



## Case Western Reserve Law Review

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Volume 56 | Issue 4

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2006

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### Recommended Citation

Susan Bandes, *Judging, Politics, and Accountability: A Reply to Charles Geyh*, 56 Case W. Res. L. Rev. 947 (2006)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol56/iss4/6>

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# JUDGING, POLITICS, AND ACCOUNTABILITY: A REPLY TO CHARLES GEYH

*Susan Bandes*<sup>†</sup>

Charles Geyh bravely takes on the overused, under-theorized notion of judicial accountability. He endeavors to bring substance and clarity to this phrase, which he correctly observes is often used as little more than a poorly defined “flip side” for judicial independence. As he observes, there is a danger that in defending judicial independence from inappropriate influences, reasonable people will lose sight of—or at least fail to articulate—the appropriateness and indeed importance of holding the judiciary to certain standards and values.<sup>1</sup> Geyh properly recognizes that judicial accountability, like judicial independence, is an instrumental value, and that both are ultimately designed to improve the administration of justice. He argues that accountability promotes the rule of law, public confidence in the courts, and the judiciary’s responsiveness to the public it serves.<sup>2</sup> Though, as he notes, the precise articulation of instrumental ends can be debated,<sup>3</sup> all of the forgoing are essentially uncontroversial.

In service of his goal of explicating a notion of the appropriate scope of judicial accountability, Geyh does two things. First, he suggests a taxonomy that he hopes will facilitate a more precise, less rhetorical discussion of the scope and purposes of accountability. He suggests that judicial accountability can be usefully divided into three categories: institutional, behavioral, and decisional.<sup>4</sup> Second, he ar-

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<sup>†</sup> Distinguished Research Professor, DePaul University College of Law. I wish to thank the editors and faculty advisors of the Case Western Reserve Law Review for organizing and inviting me to participate in this timely and fascinating symposium on judicial accountability and independence. I am also grateful to David Franklin, Barry Friedman, and Stephen Siegel for helpful comments on earlier drafts of this article.

<sup>1</sup> Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 911-15 (2006).

<sup>2</sup> *Id.* at 915-16.

<sup>3</sup> *Id.* at 915.

<sup>4</sup> *Id.* at 917.

gues that decisional accountability—or at least sanctions for decisional error—should be reserved for situations in which the error is intentional. With the laudable aim of clarifying and limiting the universe of situations in which judges will be held accountable for errors in decision-making, Geyh proposes a rebuttable presumption that most decisional error is unintentional.<sup>5</sup> He argues that the key to determining what judicial conduct ought to lead to sanctions is to “distinguish simple disagreements as to applicable facts and law, for which direct political accountability is inappropriate, from deliberate usurpations of political power, which are properly subject to sanction,”<sup>6</sup> and he suggests some guidelines for doing so.

My remarks will focus on two interrelated concerns about Geyh’s paper. First, I fear that his taxonomy is not well designed to “rescue judicial accountability from the realm of political rhetoric”<sup>7</sup> because the taxonomy both overstates the demarcation among the types of accountability it lists and fails to adequately define the underlying notions of “politics” and “activism” so essential to his argument. The second concern, which follows from the first, centers on Geyh’s attempt to defend sanctions for certain types of decisional misconduct, or for judicial forays into “politics.” In short, I think this attempt is doomed to failure.

My concerns about Geyh’s argument begin with his description of the instrumental purposes of accountability: promotion of the rule of law, of public confidence in the courts, and of judicial responsiveness to the public. These purposes, without more, are too indeterminate to take us beyond the realm of rhetoric. To bring any determinacy to their definition requires the instantiation of values that are unavoidably political. The rule of law promotes consistency and transparency, which are worthy goals, but which, in our system, must coexist with other values, such as fairness and substantive justice. Any debate about the scope of the rule of law—the extent to which it circumscribes discretion or evolution of doctrine—is in essence a debate about the proper scope of the judicial role. The latter two purposes—public confidence and responsiveness to the public—raise obvious questions about the counter-majoritarian role of the courts. Public confidence is good—we want courts to deliver not only justice but the appearance of justice—but as I will discuss, it is not necessarily correlated with the kinds of courageous decision-making we often wish to encourage. And the question of how responsive

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<sup>5</sup> *Id.* at 928-29.

