His funeral was held in the village to which he had been banished. Thousands of black South Africans gathered to pay tribute. Despite the overwhelming presence of armed police, speaker after speaker at the funeral recounted years of frustration. They called for resistance to apartheid. They joined in singing the anthem of the African National Congress, an illegal act itself. I was awestruck. I knew the speakers could be, would be, jailed and tortured simply for expressing these views. One of the speakers, a student I knew well, Stephen Biko, was

10. The prize was awarded to Chief Albert Luthuli in 1961. There was no Nobel Peace Prize ceremony in 1960 because the South African government refused to permit Chief Luthuli to travel to receive the award. The South African government relented in 1961. See [http://nobelprize.org/nobel\\_prizes/peace/laureates/1960/lutuli-bio.html](http://nobelprize.org/nobel_prizes/peace/laureates/1960/lutuli-bio.html).



later tortured to death in a prison cell.<sup>11</sup> Listening to the men and women who spoke that day, I came face-to-face with true courage. And I understood with searing clarity the harvest of bitterness reaped by a government that denies its people equality and justice.

My presence at Chief Luthuli's funeral gave more to me than I can ever describe. Although each of us was a mourner, collectively we were far more. We were testaments to the universal aspiration for human dignity. Because I am white, because I am a woman, I had been protected from government brutality. Now I lived in fear of the knock on the door in the middle of the night.

"How could apartheid have taken hold in South Africa?" I am often asked. "How could white South Africans not see?" How could an entire sophisticated, modern industrial society be tethered by law to the idea that whites are superior in every respect to blacks? The question is not new. And apartheid was not a singular aberration—compare the experiences in Bosnia, Chile, Germany, and Rwanda. Given the bloody history of the twentieth century, perhaps we should ask, "How might apartheid South Africa not happen again?"

In 1791, patriot and pamphleteer Thomas Paine used this metaphor to describe our nation's then newly minted state and federal constitutions: "The American Constitutions," he said, "[are] to liberty, what a grammar is to language; they define its parts of speech, and practically construct them into syntax."<sup>12</sup> The grammar of human freedom, the language of liberty: we can pinpoint the time and place this language came to be. The year? 1780. The place? The Commonwealth of Massachusetts. The document? The Massachusetts Constitution, in which the principle of constitutional democracy first gained its institutional and practical form as a structure of government.

The Massachusetts Constitution was drafted principally by John Adams, patriot, statesman, future president. Adams was the foremost political philosopher of his day.<sup>13</sup> In his earlier influential work *Thoughts on*

11. See *Cry Freedom* (directed and produced by Sir Richard Attenborough, Universal Pictures, 1987), detailing the contributions of Stephen Biko. See also Donald Woods, *Biko: Cry Freedom*, 3d rev. ed. (New York: Henry Holt, 1991).

12. Paine, *The Rights of Man* (1791), reprinted in Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations*, s.v. "Constitution."

13. See Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Vintage Books, 2002), 165. Adams was known to his contemporaries as "the Atlas of independence."

*Government*, Adams had written: “How few of the human race have ever had an opportunity of choosing a system of government for themselves and their children?” In 1780, Adams was the obvious choice of the delegates to the Massachusetts Constitutional Convention to draft their permanent charter of government.<sup>14</sup>

Like many of his compatriots, John Adams believed in both the nobility and the corruptibility of humankind. He posited that all people possessed natural rights that no government had the authority to abridge. He believed that good government should strive for the greatest happiness of the greatest number.<sup>15</sup> But Adams also held a dark view of a world in which power begets the appetite for more power, where the strong trample the weak, and where tyrants gain ascendancy by deceit. “Nature throws us all into the world equal and alike,” he wrote in his diary, but “[t]he love of power is insatiable and uncontrollable. . . . There is danger from all men. The only maxim of a free government ought to be to trust no man . . . with power to endanger the public liberty.”<sup>16</sup>

The Massachusetts Constitution of 1780 begins with a ringing promise: “All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.” But was it possible to design a scheme of government that held in check man’s ruthless appetite for power while promoting, in Adams’s words, “peace, order, safety, [and the] good and happiness of the people”?<sup>17</sup>

Adams invented the answer. In the Massachusetts Constitution, he created, for the first time in history, a representative democracy that guaranteed certain rights—guaranteed them in writing—and limited, divided,

14. David McCullough, *John Adams* (New York: Simon and Schuster, 2001), 102, 220. At the time, the citizens of Massachusetts had just rejected the first attempt by their fledgling state to adopt a constitution, in part because it contained no written protections of their liberties. See “John Adams and the Massachusetts Constitution,” <http://www.mass.gov/courts/jac/education>.

15. McCullough, *John Adams*, 102. His ideas are aptly expressed in the Preamble to the Massachusetts Constitution, which declares, among other things: “The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life.”

16. *Ibid.*, 70.

17. Ma. Const. pt. 1, art. 1; McCullough, *John Adams*, 69–70.

and balanced public power. To be sure, he borrowed from Britain (and other examples) the idea of a supreme executive (in this case, a governor elected by the voters) and a bicameral parliament (again elected entirely by the voters). But in Britain, the word of Parliament was the supreme law of the land, no matter what it enacted. The ever quotable Alexis de Tocqueville put it this way: “Parliament can do everything except make a woman a man, or a man a woman.” Adams knew, from history and experience, that majorities as well as monarchs could become so enamored of their own “fits of humor, transports of passion, [and] partialities of prejudice,” as he called them, that they disregarded the rights of others.<sup>18</sup> And judges who were required to enforce the will of Parliament had no choice but to do the same.

Adams sought a different solution. To the executive and legislative departments, Adams added a third equal-standing department: the judiciary. Judges, long regarded as subordinate to the will of the powerful, would now be “subservient to none,” except the rule of law.<sup>19</sup>

The idea of separating the powers of government into distinct branches, and elevating the judiciary to coequal status with the executive and the legislature, marked a huge step forward in the march of human freedom. Samuel Eliot Morison referred to this as “one of John Adams’s profoundest conceptions.”<sup>20</sup> Another student of history termed it “a mighty invention.”<sup>21</sup> The theory behind Adams’s design was simple but elegant. To secure the greatest happiness and safety of the people, Adams divided the powers of government. He gave each branch its own sphere of activity, a measure of oversight over the other branches, and a responsibility to act in conformity with the Constitution. In every branch of government, the Constitution—a timeless pact that transcends daily politics—would have the final word.

If this seems obvious to us today, recall that in 1780, the notion of dif-fusing government power among three separate branches of government,

18. Tocqueville, *Democracy in America*, vol. 1, at app. M (1835) (quoting Delolme, book 1, chap. 10, p. 77); McCullough, *John Adams*, 102.

19. McCullough, *John Adams*, 103.

20. *Manual for the Constitutional Convention of 1917*, reprinted in Morison, *A History of the Constitution of Massachusetts* (1917), 23.

21. The phrase is taken from an address by Justice Benjamin Kaplan on the occasion of the 300th Anniversary of the Supreme Judicial Court. Kaplan, introduction to *The History of the Law in Massachusetts: The Supreme Judicial Court, 1692–1992*, edited by Russell K. Osgood (Boston: Supreme Judicial Court Historical Society, 1992), 4.

with each beholden to the Constitution, was radical—revolutionary. Most startling of all: the proposition that the judiciary would protect individual and property rights by the power to say no—no to the legislature, no to the executive—when the elected bodies overstepped the limits of their constitutional powers. Almost fifty years later, when he tried to explain this structure to his European readers, Tocqueville now seemed tongue-tied: “I am not aware of any nation of the globe that has hitherto organized a judicial power in the same manner . . .,” he wrote. “The judicial organization . . . is the institution which a stranger [to the United States] has the greatest difficulty understanding.”<sup>22</sup>

The Massachusetts Constitution was unprecedented in another way. The citizens of Massachusetts robustly debated the merits of John Adams’s proposed form of government before adopting it in 1780. Yale Law School professor Akhil Amar tells us that it was the first written constitution ever submitted directly to the people for their approval.<sup>23</sup> And significantly, “the people” included all free men in Massachusetts, not just those who owned property. Today, we can find fault in the omission of women and slaves from the rolls of ratifying voters, but we should not overlook the radical message that the expanded Massachusetts franchise held for its contemporaries.

How soon was the Massachusetts Constitution put to the test? In 1783, just three years after its adoption. On the docket of the Supreme Judicial Court was a case—actually a series of cases—concerning the savage beating of a man named Quock Walker, a black man, by or at the behest of Nathaniel Jennison, a white man. Jennison claimed that Walker was a slave, his property, and had run away. Walker claimed that he had been promised his freedom by his former masters. Walker took the extraordinary step of suing Jennison in court for assault and battery. Before the Supreme Judicial Court, the case boiled down to this: could Jennison rightfully claim Walker as his “property”? The outcome of the case—this at a time when slavery was widely endorsed in all thirteen colonies, Britain, Europe, and elsewhere—was far from certain.

We do not have a decision of the court, because none is published. But we do have Chief Justice William Cushing’s notes. I quote from them to give you some of the texture of this extraordinary event in American history:

22. Tocqueville, *Democracy in America*, 1:56.

23. Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 35 n. 33 (2000).

As to the doctrine of slavery, and the right of Christians to hold Africans in perpetual servitude and sell and treat them as we do our horses and cattle, that has been heretofore countenanced by the Province Laws. . . . But whatever sentiments have formerly prevailed . . . a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of noses) . . . has inspired all the human race. And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal—and that every subject is entitled to liberty, to have it guarded by the laws, as well as life and property, and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is inconsistent with our conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature.<sup>24</sup>

The Supreme Judicial Court treated the new constitution of Massachusetts not as a mere statement of ideals but as binding law. Quock Walker's case was the first case in the United States, or anywhere,<sup>25</sup> to abolish slavery by judicial decision.<sup>26</sup> Twenty-six years before *Marbury v. Madison*,

24. *Proceedings of Massachusetts Historical Society* 1873–75 (1875): 294. “Chief Justice Gray submitted for the inspection of the members of the Massachusetts Historical Society Chief Justice Cushing’s original note-book of the trials before the Supreme Judicial Court of Massachusetts at the terms held in the County of Worcester in 1783, (which had been intrusted to him for the purpose by Mr. William Cushing Paine, the namesake and great grand-nephew of Chief Justice Cushing), and read therefrom the minutes of the trial at the April Term 1783 of the case of *Commonwealth v. Nathaniel Jennison*, in which it was established that slavery was wholly abolished in this Commonwealth by the Declaration of Rights prefixed to the Constitution of 1780” (292–93).

25. Cf. *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772): “The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law.” See also “Slave or Free?” in the National Archives, [http://www.nationalarchives.gov.uk/pathways/blackhistory/rights/slave\\_free.htm](http://www.nationalarchives.gov.uk/pathways/blackhistory/rights/slave_free.htm).

“Lord Mansfield’s judgment had a profound effect on slaves. Many of them misunderstood the ruling to mean that slaves were emancipated in Britain. This was not the case. The decision was that no slave could be forcibly removed from Britain and sold into slavery.

“Despite Lord Mansfield’s ruling, slave owners continued recapturing their runaway slaves and shipping them back to the colonies. Numerous newspaper advertisements of the time show that Black slaves were still being bought and sold in England. A few years later, in 1785, Mansfield himself ruled that ‘black slaves in Britain were not entitled to be paid for their labour’ (free Black people were, however, paid).”

26. See Ellis, *Founding Brothers*, 89–90.

Adams's "mighty invention" had met the real world.<sup>27</sup> And made it a better world.

In 1783, when Quock Walker was pleading his case in Massachusetts, our national government was floundering, the Articles of Confederation unraveling. This much was obvious: the new nation would not survive without another revolution, a revolution in governance.

Historian Joseph Ellis reminds us that our federal constitution was "built in a sudden spasm of enforced inspiration and makeshift construction during the final decades of the eighteenth century." Having no models of a constitutional republic on the national scale from which to draw, Ellis writes, the founders of our nation were "making it up as they went along, improvising on the edge of catastrophe." But they were not without guideposts. The men who met at the Constitutional Convention in Philadelphia closely studied the constitutions of the thirteen now independent states. They were particularly drawn to the Massachusetts scheme of government. Adams's compatriots shared his vision of a humankind endowed with natural rights but also, as Hamilton put it, by nature an "ambitious, vindictive, and rapacious" lot.<sup>28</sup> They saw in the Adams model a scheme to enhance liberty while restraining the curse of power. Alexander Hamilton, John Jay, and James Madison set about the task of making the case for this new construct to those who would decide its fate: the people. Here is a familiar passage from *The Federalist Papers*:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.<sup>29</sup>

"Auxiliary precautions"? A representative democracy with a government of limited, divided, and enumerated powers,<sup>30</sup> dual sovereignty between

27. 5 U.S. (1 Cranch) 137 (1803); Kaplan, introduction to *History of the Law in Massachusetts*, edited by Osgood, 4.

28. Ellis, *Founding Brothers*, 216; *The Federalist no. 6*, 27.

29. *The Federalist no. 51* (Madison or Hamilton), 331–32.

30. See *The Federalist no. 14* (Madison), 82: "The general government is not to be charged

the state and federal governments;<sup>31</sup> checks and balances;<sup>32</sup> and an impartial, coequal judiciary.<sup>33</sup>

The proposal to adopt the Adams model on a national scale was daring—unprecedented. That is how James Madison described the government established by the United States Constitution: “We cannot find one express prototype in the experience of the world,” he said. “It stands by itself.” Yet the founders’ ambitions were modest. They had no illusions about curing human avarice. They were realists. This new frame of government would not make a dent in stupidity, evil, or foolishness. But it might encase the passions of humankind in a framework strong enough to contain even the most polarizing disagreements without resort to violence or tyranny. It would be a national government, in Paine’s metaphor, that established a “grammar” of public discourse.<sup>34</sup>

With very few exceptions, it has done just that, for more than two centuries. The “grammar” of public discourse has continued to unfold as our nation has confronted ever challenging problems far removed from the founders’ experience. This has been accomplished in large part because all three branches of government have accepted their status as constitutional actors, public bodies governed by the same fundamental social contract and pledged to further the aims of that social contract.

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with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any.”

31. See *The Federalist no. 9* (Hamilton), 52: “The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of the sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.”

32. See *The Federalist no. 48* (Madison), 315–16: “It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers.” See also *The Federalist no. 51* (Madison or Hamilton), 331: “But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others. . . . Ambition must be made to counteract ambition.”

33. See *The Federalist no. 78* (Hamilton), 502: A separate, coequal judicial branch will provide “an inflexible and uniform adherence to the rights of the Constitution, and of individuals.”

34. Madison, address at the Convention of Virginia, urging adoption of the federal constitution, June 8, 1788, reprinted in *The World’s Great Speeches: 292 Speeches from Pericles to Nelson Mandela*, edited by L. Copeland et al., 4th ed. (Mineola, N.Y.: Dover Publications, 1999), 237–38.



I focus here on the judicial branch, the arm of government I know best. In our design of government, it is the constitutional duty of the courts to “say what the law is” when an act of government is challenged.<sup>35</sup> The same revolutionary Constitution that encourages participatory self-government, with its attendant negotiations and compromises, also takes some solutions entirely off the table, most particularly those jeopardizing the written guarantees of liberty.

Inevitably, the judiciary’s constitutional role will sometimes place it at odds with one segment or another of the political community. Speaking of the United States Supreme Court, Justice O’Connor has said, “Whatever courts do, we have the power to make the President and Congress really, really angry.”<sup>36</sup> True indeed. Several recent decisions of the United States Supreme Court angered many in Congress. Recall the 2005 decision invalidating legislation that imposed mandatory guidelines on sentences for federal crimes.<sup>37</sup> The Court concluded that the statute was beyond Congress’s sphere of power. Its decision called into question thousands of criminal sentences and elicited unusually heated criticism from politicians and others.<sup>38</sup>

Presidential wrath is sometimes piqued as well. In *United States v. Nixon*, the Supreme Court ordered a sitting president, over his objections on the ground of executive privilege, to turn over to a prosecutor tape recordings of the president’s most intimate conversations with his aides and advisers.<sup>39</sup> The tapes were produced, and the president was forced to resign.

More recently, in *Hamdi v. Rumsfeld*, the Supreme Court held that Yasser Hamdi, an American citizen held indefinitely as an enemy combatant, was constitutionally entitled to a meaningful opportunity to contest the government’s designation before a neutral decision maker. The ruling set a limit on President George W. Bush’s broad assertion of wartime powers. The Justice Department settled the case with Hamdi, releasing him to Saudi Arabia in exchange for Hamdi’s renunciation of American citizenship.<sup>40</sup>

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

36. O’Connor, remarks at the American Academy of Appellate Lawyers, November 7, 2005 (transcript available at <http://www.appellateacademy.org>).

37. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 USC §§ 3551–59, 3561–66, 3571–74, 3581–86, 28 USC §§ 991–98 [Supp. III 1985]).

38. *United States v. Booker*, 543 U.S. 220, 244–46 (2005). See, for example, Gina Holland, “Congressman to Seek New Sentencing Rules,” Associated Press, March 15, 2006.

39. *United States v. Nixon*, 418 U.S. 683 (1974).

40. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). See, for example, “Hamdi Returns to Saudi



Other of the Court's constitutional holdings have incensed whole communities, just as they have elated others. One thinks of *Brown v. Board of Education*, prohibiting racial segregation in public schools, and *Roe v. Wade*, and last term's decision, *Kelo v. New London*, in which the Court upheld the authority of New London, Connecticut, officials to condemn private property in order to make way for large private development projects, such as office parks and shopping centers.<sup>41</sup>

Given that some decisions of our courts are highly controversial, and sometimes unpopular, it is a wonder that some court orders are obeyed at all. Even *Bush v. Gore*, where the political stakes could not have been higher, or the margin of decision slimmer, provoked no widespread disobedience of the Court. As Supreme Court justice Stephen Breyer has observed, we live in an "orderly society, in which people follow the rulings of courts as a matter of course, and in which resistance to a valid court order is considered unacceptable behavior which most people would not countenance."<sup>42</sup> That is a remarkable feature of our constitutional democracy. I regularly meet judges from new democracies around the world. Often, they ask, "Do people obey your court orders?"