<sup>6</sup> *Id.* at 915.

<sup>7</sup> *Id.* at 914.

judges should be to the public is basically a variant of the activism question: how do we delineate the realm in which judges may override majoritarian preferences?

I find Geyh's proposal problematic for several overlapping reasons, all of which spring from my essential disagreement with his assumptions that the legal and the political are distinct entities in our constitutional scheme and that improper judicial activism is an activity that can be usefully defined and even controlled. At the outset, the lack of definition creates a problem for Geyh's taxonomy. Without a theory for what counts as "political" in the sense of "inappropriately nonjudicial," it is difficult to evaluate whether willful disregard of the law should be characterized as "a deliberate usurpation of political power" or whether sanctioning such acts will further accountability's proper purposes.

My second objection to Geyh's taxonomy is that it attempts to discuss the judicial role in the aggregate, without sufficient concern for the differences between Article III and non-Article III courts, between lower courts and appellate courts, and between all other courts and the Supreme Court. Geyh mentions this problem briefly,<sup>8</sup> but I think it is more profound than he acknowledges. The requisites of the judicial role—behavioral, institutional, and decisional—are in many respects a function of the type of judicial power that is being exercised. Geyh recognizes that state and federal judges are subject to different enforcement mechanisms, but the more basic point is that the nature and scope of the judicial power differ in different contexts. Thus, the meaning of exceeding the judicial power—and encroaching on the political realm—will differ as well, as will the nature and viability of any proposed reforms or sanctions.

#### STATE COURTS

Geyh refers to judicial elections as "the elephant in the parlor of state judicial accountability."<sup>9</sup> I think it fairer to say that judicial elections, where they are used,<sup>10</sup> *are* the parlor. Or, to borrow another zoological/household metaphor, as late California Supreme Court

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<sup>8</sup> *Id.* at 918-19.

<sup>9</sup> *Id.* at 924.

<sup>10</sup> It is difficult to report precise statistics because several states use a variety of methods depending on the type of judgeship or a combination of methods. But, in a 2002 concurring opinion, Justice O'Connor noted that "39 states currently employ some form of judicial elections for their appellate courts, general jurisdiction trial courts, or both." Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) (citing the American Judicature Society's report, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2002)).

Justice Otto Kaus colorfully put it, judicial elections are the “crocodile in [the] bathtub” of the judicial consciousness.<sup>11</sup> In many respects, they establish the rules of the game, create barriers to reform, and exercise an effect, which Geyh and I seem to agree is mainly deleterious,<sup>12</sup> on institutional, behavioral, and decisional accountability. Indeed, they call into question whether these categories are sufficiently helpful or distinct. Moreover, elections pose a unique set of challenges to those who would like to keep politics out of the courts and the courts out of politics.

The word “politics,” like its close companion, the term “activist,” is a moving target, and many of its possible meanings come into play in this discussion. Perhaps in common parlance, as in the claim that judges or those who determine their appointment should not “play politics,” the term is used to connote party or partisan politics—politics meant to advance the agenda of a particular party or candidate. Of course, politics encompasses far more and need not be derogatory. Politics, ideologies, and theories of governance and interpretation shade into one another. We might say, for example, as I have elsewhere, that Justice Brandeis had a judicial philosophy in which his “respect for the constraints of judging coexisted with his conception of substantive justice, a conception that was infused with his deeply held Progressive values.”<sup>13</sup> We could speak about low politics and high politics; a coarse reduction that at least has the virtue of simplicity.