Americans obey court decisions for a variety of reasons. But surely one of them, a significant one, is that, whatever we might think about individual courts or individual decisions, we continue to trust that the judiciary, as an institution, on balance, continues faithfully to carry out its constitutional duty to do justice, to "say what the law is." President Franklin D. Roosevelt tried to pack the Supreme Court because he was angered by decisions striking down some New Deal initiatives. Some politicians tried to impeach Chief Justice Earl Warren for *Brown v. Board of Education*. On the state level, when my court ordered the legislature to fund a law passed by popular initiative or to repeal it, as the provisions of the Massachusetts Constitution require, some politicians campaigned to have Massachusetts judges elected rather than appointed.<sup>43</sup> All failed. Politicians seeking to capitalize on unpopular court decisions to eviscerate the courts historically have found little public appetite to do so.

In my view two factors are primarily responsible for securing the role

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Arabia," *USA Today*, October 11, 2004; and Dahlia Lithwick, "Nevermind—Hamdi Wasn't So Bad After All," *Slate*, September 23, 2004, <http://www.slate.com>.

41. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Roe v. Wade*, 410 U.S. 113 (1973); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

42. *Bush v. Gore*, 531 U.S. 98 (2000); Breyer, *Judicial Independence in the United States*, 40 St. Louis U.L.J. 989, 996 (1996).

43. See, for example, Rick Klein, "Finneran Suggests Election of Judges," *Boston Globe*, February 8, 2002, A1.

of our courts as gatekeepers of individual and property rights guaranteed in our constitutions, even when individual decisions provoke widespread public consternation. First, the federal and Massachusetts constitutions—and here I shall focus on those two constitutions—structurally insulate the judiciary from the taint of partiality and bias by placing courts beyond the realm of day-to-day politics. Recall that one of the complaints enumerated in the Declaration of Independence was that King George III had “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” Dependent judges are compliant judges. The Massachusetts and the later federal charters sought to end all political dependency of the judiciary. The structural, constitutional guarantees of judicial integrity are undoubtedly familiar to you. First, under the United States Constitution, judges are appointed and once appointed serve for life; under the Massachusetts Constitution, judges are appointed and once appointed serve until age seventy.<sup>44</sup> Second, only the unwieldy process of impeachment can unseat judges. And impeachment touches only the most blatant criminal infractions of judicial norms, such as bribery or other “blatant misconduct.”<sup>45</sup> Third, the salaries of judges cannot be reduced. These mechanisms were put in place not for the ease of judges but for the security of the people. The founders viewed the independence of courts, in Hamilton’s words, as “an indispensable ingredient [of the judicial branch], and, in a great measure, as the citadel of the public justice and the public security.” It was, he said, “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”<sup>46</sup> By establishing courts insulated from day-to-day politics, corruption, and reprisal, the founders, following the lead of John Adams, sought to ensure judicial integrity, and the public’s faith in that integrity.<sup>47</sup>

44. The Declaration of Independence, para. 3.9 (U.S. 1776); U.S. Const. art. III, § 1; Ma. Const, pt. 2, c. 3, art. 1, as amended by art. 98.

45. John A. Ferejohn and Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 980 (2002). As the authors note, impeachment is a rarely used instrument to discipline federal judges. “Over the course of American history only thirteen judges have been impeached and only seven removed from office; four were acquitted and two more resigned before their trials in the Senate. One must be careful in assessing these numbers not to overlook the possibility that judges might be intimidated by the mere threat of impeachment proceedings, and an additional twenty or so judges may have resigned rather than face investigation. Still, given the nearly 2800 men and women who have served as federal judges since 1789, these are pretty small numbers” (980, citations omitted).

46. *The Federalist* no. 78, 496, 497.

47. In the Massachusetts Constitution, John Adams had laid out the reason: “It is essential to the preservation of the rights of every individual, his life, liberty, property, and character,

There is a second important mechanism to secure the people's faith in judicial decision making. Often ignored by those fixated on so-called judicial activism are the institutional and practical restraints that lead judges to take a measured approach to the exercise of judicial authority. First are the institutional restraints. Professor John Ferejohn has observed that, notwithstanding the "big" constitutional cases that have shifted social and political paradigms, "the remarkable fact is how reluctant the federal judiciary has historically been to take an expansive view of its jurisdiction or its authority." In asking why, he offers these insights. Judges in a constitutional democracy, he notes, will always face a complex, intertwined allegiance between faithfulness to the rule of law and responsiveness to the people's needs. A well-functioning judiciary must hold these tensions in equipoise.<sup>48</sup> The balance is struck by a design of government that gives judges broad decision-making authority within their courtrooms but makes the judiciary institutionally weak.

The institutional restraints on the judiciary have real bite, far more so than the little-used mechanism of impeachment. Some examples: Legislatures, and in many states the people directly, may override a court's decision by statute or constitutional amendment. They may, and they do. In 1980 the Supreme Judicial Court ruled that a new death penalty statute was unconstitutionally cruel under the provision of the Massachusetts Constitution.<sup>49</sup> In 1982, the people amended the Massachusetts Constitution to state that the constitution shall not "be construed as prohibiting the imposition of the punishment of death."<sup>50</sup> Legislatures may not use their "power of the purse" to reduce judicial salaries, but nothing telegraphs legislative disapproval as effectively as an understaffed court system, or

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that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws" (Ma. Const. pt. 1, art. 29).

48. See Ferejohn and Kramer, *Independent Judges, Dependent Judiciary*, 963–64, 1037. See also Ferejohn, *Independent Judges, Dependent Judiciary*, 72 S. Cal. L. Rev. 353 (1998–1999); and Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 Law and Soc. Inquiry 501 (1997).

49. *District Attorney for the Suffolk Dist. v. Watson*, 381 Mass. 648 (1980).

50. Amendment 116 of the Amendments to the Massachusetts Constitution, amending art. pt. 1, art. 26 of the Massachusetts Constitution (prohibiting cruel or unusual punishment). Two years later, in *Commonwealth v. Colon-Cruz*, 393 Mass. 150 (1984), the Supreme Judicial Court held that, although article 116 of the Amendments to the Massachusetts Constitution prohibited the court from invalidating a death penalty statute on state constitutional grounds, a death penalty statute may be voided on other grounds. Massachusetts does not currently have a death penalty statute.

refusing to keep judicial salaries on pace with inflation. The United States Constitution (as in Massachusetts) gives legislators complete discretion to create and abolish inferior courts, as well as to redefine the jurisdiction of these courts. Congress, for example, has extensively debated whether to restructure the appellate region in the western part of the country, the Ninth Circuit, against the wishes of the vast majority of the appellate judges in that circuit. What is the motivation? Some legislators have said that the Ninth Circuit needs to be broken apart because it is too liberal.<sup>51</sup> Whether practical considerations or animus motivates these legislative decisions is, constitutionally speaking, irrelevant.

Governors and presidents also have a significant hold on the courts. President George W. Bush came in for a great deal of criticism from some quarters for nominating Chief Justice John Roberts and Justice Samuel Alito to the United States Supreme Court. The president was doing only what the Constitution gives him authority to do. In the Massachusetts Constitution, John Adams provided for judicial appointment to rest in political hands, accountable to the electorate: the governor appoints judges, subject to approval by the Governor's Council, an elected body of officials.<sup>52</sup> His model is mirrored in the U.S. Constitution. President Bush certainly made clear to the American people the type of judges he would nominate to the Supreme Court if an opportunity to do so arose.<sup>53</sup> And there are other powerful ways for the executive to shape the judiciary. One commentary noted that "subtle forms of court packing—such as adding judgeships to lower courts or making ideologically driven appointments—have long and distinguished pedigrees in American politics."<sup>54</sup>

Just as remarkable as the formal design of the Constitution, with its many checks and balances on judicial overreaching, are the rules, regulations, and customs the judiciary has devised to regulate itself.<sup>55</sup> To be

51. See, for example, Justin Scheck, "Latest Plan to Split 9th Circuit Aims to Sidestep Debate," November 3, 2005, <http://www.law.com/jsp/article.jsp?id=1130953710177>.

52. U.S. Const. art. II, § 2, cl. 2; Ma. Const. pt. 2, c. 2, art. 9.

53. See President George W. Bush's response to a question regarding judicial appointments (2000 Presidential Debates, October 3, 2000, <http://www.debates.org/pages/trans2000a.html>).

54. Ferejohn and Kramer, *Independent Judges, Dependent Judiciary*, 981.

55. See generally *ibid.*, at 994–1039 (detailing the judiciary's various "self-policing" devices). The judiciary is not the only arm of government that has voluntarily circumscribed the full theoretical reach of its powers. For example, Congress routinely creates new administrative agencies invested with broad rule-making authority, and presidents routinely consult members of Congress about appointments to the federal bench. I focus on the judicial branch only because it is the arm of government with which I am most familiar.

sure, appellate review and the formal mechanisms for judicial discipline are self-regulating mechanisms for judges in the United States. Judicial conduct codes temper judicial behavior. Judicial conduct commissions investigate and respond to allegations of judicial misconduct. Judicial assignment policies remove judges from courts in which they are not effective. These measures place the issue of judicial accountability squarely where it belongs: on the judge's allegiance to equal justice under law.