Politics, both high and low, operate in both state and federal courts, at every level, but in different ways. Or as Kathy Abrams nicely put it, “The compromises of integrity that can occur in the funding of judicial elections, and their aftermath, are so stark that they baffle those of us who are accustomed to more theoretical problems of adjudication, such as the ‘countermajoritarian difficulty.’”<sup>14</sup> In state courts, where judges have no life tenure or salary protection, and particularly in those courts where judges must stand for election, partisan political influences are a pervasive aspect of judicial life. As Justice O’Connor recently observed, judges subject to regular elections “cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelec-

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<sup>11</sup> *Id.* at 789 (quoting Justice Kaus).

<sup>12</sup> See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO STATE L.J. 43 (2003) (criticizing, sharply, judicial elections).

<sup>13</sup> Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 837 (2001) (book review).

<sup>14</sup> Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Finance*, 72 S. CAL. L. REV. 505, 505 (1999).

tion prospects.”<sup>15</sup> As she further notes, “contested elections generally entail campaigning,”<sup>16</sup> and “campaign donations may leave judges feeling indebted to certain parties or interest groups.”<sup>17</sup>

Capital punishment places this issue in sharp relief. In this arena, the political pressures tend to run strongly in one direction: toward rendering and upholding a sentence of death. There can be immediate consequences for the judge who bucks this trend, whereas there are generally few consequences, either internal or public, for those who conform, even at the expense of due process and fairness. There is empirical evidence that this risk has a deleterious impact on judicial decision-making. Steve Bright and Patrick Keenan cite evidence that, at a time when judges could impose the death penalty by overriding a jury recommendation, elected judges were far more likely to do so than judges who did not face reelection.<sup>18</sup> Jim Liebman and his coauthors, in the landmark study *A Broken System*, found, “The more political pressure imposed on judges by a state’s method of selecting—which usually means *electing*—judges, the higher is the risk that capital trial verdicts imposed in the state will be seriously flawed.”<sup>19</sup>

If we assume that this state of affairs is highly unfortunate, and indeed antithetical to the justice values that ought to animate any standard of judicial accountability, we might consider whether Geyh’s approach helps identify or address the problem. Consider the Texas state courts and their approach to capital cases. Texas has no state-wide public defender system. Each county is free to set its own rules for providing counsel to indigent capital defendants. In many counties, judges appoint private attorneys to individual capital cases. A recent study found that although judges did consider competence and familiarity with the applicable law, “[n]early half of the judges . . . report that their peers sometimes appoint counsel because they have a reputation for moving cases, *regardless of the quality of the defense they provide* and a comparable number . . . indicate that the attorney’s need for income influences the appointment decision.”<sup>20</sup> Even more troubling, the study found that

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<sup>15</sup> *Republican Party of Minn.*, 536 U.S. at 789 (O’Connor, J., concurring).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 790.

<sup>18</sup> Steven B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793-94 (1995).

<sup>19</sup> JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 397 (2002), available at <http://ccjr.policy.net/cjedfund/dpstudy/liebman2.pdf>.

<sup>20</sup> ALLAN K. BUTCHER & MICHAEL K. MOORE, MUTING GIDEON’S TRUMPET: THE CRISIS

[p]ersonal and political factors also play a role in the appointment process. Nearly four in ten . . . judges indicate that their peers occasionally appoint an attorney because he or she is a friend, while roughly one-third of judges sometimes consider whether the attorney is a political supporter . . . or has contributed to their campaign . . . . As a defense attorney from Harris County noted, "I have been refused appointments because I cannot afford to give money to the judge's reelection campaign . . . those attorneys who contribute the most money receive the most work."<sup>21</sup>

Note the seamless way in which the threats to institutional, behavioral, and decisional accountability merge. Judges appoint attorneys based on factors either irrelevant or inimical to the goals of a just system. They look for attorneys who will not take too long on a case or ask for too much in the way of experts and other costly and time-consuming indicia of competent defense work, thus compromising the integrity of the adversary process. They also create a barely disguised system of legalized bribery—contributions in exchange for appointments. Indeed, there seems little incentive to disguise it. There is no indication that judges are held accountable for conduct that reflects poorly on their own integrity and impartiality and on the administration of justice in capital cases. Its most noticeable effect is to swell campaign coffers.