More telling is the panoply of rules, regulations, and legal norms and customs that judges in the United States have developed over the past two hundred-odd years to avoid clashing too often or too harshly with the coordinate branches. These doctrines are designed to keep certain cases out of court. Some examples: Courts have established elaborate restrictive doctrines concerning standing to sue, even on constitutional claims. The controversy must be immediate, not theoretical, asserting some specific, individual harm, not some generalized unfortunate situation. Rules of justiciability may permit broad categories of government action to go unexamined by the courts. American courts have developed robust doctrines of sovereign immunity, as well as policies of high deference to the statutory interpretations, administrative regulations, and adjudications of administrative agencies. Established rules of statutory interpretation developed over the decades counsel judges to avoid ruling on the constitutionality of acts of the coordinate branches unless absolutely necessary, and then only to the extent necessary. Rules of construction also require U.S. courts to choose the constitutional over the unconstitutional construction of a statute whenever possible.<sup>56</sup>

These self-limiting doctrines contrast markedly with judicial practices in some more recently established constitutional democracies, where judges view their proper role more expansively. A distinguished former justice of the South African Constitutional Court, Justice Laurie Ackerman, for example, has inveighed against "unnecessary timidity" in describing the role of the judiciary in his country.<sup>57</sup>

The historical context in which our federal and state constitutions were drafted often places American judges in an uncomfortable position when asked to give twenty-first-century effect to principles of public power and

56. See *ibid.*, 1001-15, 1033-37.

57. Ackerman, "A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy" (n.d.) (on file with author). Justice Ackerman's remarks also recognized that South Africa, unlike the United States, is a "substantive constitutional state" that recognizes a broad array of "socio-economic rights."

human freedom grounded in the experiences of the eighteenth and nineteenth centuries and set out in broad, general terms.<sup>58</sup> Does freedom of “speech” mean freedom to contribute any amount of money to any political candidate?<sup>59</sup> Does the right to life, liberty, and happiness mean the right of a brain-dead individual to remain on life support?<sup>60</sup>

When, in spite of all the formidable barriers to entry, a matter is properly brought to court, the court must decide. Courts do not have the option of sending the matter off to a committee for further study. Courts cannot put off a decision to a more opportune time. Courts cannot broker a compromise or leave a matter in limbo. Courts must somehow bridge the gap between the sometimes spare words of our constitutions and the often rich and novel factual context of a particular case.

How we approach our task will always elicit disagreement, for hard-and-fast guideposts are few. Should individual liberty guarantees of the Bill of Rights be construed to give effect to specific intentions of its eighteenth-century drafters, as Supreme Court justice Antonin Scalia proposes?<sup>61</sup> Can such intentions or understandings be identified? Should the justices consider the likely consequences for contemporary democracy that their constitutional interpretation will impose, as Justice Breyer advocates?<sup>62</sup> The U.S. Constitution itself provides no answer. Small wonder that courts elect to proceed incrementally. The cases in which this is not possible are the cases that cause judges to hold our breath: will our decision be perceived in ways that will strengthen or weaken the ability of courts to function well?

To the extent that the American public understands the judiciary to proceed thoughtfully, circumspectly, it is willing to obey even those judgments that most rankle. When a group in the United States strongly disagrees with a court decision, what is the response? Not blood in the streets. The losing side returns to the drawing board to develop new evi-

58. See Robert H. Jackson, *The Supreme Court in the American System of Government* (Cambridge: Harvard University Press, 1955).

59. See, for example, *Buckley v. Valeo*, 424 U.S. 1 (1976).

60. See, for example, *Schindler v. Schiavo*, 544 U.S. 915 (2005) (mem).

61. See Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 864 (1989): “Originalism . . . establishes a historical criterion that is quite conceptually separate from the preferences of the judge himself.”

62. See Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Alfred A. Knopf, 2005), 131: “An examination of consequences [of a constitutional ruling] can help us determine whether our interpretations promote specific democratic purposes and general constitutional objectives.”



dence, refine its arguments, and file the next case—or so at least has been the pattern until lately.

While our unprecedented constitutional democracy was taking shape, were other nations taking notice? Consider this: the year 1848 was a watershed moment in Europe. The tide of democracy was sweeping the continent; it appeared unstoppable. In Germany, the National Assembly was poised to sever ties with the monarchical past. The assembly resolved to replicate the American experiment in constitutional democracy. “Let us follow the example of America,” proclaimed the deputy of the assembly, “for then we will harvest the most glorious of fruits.” The esteemed former justice of Germany’s constitutional court Dieter Grimm has written of that moment in German history. “For a short historical moment,” he said, the assembly in Frankfurt was poised to enact what its members considered to be “America’s most important contribution to political institutions”: a “Supreme Court with ample powers to review government acts, including laws.” But it was not to be. The German revolution of 1848 failed. The princes returned. Then, after World War I, came the feeble Weimar government, followed by the rise of National Socialism.<sup>63</sup>

Today, there is a united Germany. Germany has a written constitution, the Basic Law, and a constitutional court, whose decisions upholding written guarantees of fundamental rights are relied on in courts around the world. Germany is not alone. England’s Lord Lester has observed that “currently, there is a vigorous overseas trade in the American Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law.”<sup>64</sup> From the ashes of World War II, the rubble of communism, and the collapse of colonial and totalitarian regimes around the world have emerged constitutional democracies in which the powers of government are separated, individual and property rights are guaranteed in a fundamental charter, and constitutional norms are upheld by a fair and impartial judiciary.<sup>65</sup>

What was it about the latter half of the twentieth century that prompted India, Slovenia, Israel, Japan, Germany, the Ukraine, Poland,

63. Grimm, *German and American Constitutionalism: A Comparison*, 7 Berlin J. 8, 9, 10 (Fall 2003) (first he quotes a “deputy Mittermaier”).

64. Lester, *Overseas Trade*, 541.

65. See, for example, Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Intl. L. 1103, 1117 (2000), noting the emergence since the end of the cold war “of many fledgling democracies with new constitutional courts seeking to emulate their more established counterparts.”

and South Africa to fundamentally reorder their systems of government in the American mold, the John Adams mold? The most eloquent answer I have encountered is that of Aharon Barak, chief justice of the Supreme Court of Israel. Chief Justice Barak reminds us that at the beginning of the last century it was widely assumed that democratically elected parliaments would uphold the basic rights of all by exercising “self-restraint.” The cataclysmic wars and totalitarian regimes of the past sixty years belied that premise. People came to realize, in Chief Justice Barak’s phrase, that the social norm—“It is not done”—was inadequate. Political restraint would “[need] to receive the formal expression, ‘It is forbidden.’” In a constitutional democracy, he said, the task of saying “It is forbidden” belonged to an arm of government “not subject to the mercies of the majority or the minority. . . . [I]t must be the courts.”<sup>66</sup>

Today, world leaders, development experts, business representatives, bankers, and ordinary people in every corner of the globe seem to agree that the presence of an independent, unbiased judiciary with the power of constitutional review is a crucial yardstick of a stable and prosperous nation. “I never do business in a country that does not have an independent judiciary,” a hard-nosed businessman once remarked to me. The World Bank,<sup>67</sup> the United Nations,<sup>68</sup> Amnesty International,<sup>69</sup> the World Trade Organization<sup>70</sup>—all are joined in this view.

Even England, the crown jewel of parliamentary democracy, has begun to alter its ancient form of governance in favor of a form of constitutional

66. Barak, “Democracy in Our Times,” remarks at the Hebrew University, June 7, 1998, reprinted in Anthony Lewis, *Why the Courts*, 22 *Cardozo L. Rev.* 133, 137 (2000).

67. See generally the World Bank, Law and Justice Institutions home page, <http://www1.worldbank.org/publicsector/legal/index.cfm>, which contains working papers, studies, and other documents on the relationship of the judicial branch to economic development.

68. See generally the United Nations, Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, <http://www.ohchr.org/english/issues/judiciary/index.htm>.

69. See, for example, “People’s Republic of China—Establishing the Rule of Law and Respect for Human Rights: The Need for Institutional and Legal Reforms,” memorandum to the State Council and National People’s Congress of the People’s Republic of China, by Amnesty International, September 2002, <http://web.amnesty.org/library/index/ENGASA170522002>, recommending reforms to China’s judicial system and stating, among other things, “Amnesty International believes that solid foundations for the rule of law can only be established if the full range of rights is respected and if the requirements of law in a broad sense are served by an independent and impartial judiciary.”

70. See, for example, World Trade Organization, General Council, Minutes of Meeting, February 10, 2003, <http://docsonline.wto.org-WT/GC/M/78>, reporting “political transformation” in Ethiopia, including, among other things, “introduc[tion of] human rights buttressed by an independent judiciary.”



democracy. In 2000, the Westminster Parliament voted to give the provisions of the European Convention on Human Rights the full force of law in domestic courts.<sup>71</sup> No longer can it be said that “an act of parliament can do no wrong.”<sup>72</sup> Today, acts of Parliament *can* do wrong, if British judges conclude that an act violates the European Convention on Human Rights.<sup>73</sup>

Canada existed in relative tranquillity for 115 years before adopting its constitution, the Charter of Rights and Freedoms, in 1982. Irwin Cotler, Canada’s former minister of justice and attorney general, called adoption of the charter a “transformative act.” His remarks bear quoting:

The Charter not only changed how we teach law or how we practice it or litigate it, it changed how we lived. Because it evolved into the protection of human values. We moved from being a parliamentary democracy to a constitutional democracy. The judges moved from being arbiters of jurisdictional disputes between the federal government and the provinces—we call it the powers process—to being the guarantors of human rights—what we call the rights process, and the limitations on exercise of power. . . . And individuals moved from being passive objects in an inter-jurisdictional federal-provincial dispute to being rights holders, rights claimants. And if you ask Canadians today—women, the disabled, minorities, refugees—are you better off now than you were . . . before the Charter was adopted, the answer is a resounding yes.<sup>74</sup>

Attorney General Cotler’s remarks point to two powerful controls that constitutional democracy, in the sense I have been describing, exerts on government authority. First, a constitutional democracy endows its people with a sense of rights. A sense of rights, coupled with an understanding that those rights can be vindicated in court, poses a formidable barrier to overreaching by government. Second, a constitutional democracy induces government actors in the other branches to act in ways they perceive to

71. Human Rights Act, 1998, c. 42 (Eng.), as fully implemented by Human Rights Act 1998 (Commencement no. 2) Order 2000 (S.I. 2000/1851).