In short, if we agree that the Texas system cries out for reform, I would argue that the problem here is not merely one of lack of decisional accountability. There is a failure in that regard, of course, but it is part and parcel of a greater failure and, moreover, the decisional failures themselves do not fit neatly into the category of "intentional."

Of course, I am not suggesting that intentional misconduct can never be identified or targeted. I have long practiced law in Chicago, which has had more than its share of out-and-out corruption and bribery, dating back to the earliest years of machine politics.<sup>22</sup> In the early 1980s, Operation Greylord, a probe of judicial corruption in Cook County, led to the conviction of fifteen sitting judges and seventy-nine other court personnel.<sup>23</sup> The reform commission established in

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IN INDIGENT CRIMINAL DEFENSE IN TEXAS 12 (2002), <http://www.uta.edu/pols/moore/indigent/last.pdf>.

<sup>21</sup> *Id.* at 13.

<sup>22</sup> See PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 120-121 (1995) (discussing history of pervasive machine-style political corruption of the criminal justice system).

<sup>23</sup> Jim Edgar, *Voting for Judges Intelligently*, CHI. TRIB., Feb. 23, 2000, at 14.

the wake of Greylord in 1985, proposed a move to merit selection, a reform the major bar associations have been proposing in vain since 1952.<sup>24</sup> It “took note of the ‘particularly corrosive effect’ of campaign fund-raising by judges under the elective system.”<sup>25</sup> The contributions come primarily from lawyers likely to appear before the judges; the money flows even in uncontested elections. The reform that came from Greylord, as Chicago author and reporter Steve Bogira sums it up, is that while Greylord “may have reduced the practice of lawyers slipping money to judges . . . it’s still perfectly legal, and customary, for lawyers to pass money to judges through their campaign committees.”<sup>26</sup> And judges are well aware of who gave, and how much.<sup>27</sup>

Here, the values Geyh identifies—the rule of law, public confidence in the courts, and institutional responsibility—seem severely compromised in ways that his taxonomy fails to capture. Politics, in the “low” sense—partisan politics—infect the process through means that are difficult to isolate or address. Ironically, the elections that are such a large part of the problem are supposed to act as their solution as well.<sup>28</sup> Cook County’s experience in this area is not encouraging. Voters choose judges with little regard for their abilities and nearly every judge is retained, even those who receive failing marks from every bar association that provides ratings.<sup>29</sup> In the rare instances where judges are not retained, usually an unpopular decision on a hot button issue—such as a decision too solicitous of the due process rights of a defendant—is the trigger.<sup>30</sup>

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<sup>24</sup> See STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE* 321-22 (2005) (comparing the traditional election of judges to a non-partisan merit-selection system).

<sup>25</sup> *Id.* at 322.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; see also Abrams, *supra* note 14, at 517 (noting that because of disclosure requirements adopted by most states, “judges know precisely who has contributed to their campaigns and how much”).

<sup>28</sup> See, e.g., Geyh, *supra* note 1, at 924 (pointing out that “judicial elections can serve to hold judges accountable in ways that keep faith with all three objectives of judicial accountability”).

<sup>29</sup> See Joseph R. Tybor, *Reawakened Voters Rise To Oust 3 Judges*, CHI. TRIB., Nov. 6, 1986, at 3 (noting that prior to the 1986 retention election, only four judges had been “kicked out of office by voters since the first retention election in 1966”).