72. *City of London v. Wood*, 88 Eng. Rep. 1592, 1602 (K.B. 1701).

73. See Clare Dyer, “The Rights Stuff,” *Guardian Unlimited*, Apr. 3, 2001; and <http://www.humanrights.gov.uk/decim.htm>, providing a list of laws declared incompatible with the Human Rights Act.

74. Cotler, “Dilemmas of Democracies in Maintaining Civil Liberties in the Face of Terror Threats,” Sir Isaiah Berlin Lecture at the Yakar Center for Social Concern, Jerusalem, Israel, December 2004 (on file with author).

be constitutionally acceptable. This is what my Yale Law School classmate Professor Vicki C. Jackson has termed “protoconstitutional behavior.”<sup>75</sup> The degree to which the words of a constitution can envelop the spirit and practice of governing is indeed transformative, as the attorney general remarked.

This, too, I know from experience. Etched in my memory are particular events from South Africa in September 1995 when that nation’s constitution and its new constitutional court were in their infancy. The South African Constitutional Court held that the African National Congress, a political party headed by then president Nelson Mandela, had violated the new constitution by establishing election boundaries in the Western Cape without enabling parliamentary legislation. The next day, the Associated Press began its story as follows:

The Constitutional Court handed Nelson Mandela his first major defeat as President on Friday, but instead of reacting angrily, Mandela called the ruling a victory for South Africa. . . .

“The judgment of the Constitutional Court confirms,” Mandela said, “that our new democracy is taking firm root and that nobody is above the law. This is something of which we should be proud and which the whole of our country must welcome.”<sup>76</sup>

South Africa’s executive branch agreed to alter its course of action and to abide by the dictates of the Constitution, as construed by impartial judges. That is the moment I knew that, whatever South Africa’s difficulties, and those difficulties are immense, constitutional democracy was indeed putting down deep roots there.

That remarkable moment when a court says no to government actors who violate the supreme law of the land and the government obeys is no longer a purely American moment. The Supreme Court of Israel has refused to permit the government to engage in methods of interrogation that violate basic principles of human dignity. The Supreme Court of the Ukraine invalidated a runoff presidential election it determined violated basic election laws, in a bold challenge to the incumbent president’s authority. The German Constitutional Court held unconstitutional a

75. See Jackson, *Proconstitutional Behavior, Political Actors, and Independent Courts: A Comment on Geoffrey Stone’s Paper*, 2 Int’l J. Const. L. 368 (2004).

76. Tom Cohen, “Mandela Cites Silver Lining in Losing Court Ruling,” Associated Press, September 22, 1995.

provision of European law that would have permitted the extradition to other countries of Arab nationals residing in Germany.<sup>77</sup> National constitutional courts and international tribunals build on, refine, adapt each other's human rights jurisprudence to frame a growing, robust global dialogue about individual rights and governmental responsibilities, a frame with origins in our American constitutions. For this child of apartheid, these are breathtaking developments.

How ironic, then, in an era when the British Parliament embraces review of its laws in the courts, when students take to the streets in Hong Kong to protest the dilution of judicial authority,<sup>78</sup> that some in the United States are claiming, loudly, that our judiciary should be reconstituted as a de facto voice of the majority. When other nations are discovering the benefits to personal and national security of separating the powers of government, are we turning our backs on our own history?

I referred earlier to three contemporary forces that are converging and whose combined force causes me great concern: attacks on the constitutional requirement of political impartiality in the judicial branch, the torrent of special-interest money pouring into the selection of state judges, and the loosening of canons of ethics regulating what judicial candidates may and may not say about cases likely to come before them. Let me give you some sense, albeit briefly, of the scope of these recent developments.

We have all heard the thunderous denunciations. Judges are under fire from politicians and segments of the public and the press. Some politicians urge citizens to "save America from the judges."<sup>79</sup> Others tell us that

77. See "Judgment Concerning the Interrogation Methods Implied [*sic*] by the General Security Services," Supreme Court of Israel, sitting as the High Court of Justice, adjudicating H.C. 5100/94, H.C. 4054/95, H.C. 6536/95, H.C. 5188/96, H.C. 7563/97, H.C. 7628/97, H.C. 1043/99 (1999); "Israel Supreme Court Bans Interrogation Abuse of Palestinians," CNN, September 6, 1999, <http://www.cnn.com/WORLD/meast/9909/06/israel.torture>; Daniel Williams, "Court Rejects Ukraine Vote: Justices Cite Massive Fraud in Runoff, Set New Election," *Washington Post*, December 4, 2004, A1; and BVerfG, 2 BvR 2236/04 (July 18, 2005).

78. See Lin Xiuyi, "Hong Kong's Legal Community Holds Silent March to Protest Law Interpretation," *Epoch Times*, April 28, 2005, <http://www.theepochtimes.com>.

79. Bert Brandenburg, "Judge Dread: The Judiciary May End Up the Big Losers in the Schiavo Mess," *Slate*, March 29, 2005, <http://www.slate.com/id/2115924>: "Majority Leader [Tom] DeLay, Phyllis Schlafly, and Alan Keyes will gather in Washington to lambaste 'the Judicial War on Faith.' Conference organizers call it 'the beginning of a broad-based effort to save America from the judges.'"

judges “are trying to take the hearts and souls of our culture.”<sup>80</sup> Hardly a day goes by, it seems, without charges of “judicial activism” or “judicial legislating” being hurled in print and over the airwaves.

Prominent politicians also trumpet their intention to punish—and that is the word they use, *punish*<sup>81</sup>—judges for issuing opinions with which they disagree. In Ohio, a judge accepted a plea bargain, with the agreement of the prosecutor, that gave a first-time sexual offender probation instead of jail time and spared him a trial on more serious charges. A talk-show host got wind of the agreement, agitated for the judge’s impeachment, and started a political feeding frenzy. Bills were introduced to impeach the judge; the state’s attorney general questioned the judge’s fitness to remain on the bench; the governor urged the legislature to “act immediately” to remove the judge.<sup>82</sup>

Attacking the courts seems to play well with certain political constituencies, including groups whose views of the judiciary are, at least for now, far beyond those of the mainstream. A South Dakota group calling itself Judicial Accountability Initiative Law 4 Judges—acronym JAIL 4 Judges—circulated an initiative petition for inclusion on the state’s 2006 ballot that could send a judge to jail for handing down a ruling with which any South Dakota citizen disagrees. Yet the head of JAIL 4 Judges admitted “there isn’t yet much of a problem with the issue of judicial accountability in South Dakota.”<sup>83</sup> It is a fringe group, some might say. JAIL 4 Judges organizers gathered more than forty thousand signatures to put their measure on the ballot as a constitutional amendment. The proposed constitutional amendment was ultimately, and resoundingly, defeated, but only after bar organizations, civic leaders, and others mounted an intensive public education campaign. Earlier polls had suggested that South

80. Beth Rucker, “House Leader Takes on High Court at Tenn. Christian Rally,” Associated Press, August 15, 2005.

81. See, for example, David D. Kirkpatrick, “Republican Suggests a Judicial Inspector General,” *New York Times*, May 10, 2005, A12: “To preserve the independence of the judiciary, [Congressman James] Sensenbrenner said, Congress should not seek ‘to regulate judicial decision-making through such extreme measures as retroactively removing lifetime appointees through impeachment.’ But he continued, ‘[t]his does not mean that judges should not be punished in some capacity for behavior that does not rise to the level of impeachable conduct.’ ‘The appropriate questions,’ he added, ‘are how do we punish and who does the punishing.’”

82. See, for example, James Nash and Jim Siegel, “GOP Puts Judge’s Ouster on Fast Track,” *Columbus Dispatch*, March 17, 2006; T. C. Brown, “Sex Offender Sentencing Puts Judge on Hot Seat,” *Cleveland Plain Dealer*, March 17, 2006; Angela An, “Taft Calls for Judge to Be Removed,” March 15, 2006, <http://www.ohionewsnow.com/Global/story.asp?5=4637463>.

83. See David Kranz, “Don’t Like How the Court Ruled? Sue the Judge, Groups Says,” *Sioux Falls Argus Leader*, August 28, 2005, <http://www.argusleader.com>.

Dakota voters supported the JAIL 4 Judges initiative petition by a margin of 66 percent to 22 percent.<sup>84</sup> The group claims chapters in all fifty states.<sup>85</sup>

Some residents of the New Hampshire town of Weare, where Supreme Court justice David Souter has a home, mounted a campaign to pass legislation that would have condemned Justice Souter's property and turned it into the "Lost Liberty Hotel." Why? Because Justice Souter joined a five-to-four majority in the *Kelo* case, the case upholding the government's authority to condemn private property for redevelopment by a private developer. A conservative columnist writing in the *New York Times* registered his "admir[ation]" for the townspeople's effort, saying it gave Justice Souter a needed "reality check."<sup>86</sup>

The attacks range beyond assaults on livelihood and reputation. Federal judge Joan Lefkow, whose husband and mother were assassinated by a dissatisfied litigant, told the Senate Judiciary Committee in May 2005 of the terrible consequences posed by a political climate that fosters disrespect, even contempt, for courts. In her words, "Harsh rhetoric is truly dangerous."<sup>87</sup> Yet a prominent national politician suggests that judges are to blame for acting in ways that provoke wrath. Supreme Court justice Ruth Bader Ginsburg has revealed that both she and Justice Sandra Day O'Connor have been the targets of death threats.<sup>88</sup>

Make no mistake: I believe, deeply, that the American people should hold the judicial branches accountable. Our courts should be placed under the closest scrutiny. The public should be free to criticize our reasoning and to challenge the language of our decisions. In no other Anglo-American jurisdiction in the world, including Great Britain, Canada, and Australia, are citizens permitted unfettered freedom to criticize a court's conduct in an ongoing trial, as our First Amendment permits. I welcome public scrutiny, for, in the words of Justice Albie Sachs of the South

84. Polling data of four hundred South Dakota voters from poll conducted on January 27–28, 2006, by Moore Information (on file with author).

85. Bert Brandenburg, "Rushmore to Judgment: South Dakota Ups the Ante in the National War over Judges," *Slate*, March 14, 2006, <http://www.slate.com/id/2138057>.

86. John Tierney, "Supreme Home Makeover," *New York Times*, March 14, 2006.

87. Testimony of Joan Humphrey Lefkow, United States District Judge, Northern District of Illinois, before the Judiciary Committee of the United States Senate, May 18, 2005, available online at [http://www.uscourts.gov/Press\\_Releases/lefkowsenjudcom51705.htm](http://www.uscourts.gov/Press_Releases/lefkowsenjudcom51705.htm).

88. Ginsburg, "A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication," speech before the Constitutional Court of South Africa, February 7, 2006, [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_02-07b-06.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html).

African Constitutional Court, there “are no intrinsically closed areas in an open and democratic society.” Speaking of the work of the judiciary under South Africa’s apartheid regime, Justice Sachs observed, “The more the critics were suppressed, the greater the loss of prestige of the judiciary.”<sup>89</sup>

Nor am I suggesting that harsh criticism of courts is unique to the U.S. political scene. In Canada journalists and politicians have denounced judges for “judicial blackmail,” “meddling in legislative business,” and “ignoring the law.” A recent headline in a British tabloid blared: “Dictators in Wigs: Bogus Asylum and the Judges Who Have It in for Britain.” The decisions of the Supreme Court of Israel have been criticized as ignoring the security interests of that nation.<sup>90</sup> Inherent tension between the elected representatives and the courts, which must sometimes thwart immediate political goals, is a fact of life in any constitutional democracy. And that tension will inevitably result in criticism directed toward judges.

But in the United States the criticism has taken an ominous turn. It ranges far beyond anger over a particular decision, a judge’s pattern of behavior, or failures in the administration of and access to justice. It has little to do with legitimate disagreements about judicial philosophy. The most troubling, and increasingly pervasive, criticism targets the very heart of our judiciary: its function as a separate branch of government. It calls for the judiciary to be subordinate to legislative oversight, for example, or for judges to work in fear of “punishment.” It is difficult not to hear echoes of a time when judges were (with a tilt to our Declaration of Independence) “dependent on [the majority’s] Will alone for the tenure of their offices.”<sup>91</sup>

The second disturbing development is the recent and escalating influx of vast amounts of special-interest money into state judicial selection campaigns. Ninety-five percent of all litigation in the United States—fully 95 percent—takes place in state courts. The potential of state judicial selection and reappointment processes to affect how people think about and

89. *S. v. Mamabolo*, 2001 (3) SA 409 (CC), at paras. 77, 76 (Sachs, J.).

90. Rory Leishman, “Robed Dictators: Legislators for Life,” <http://www.conservativeforum.org/EssaysForm.asp?ID=6252>; Helena Kennedy, “A Good Brand: Is That All the Lord Chancellor Is?” *Times* (London), February 24, 2004, at Law 7. See also generally Shimon Shetreet, *Resolving the Controversy over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint of Redefining the Role of the Supreme Court and the Knesset*, 77 *Tul. L. Rev.* 659 (2002–2003) (recent decisions of the Supreme Court of Israel implicating national security concerns have caused a “crisis of confidence” in the court among the general public).

91. The Declaration of Independence para. 3.9 (U.S. 1776).



experience the American justice system, and ultimately how we feel about the rule of law, is great.

For a century and more state judicial selection campaigns were sleepy affairs. No longer. Since the 1990s, the decibel level of judicial campaigning has risen dramatically, as the campaigns themselves have assumed the character of partisan fights to the death. Special interests—political, business, and others—have come to recognize that state courts matter. They matter not only to individual litigants but also, because of our system of constitutional review, to many “hot-button” controversies. Federal trials—terrorism, securities fraud, drug trafficking—may dominate the headlines, but the overwhelming number of cases take place in state courts. And those cases concern government regulation of businesses, education, abortion, tort reform, voting rights, the environment, investor relations, public safety, class actions, privacy—I could go on and on.

In our fast-paced, technologically explosive world, judicial review often means ruling on urgent issues of constitutional dimension that legislatures have not addressed. May a woman be implanted with a frozen pre-embryo created with her now divorced spouse? That is a deeply personal issue, but also a constitutional one. Should a corporation have to pay hundreds of millions of dollars in punitive damages for a new, officially approved drug that later research demonstrates causes injury to some? Here is the same interface between the purely private question and the constitutional. As these issues present themselves in state courts, and as modern communication methods facilitate the public’s knowledge of these cases, those who have an ideological stake in the outcome are putting tremendous effort into making sure that judges sympathetic to their views will be elevated to the bench and, once there, will have every reason to decide cases conformably not to the law but to the wishes of those who put them in office in the first place.

Judicial campaigns have become far more competitive, harsher, and more expensive—a lot more expensive. One writer observed that “from 1998 to 2000, in just one election cycle, spending in state judicial elections increased 61 percent. The average cost of winning a judicial election jumped 45 percent between 2002 and 2004, to more than \$650,000. . . . Two Illinois Supreme Court candidates combined to raise more than \$9.3 million, far exceeding the previous national record, set in Alabama in 2000, when spending reached \$4.9 million.”<sup>92</sup> In 2004, three of four

92. Zach Patton, “Judicial Elections: Robe Warriors,” *Governing*, March 2006, <http://www.governing.com>.

winners of a seat on the Ohio Supreme Court raised more than \$1 million. In 2003–2004, 81 percent of high court races (thirty-five of forty-three) were won by the top fund-raisers.<sup>93</sup>

Where does this money come from? Interest groups that have business before the courts. A great deal of the money raised for judicial candidates goes to advertising—a lot of it overwhelmingly negative. One study asserts that, between 2000 and 2004, viewers in Ohio have seen 39,151 television ads for judicial candidates.<sup>94</sup> One advertisement attacking an Ohio State Supreme Court incumbent showed “Lady Liberty” peeking through her blindfolds to tip the scales of justice.<sup>95</sup> In Alabama, a supreme court justice compared another supreme court justice to a skunk.<sup>96</sup> In Illinois, voters were treated to a supreme court judicial campaign between two seated judges in which one accused the other of rifling through his trash.<sup>97</sup> Perhaps most troublesome, many judicial campaigns now attack the very institution of the judiciary itself. Just as national politicians see advantage in running against Washington, judicial candidates now find benefit in running against the bench. In Alabama, for example, Justice Tom Parker centered his 2004 judicial campaign on attacks against “liberal judges,” whom he characterized as “trying to take God out of public life.”<sup>98</sup> Justice Parker, who won the election, has since suggested that state court judges need not abide by decisions of the United States Supreme Court on federal issues if they disagree with the Court’s ruling.<sup>99</sup> The pressure to politicize the judiciary is not confined to those states in which judges are elected.

93. Deborah Goldberg et al., “The New Politics of Judicial Elections 2004,” 15–16 (edited by Jesse Rutledge, Justice at Stake Campaign), <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>.

94. Justice at Stake, “2004 Ohio Supreme Court Contests Set State Record for Campaign Fundraising, Lead Nation in Television Advertising, Says Report from Justice at Stake Campaign,” press release, June 27, 2005, <http://www.justiceatstake.org/files/JAS2004ReportOhio.pdf>.

95. “Resnick Campaign Donor List Revealed,” *Cleveland Plain Dealer*, January 28, 2005, [http://www.cleveland.com/newslogs/plaindealer/index.ssf?/mtlogs/cleve\\_plaindealer/archives/2005\\_01.html](http://www.cleveland.com/newslogs/plaindealer/index.ssf?/mtlogs/cleve_plaindealer/archives/2005_01.html).

96. The charge was leveled against Alabama Chief Justice Harold See in a 1996 judicial contest. See, for example, editorial, “Year of the Skunk: It’s Hard to Recall the Year Just Passed without Thinking of Big Money and Politics,” *Birmingham News*, January 1, 1997, A1.