<sup>30</sup> In 1986, Cook County Circuit Judge Lawrence Passarella became one of the few judges to lose a retention vote, after he rendered a widely reported and hugely unpopular not-guilty verdict against a defendant who had severely beaten a female police officer. See Mike Royko, *Cops’ Verdict on Judge Already In*, CHI. TRIB., Oct. 24, 1986, at 3 (noting the influential columnist’s approval of a movement, organized by police, to “dump Passarella”); Tybor, *supra* note 29, at 3 (reporting on Judge Passarella’s defeat at the polls). The best known example of this dynamic is the defeat of several anti-death penalty members of the California Supreme Court in 1986. See Abrams, *supra* note 14, at 515.



This latter point suggests some of the limitations of Geyh's notion of decisional responsibility. The most obvious point is that public reaction to decisions is an extremely poor measure of whether those decisions follow the law or deserve censure. Indeed, there may be an inverse correlation between the type of conduct that elicits negative public reaction and that which deserves censure (for example, police misconduct generally must be egregious before a judge will allow it to interfere with a conviction in a high profile case: such a decision is usually a mark of judicial courage). But the more basic problem is with Geyh's desire to separate intentional from unintentional failures to follow the law. As the examples above suggest, the sorts of intentional errors that are easy to identify tend to fall into the category of criminal conduct.<sup>31</sup> As to the rest, even if they could or should be identified, they are part of a larger problem.

In the Illinois state courts, for example, judges tend to share a few salient characteristics. Most of them owe their jobs, at least in part, to their political organization, which means both that they are grateful to its members, and that they have worked for the organization for a long time and are likely identified with its goals and values. In addition, many of them are former prosecutors or police officers. These characteristics shape the judges' world view. I have written extensively, for example, about why it was that so many Illinois judges—on every level—seemed unable to see, much less act upon, what was ultimately shown to be a longstanding pattern of police torture of minority suspects on Chicago's South Side.<sup>32</sup> Judge after judge denied motions to suppress confessions alleged to be the product of torture or failed even to conduct hearings to determine whether allegations of a shocking pattern of police torture were well founded. As I have detailed elsewhere, the grounds for these decisions tended to be flimsy at best.<sup>33</sup> Bogira recounts one such ruling in his book: Judge Locallo, a former prosecutor, rejected Leroy Orange's bid for a hearing on torture allegations because Orange had filed inconsistent affidavits. In one affidavit he claimed "he'd been struck in the mouth, kicked, shocked with needles in his buttocks and anus, and bagged, and that his testicles had been squeezed."<sup>34</sup> But in a more recent affidavit, he

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<sup>31</sup> Indeed, Geyh notes that intentionality may be virtually impossible to prove absent "evidence of bribes or favoritism." Geyh, *supra* note 1, at 935.

<sup>32</sup> See, e.g., Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999).

<sup>33</sup> *Id.* at 1294-96.

<sup>34</sup> BOGIRA, *supra* note 24, at 285.

no longer claimed he had been kicked.<sup>35</sup> Nearly all these rulings were, at least initially, affirmed by the appellate court.

Did all these judges intentionally flout the law? Geyh offers several possible motives for intentional decisional error, including financial gain, favoritism, and political, racial, or cultural bias. No doubt many of these were at play in the police brutality decisions. The judges were likely exercising selective empathy toward law enforcement officers and exhibiting a lack of empathy toward the generally marginalized criminal defendants who were accusing them of horrific acts.<sup>36</sup> For reasons that are partly racial, cultural, and class-based, they may have found it easier to understand and believe the officers than the defendants. The fact that a ruling against law enforcement could only hurt their chances of reelection would only reinforce these unconscious biases—perhaps even assure the judge that he was indeed being responsive to the public. But the law is shot through with such biases, and rarely do they operate on an intentional level.

My point is not that any of the characteristics I have just described are inevitable, and certainly not that they are desirable. There are reforms that might address many of these shortcomings,<sup>37</sup> but many of them are politically infeasible.<sup>38</sup> Rather, my point is that many of the factors that render these judges insufficiently accountable, and that create formidable barriers to reform, cannot be generalized to the federal system, and are not well described by Geyh's taxonomy.