97. Mike France and Lorraine Woellert, “The Battle over the Courts,” *Business Week*, September 27, 2004, [http://www.businessweek.com/print/magazine/content/04\\_39/b3901001\\_mz001.htm?chan=gl](http://www.businessweek.com/print/magazine/content/04_39/b3901001_mz001.htm?chan=gl).

98. See Southern Poverty Law Center Intelligence Report, <http://www.splcenter.org/intel/intelreport/article.jsp?aid=49>.

99. Tony Mauro, “Alabama Justice Declares War on Supreme Court,” *Legal Times*, March 3, 2006, <http://www.law.com>. Justice Parker has also led a slate of candidates for judicial office



The problem is particularly ominous in any state in which judges must be reelected or reappointed to the bench. Whenever sitting judges face some form of reconfirmation they must be evaluated on their “record.” Every judicial decision becomes evidence of allegiance, or not, to partisan constituents. Groups who support or oppose a sitting judge all too frequently resort to gross distortions and mischaracterizations of the judge’s record, playing on common fears and prejudices. In one state, a prosecutor appeared in a television advertisement in which he praised a judge as a “velvet hammer” for being tough on criminal defendants.<sup>100</sup> In another, a respected appellate judge, himself a former prosecutor, was defeated by an opponent who vowed to uphold more death sentences than the appellate judge and to limit what he called “frivolous appeals especially in death penalty cases.”<sup>101</sup> Judges who uphold the rights of criminal defendants in particular are depicted as coddling predators and savaging victims.<sup>102</sup> Judges who have presided over trials that resulted in large jury awards against business entities are depicted, literally, as in the pocket of trial lawyers. Often, the barrage of negative advertising is couched in the most sweeping terms: “antifamily,” “soft on crime.” The aims are obvious: to pressure fair and honest judges, undermining the very principle of judicial neutrality.

The strategy appears to be working. Judges and former judges who have been through the retention process tell us so. The late Justice Otto Kaus, of the Oregon Supreme Court, famously said that for a judge to disregard the political implications of a decision near election time “would be like ignoring a crocodile in your bathtub.”<sup>103</sup> A former justice of the Texas Supreme Court candidly acknowledges, “If you don’t dance with them that bring you, you may not be there for the next dance.”<sup>104</sup>

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“running on a platform that state jurists should not obey rulings by U.S. Supreme Court justices who don’t interpret the Constitution the way they do” (Eric Velasco, “Moore Men Defiant, Too,” *Birmingham News*, May 21, 2006).

100. “Campaign Notebook: The ‘Hammer’ Is Back,” *Cincinnati Enquirer*, October 7, 2002, [http://www.enquirer.com/editions/2002/10/07/loc\\_campaign\\_notebook.html](http://www.enquirer.com/editions/2002/10/07/loc_campaign_notebook.html).

101. Janet Elliott and Richard Connelly, “Mansfield: The Stealth Candidate—His Past Isn’t What It Seems,” *Texas Lawyer*, October 3, 1994, 1, 32.

102. See Jeannine Bell, “The Politics of Crime and the Threat to Judicial Independence,” in American Bar Association, *Justice in Jeopardy: Report of the Commission on the 21st Century Judiciary*, App. F (2003).

103. Quoted in Paul Reidinger, *The Politics of Judging*, 73 A.B.A. J. 52, 58 (1987).

104. *Frontline: Justice for Sale* (PBS television broadcast, November 23, 1999) (synopsis with quotation available at <http://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/synopsis.html>).

Those who seek to lock judges into a particular partisan agenda were emboldened by an opinion of the United States Supreme Court. In 2002, the case of *Republican Party of Minnesota v. White* left state codes of judicial conduct throughout the nation in tatters. The case began when a candidate for a seat on the Minnesota Supreme Court distributed campaign literature criticizing the judicial decisions of his opponent—on crime, welfare, abortion, and other issues. Minnesota’s Code of Judicial Conduct prohibited a “candidate for a judicial office, including an incumbent judge,” from “announc[ing] his or her views on disputed legal or political issues.”<sup>105</sup> A complaint was lodged against the candidate with Minnesota’s judicial conduct commission. Fortified by the support of political groups, the candidate countered that the rule prohibiting a judicial candidate from “announcing” views on politically controversial issues violated the First Amendment. The United States Supreme Court agreed. By a bare majority of five, the justices concluded that judicial election speech is political, and may not be restricted in the manner set out in the Minnesota judicial code.

The dissenting opinions were scathing. By blurring the distinction between the election of a judge and the election of a senator, Justice John Paul Stevens wrote, “the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.” Justice Ruth Bader Ginsburg was more blunt. She accused the majority of disingenuously permitting judicial candidates to promise to rule a certain way on important issues. Hers was not the most striking opinion. In a short, acerbic concurrence, Justice O’Connor declared that “the very practice of electing judges undermines” the state’s “compelling governmental interes[t] in an actual and perceived . . . impartial judiciary.” States in which “judges are subject to regular elections,” she said, have “voluntarily taken on the risks to judicial bias” inherent in that form of judicial selection.<sup>106</sup> Justice O’Connor was a state court judge in Arizona before she was appointed to the Supreme Court. She was the only member of the *White* court who had ever held elective judicial office. Could she have been unaware that attempts to change the system of electing judges have failed miserably?

The *White* decision seems to have privileged freedom of speech above judicial integrity. In the wake of that decision, numerous courts have

105. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); Minnesota Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000).

106. *White*, 536 U.S. at 797 (Stevens); 804 (Ginsburg); 796 (O’Connor) (ellipsis and bracketed text in original; citation omitted).

struck down other ethical restrictions on state court judges and aspirants to the bench designed to remove political horse-trading from the judicial selection process. In many jurisdictions, judicial candidates may now commit themselves to rule a certain way on issues that may come before them.<sup>107</sup> They may personally solicit campaign donations, often from lawyers who practice before them.<sup>108</sup> They may make deliberately misleading statements about their judicial opponents.<sup>109</sup> Prior to the *White* decision, such political maneuvering would have been off-limits to judicial candidates. No longer.

How far does the free-speech right of judicial candidates extend? As if to emphasize its determination to free judicial politicking from recognized ethical constraints, the United States Supreme Court, ignoring a request by the chief justices of all fifty states, recently denied certiorari in a case from the Eighth Circuit invalidating other provisions of Minnesota's judicial conduct code. The challenged provisions prohibited judicial candidates from engaging in partisan political activities and from directly soliciting campaign contributions. They prohibited judicial candidates from attending and speaking at political-party functions, soliciting and using political endorsements, and identifying themselves with members of political parties. The Eighth Circuit reasoned that such rules did nothing to protect judicial neutrality and merely served to protect judicial incumbents.<sup>110</sup>

Predictably, in the wake of the *White* decision, special-interest groups are now bombarding judicial candidates with questionnaires asking their opinion on a wide range of live issues, including gun control, abortion, the

107. See, for example, *Family Trust Found. of Kentucky v. Kentucky Judicial Conduct Commission*, 388 F.3d 224 (6th Cir. 2004) (invalidating commit clause of Kentucky judicial conduct code); and *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (N.D.N. 2005) (invalidating provisions of North Dakota judicial conduct code precluding judicial candidates from speaking about issues likely to come before the court, but upholding provisions of code governing recusals for conflicts of interest).

108. See, for example, *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. Aug. 2, 2005) (invalidating provisions of Minnesota's judicial conduct code prohibiting judicial candidates from engaging in partisan political activities and directly soliciting campaign contributions), cert. denied sub nom. *Dimick v. Republican Party of Minnesota*, 126 S.Ct. 1165 (Jan. 23, 2006) (mem.); and *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (invalidating provisions of Georgia's judicial conduct code prohibiting candidate from personally soliciting campaign contributions, as well as provision prohibiting plaintiff judicial candidate from making false and misleading statements about his opponent).

109. See *Weaver*, 309 F.3d at 1312; *Family Trust Found. of Kentucky*, 388 F.3d at 224; and *North Dakota Family Alliance*, 361 F. Supp. 2d at 1021.

110. *Dimick*, 126 S.Ct. at 1165.

pledge of allegiance, and so-called tort reform.<sup>111</sup> These questionnaires are thinly veiled efforts to have judicial candidates commit to a political platform. Woe betide the successful candidate who departs from those commitments, especially in those states where the judge will face retention or reelection.

Before the *White* decision a judicial candidate could decline to respond to such questionnaires, relying on the widely prevalent codes of judicial ethics. Now selection may depend on providing the “right” answers. This is what Kentucky Supreme Court justice Martin E. Johnstone said about the effect of decisions loosening the restrictions on what judicial candidates may and may not say on upcoming judicial selections in his state: “This year, we’re going to deteriorate into the same gutter politics that partisan politicians have been wallowing in for so many years.”<sup>112</sup>

The future of judicial speech is unrestrained, and so, it seems, is the harm to the judiciary as a forum for fair, impartial justice. The *White* decision opened a Pandora’s box of problems for the principle of judicial integrity. The ethical code for federal judges is clear: to preserve impartiality and the appearance of impartiality, judges may not comment on cases likely to come before them.<sup>113</sup> Chief Justice John Roberts and Justice Samuel Alito were conforming to their ethical duties when they refused during their nomination hearings to respond to questions designed to elicit statements of partiality. Why should the codes of conduct for state judges strike a different balance between judicial integrity and accountability? The framers would be astounded that the First Amendment has been used to undermine judicial impartiality.