#### FEDERAL COURTS

Few issues have been as well mined as the parameters and ambiguities of Article III and the tensions inherent in the role of Article III courts in a scheme of separated and divided power. As Larry Kramer and John Ferejohn recently summed up the landscape, Article III seeks to protect the independence of individual judges while situating them "within an institution that is exposed and vulnerable to a wide array of controls by the political branches."<sup>39</sup> These controls unavoid-

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<sup>35</sup> *Id.*

<sup>36</sup> See Bandes, *supra* note 32, at 1321 n.289 (discussing reasons why judges may identify with accused torturers rather than their victims).

<sup>37</sup> See, e.g., Abrams, *supra* note 14, at 524-28 (discussing a number of proposed reforms).

<sup>38</sup> See Kermit Hall, *Perpetuating the Judiciary: The Judicialization of Public Life and the Independence of the Judiciary in American History*, Keynote address at the meeting of the Conference of Chief Justices and the Conference of State Court Administrators, Salt Lake City, Utah (July 25, 2004) (transcript available at [http://cosca.ncsc.dni.us/Perpetuating\\_Kermit.pdf](http://cosca.ncsc.dni.us/Perpetuating_Kermit.pdf)) ("The good news is that these ideas have considerable merit. The bad news is that they haven't a chance.").

<sup>39</sup> John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 977 (2002).

ably expose the courts to politics both high and low, to influences both ideological and starkly partisan. Politics play a role in the composition of the federal courts,<sup>40</sup> in oversight of the courts,<sup>41</sup> and in shaping the courts' jurisdiction.<sup>42</sup> The nature of that role is endlessly argued, but not the fact of it. The confirmation hearings on Justice Samuel Alito were an exhibition of both partisan and ideological influences in action and an illustration of the difficulties of distinguishing the two. It is within the context of the complex and delicate scheme of divided power that we must consider Geyh's question: "how does one distinguish simple disagreements as to applicable facts and law, for which direct political accountability is inappropriate, from deliberate usurpations of political power, which are properly subject to sanction?"<sup>43</sup> Putting aside for the moment the question of whether intent should be relevant, what does it mean to usurp political power in this context?

There is a vast gap between the public discourse on this topic and the accepted realm of scholarly debate. For an example of the standard public discourse, consider the response of Judge Edward Becker of the Third Circuit to revelations that Judge Alito had written memoranda stating his "passionate belief that *Roe v. Wade* . . . should be overturned."<sup>44</sup> Judge Becker said, "People don't understand what happens to you when you become a judge. When you take that oath, you are transformed. You are a different person. You have a solemn obligation to be totally impartial and fair."<sup>45</sup> Judge Alito concurs; he has repeatedly stated that he has "no agenda," and that "the judge's only obligation . . . is to the rule of law, [which means that] in every single case, the judge has to do what the law requires."<sup>46</sup> Yet it is

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<sup>40</sup> See Terri Jennings Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS 103, 104-09 (Stephen B. Burbank & Barry Friedman eds., 2002) (discussing the pervasive role of politics in judicial selection).

<sup>41</sup> As a recent example, the Feeney Amendment to the Amber Alert law requires federal judges to file a report when they hand down sentences lower than those created by the federal sentencing guidelines and allows Congress access to those reports without permission of the presiding judge. See Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1.

<sup>42</sup> See Charles M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares?*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 40, at 134, 139 (discussing the political effect of congressional assertions of control over the federal courts).

<sup>43</sup> Geyh, *supra* note 1, at 915.

<sup>44</sup> Sheryl Gay Stolberg, *Nominee Says His Views on Abortion Would Not Affect His Decisions*, N.Y. TIMES, Dec. 3, 2005, at A16.