Attacks on impartial justice, justice for sale, judges as politicians—is there any evidence that these developments are affecting the way Americans actually view the courts? The short answer is yes. In polls conducted around the country, litigants, lawyers, and judges themselves agree with statements that campaign contributions influence judicial decision making.<sup>114</sup> A recent survey by the *American Bar Journal* finds that nearly half of its respondents agreed with a congressman who said judges are “arrogant, out-of-control and unaccountable.”<sup>115</sup>

111. See Bert Brandenburg, “Promissory Notes: How Election by Questionnaire Is Threatening Independent Judges,” *Slate*, October 19, 2005, <http://www.slate.com>.

112. Patton, “Judicial Elections: Robe Warriors.”

113. *Code of Conduct for United States Judges*, Canons 2(A) and 3A(6) (1996).

114. See American Bar Association, *Justice in Jeopardy*, 24–26.

115. Martha Neil, “Half of U.S. Sees Judicial Activism Crisis,” *American Bar Journal* eReport, September 30, 2005, <http://www.abanet.org/journal/redesign/s30survey.html>.

“The law makes a promise: neutrality. If the promise gets broken, the law as we know it ceases to exist.”<sup>116</sup> These words of Supreme Court justice Anthony Kennedy remind us of the potential vulnerability of our system of justice. It is a system erected by our constitutions but founded, ultimately, on trust. Justice Thurgood Marshall put it this way: “The only real source of power that we as judges can tap is the respect of the people.” Courts, he observed, “will command that respect only as long as [they] strive for neutrality. If we are perceived as campaigning for particular policies, as joining with other branches of government in resolving questions not committed to us by the Constitution, we may gain some public acclaim in the short run. In the long run, however, we will cease to be perceived as neutral arbiters, and we will lose that public respect so vital to our function.”<sup>117</sup> How might our courts best preserve their constitutional allegiance to fairness, equality, and neutrality in the administration of laws, and with it the people’s confidence that justice is served? As we navigate the twenty-first century, the question is urgent.

The developments I have just discussed—political attacks on courts as protectors of individual rights, special-interest money flowing to judicial campaigns, and the loosening of ethical restrictions on judicial candidates—have all served to blur the line between judicial accountability and political accountability. The two are different. Judicial accountability is faithfulness to the principles of fairness, impartiality, and equal treatment under law. It is accountability to civil society’s most laudable pursuit: the work of justice. Judicial accountability knows no partisanship. It brokers no compromises and trades no favors. That is the American model so widely embraced around the world.

As a society that aspires to justice, we cannot afford to cede discussion about judicial accountability to those who, deliberately or otherwise, confound that notion with political accountability. The first step is to take the hatemongers seriously. They may have raised the debate about judicial accountability for cynical and destructive ends. But a debate about judicial accountability in the twenty-first century is timely. It is a debate in which each one of us has a stake and in which the action, or inaction, of each one

116. Kennedy, address at the American Bar Association symposium “Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice,” December 4–5, 1998, quoted in Shirley S. Abrahamson, “Judicial Independence as a Campaign Platform” (2005), <http://wsba.org/media/publications/barnews/2005/mar-05-abrahamson.htm>.

117. Marshall, address at the Annual Judicial Conference, Second Judicial Circuit of the U.S. (May 8, 1981) in 3 *Am. Law.* 37 (Aug. 1981).

of us will affect the outcome. It does not require a law degree or any special education to have a meaningful conversation with others about the importance of keeping the powers of government separate and the judiciary free from partisanship. It does not take a law degree to write a letter to the editor supporting rational measures to tone down the heated rhetoric of judicial campaigns.

Sensing that judicial campaigning is fast spiraling out of control, community groups, bar organizations, and courts in many states have proposed a range of reform measures. North Carolina has enacted perhaps the most ambitious project to curb divisive judicial campaigning. It has established a system of public financing available to any judicial candidate who raises a threshold amount from small donations prior to the primary. In the first year of operation, 2004, three-fourths of judicial candidates received public funding, and private contributions to judicial campaigns were halved. Oregon is considering a similar measure.<sup>118</sup> But a strong public-financing system cannot cure the most troublesome aspect of all: judges forced to “run on their record” for reelection or reappointment. The pressure on judges to “dance with the one that brung ’em” is enormous.

To me, it is significant that the newer democracies whose constitutions contain written guarantees of freedom of speech have rejected, consciously rejected, the American example of unbridled attacks on the judiciary. One example: in South Africa the justices of the constitutional court reasoned that the judiciary, which relies for its legitimacy only on its moral authority, is “different, really fundamentally different,” from other governmental institutions in a way that justifies “special safeguards” for its protection. It viewed denigrating the courts as a “public injury.”<sup>119</sup> In England, Australia, and almost everywhere else in the former British Commonwealth, the rule that prohibits “publications calculated to impair the confidence of the people in the Court’s judgments” still prevails.<sup>120</sup>

Equally significant to me: among all of the new constitutional democracies that have emerged since the Second World War—many borrowing freely from the American Constitutions—none provides for any system of judicial reappointment, retention, or reelection.<sup>121</sup> I was privileged to be a

118. See Patton, “Judicial Elections: Robe Warriors”; and Paul J. DeMuniz, *Judicial Selection in Oregon: Money, Politics, and the Initiative Process*, 39 *Willamette L. Rev.* 1265 (2003).

119. *S. v. Mamabolo*, 2001 (3) SA 409 (CC).

120. *R. v. Dumbabin; Ex Parte Williams* (1935) 53 C.L.R. 434, 442.

121. John E. Ferejohn, *Constitutional Review in the Global Context*, 6 *N.Y.U. J. Legis. and Pub. Pol’y* 49, 56–57 (2002–2003).



member of the American Bar Association's Commission on the Twenty-first Century Judiciary. Our charge was to "study, report, and make recommendations" to the ABA on measures to "ensure fairness, impartiality and accountability in state judiciaries." We traveled across the country for months, hearing testimony from scholars, judges, legal professionals, and other interested women and men. We read studies. We came from many different states, with many different judicial appointment systems. We debated among ourselves. In the end we concluded, collectively, that the "preferred system" of selecting judges is one in which judges are not elected but appointed by a governor from a pool of aspirants that has been vetted by a nonpartisan, diverse commission. The more important recommendation, however, was that all judges, however selected, should then serve a single, specified term, with no possibility of reappointment.<sup>122</sup> This mirrors our federal system. I continue to believe that this is the best way to ensure fairness and impartiality—true judicial accountability—on the bench. Recall again the grievance of the Declaration of Independence: judges should be dependent on no political force for the length of their tenure.

In our rapidly changing, diversifying world, the question of judicial renewal is weighty. For people to have faith in their judges, they must be assured that judges are immune to outside pressure. Lifetime tenure made sense in 1787, when the life span was approximately forty-seven years of age. A single term until an established mandatory retirement age<sup>123</sup> or for a specified lengthy term of years achieves the same goal in light of contemporary reality. Ending the systems of reelection and retention will not solve all of the problems facing our state judiciaries. It would, however, go a long way in righting the balance between the courts' removal from daily politics and the duty to be attuned to the needs of the people.

But however people choose to bring the judicial selection process back in line with the constitutional responsibility for the fair and impartial administration of justice, the important thing is to act while we still have the opportunity to do so effectively. It would be a tragedy if the nation that gave the world constitutional democracy—the greatest instrument for freedom humankind has ever known—were to compromise on the commitment that has so universally inspired others.

122. See American Bar Association, *Justice in Jeopardy*, i and App. A at 4.

123. See Ma. Const. pt. 2, c. 3, art. 1, as amended by art. 98 (mandatory retirement of judicial officers at age seventy). Article 98 preserves the essence of lifetime judicial tenure as proposed by John Adams and ratified by the people in the Massachusetts Constitution of 1780. That essence finds expression in the Massachusetts Constitution, Part the First, art. 29.

The erosion of liberty is a slow process. The totalitarian regime of my youth in South Africa did not spring full-blown. It emerged in increments. Too few paid attention to the baby steps until they became a rolling gallop. Human freedom is hard to obtain and easy to lose. I am not suggesting that the United States is in danger of becoming apartheid South Africa. I am saying that it is essential to our future as a nation that we preserve the idea that courts must be truly fair and impartial.

When I returned to the United States as a graduate student after college in South Africa, I never dreamed I would remain in this country. But like millions upon millions of visitors who came before and after me, I found a liberty here I had never known. I never imagined I would become a lawyer, still less that I would become a judge. But I fell in love with the promise of this land, the promise of our federal and state constitutions. They are constitutions worth fighting for.

The work of justice is not the exclusive province of the courts. It is everyone's work. Every day in the United States, people do remarkable things to strengthen the rule of law: they vote, they serve on juries, they run for public office—three hundred million people, from every walk of life, every ethnicity, speaking every language, in the longest-lived democracy the world has ever known.

The greatest threat to that democracy is not terror. It is indifference. Nearly two centuries ago the great chief justice John Marshall observed that “people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will.”<sup>124</sup> People. You and me. One ripple of hope at a time.

124. *Cobens v. Virginia*, 19 U.S. 264, 389 (1821).