<sup>45</sup> *Id.*

<sup>46</sup> *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. On the Judiciary*, 109th Cong. 56 (2006) (opening statement of Samuel Alito).

fairly uncontroversial among legal scholars to say, as Kramer and Ferejohn do, “Like it or not, a judge’s choice of methodologies and his or her exercise of discretion are imbued with an inescapably political dimension . . . .”<sup>47</sup> In his foreword to the 2004 Supreme Court term, Judge Posner, discussing the category of “open” constitutional cases in which no authoritative text or precedent controls, flatly states:

Constitutional cases . . . are aptly regarded as ‘political’ because the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms. . . . [I]t is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly.<sup>48</sup>

Of course, as Judge Posner implies, different institutional rules govern appellate courts, and Geyh asserts that his proposal is directed primarily at the lower courts.<sup>49</sup> We might say with more confidence that an inferior court flouted precedent. Perhaps we might say this about the Fifth Circuit, for example, which had to be directly told by the Supreme Court on two occasions that it could not uphold a particular jury instruction in a death penalty case.<sup>50</sup> But this sort of misbehavior is unusual; most deviations are much harder to identify. In fact, as Barry Friedman points out, the top-down model that assumes lower courts simply follow the mandate of the Supreme Court—and that any deviations from that mandate are improper—is incomplete and misleading.<sup>51</sup> Lower courts also operate in the “open area,” as Judge Posner calls it, much of the time.<sup>52</sup> That is, lower courts have significant interpretive leeway. Compliance with precedent may not dictate a particular outcome.<sup>53</sup> The top-down notion is incorrect in an additional way—the lower courts’ interstitial interpretations may influence the shape of doctrine in the Supreme Court.<sup>54</sup> Moreover, as to

<sup>47</sup> Ferejohn & Kramer, *supra* note 39, at 974.

<sup>48</sup> Richard A. Posner, *The Supreme Court 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 40 (2005).

<sup>49</sup> Geyh, *supra* note 1, at 933-34.

<sup>50</sup> See *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (reversing a Fifth Circuit case which upheld a capital jury instruction identical in all relevant respects to that the Supreme Court had earlier struck down in *Perry v. Lynaugh*, 492 U.S. 302 (1989), and holding that the standard applied by the Fifth Circuit had “no foundation in the decisions of th[e] Court”).

<sup>51</sup> See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 295-308 (2005).

<sup>52</sup> See Posner, *supra* note 48, at 40.

<sup>53</sup> Friedman, *supra* note 51, at 300-01.

<sup>54</sup> See *id.* at 304 (discussing how the Supreme Court may alter its constitutional doctrine to ensure lower-court support and, thus, compliance with the Court’s decision).

the vast majority of lower court cases, we will simply have no definitive way of knowing whether deviations have occurred because no reviewing court will weigh in on the issue.<sup>55</sup>

Friedman points to a significant body of work by political scientists supporting the claim that ideology plays a role in the outcome of lower court federal decisions.<sup>56</sup> Some of these studies suggest that the political party of the President who appointed the judge is highly predictive of how this ideology affects the judge's decisions.<sup>57</sup> Along these same lines, Jim Liebman's study of reversible error in capital cases provided evidence that "the probability that a capital verdict will be reversed on final federal review seems to be related to whether review is by judges mainly appointed by Republican presidents or by judges mainly appointed by Democratic presidents."<sup>58</sup> In short, even life tenured judges do not float free of political influences—both high and low.<sup>59</sup> Certainly Geyh is correct that "law still means *something* to judges";<sup>60</sup> the point is that judges apply the law in light of an ideological framework and that framework may not be easy to distinguish from their personal values or political preferences.

As to the Supreme Court in particular, what is an example of a decision "in which the judges have willfully disregarded the law and imposed their own personal values or political preferences?"<sup>61</sup> Geyh argues that Kramer and Ferejohn's argument that judicial independence fosters "a decision-making process in which cases are decided

<sup>55</sup> To illustrate, the lower federal courts have long relied upon the obscure *Rooker-Feldman* doctrine as a primary docket clearing device. The expansive version of the doctrine these courts used bore little resemblance to the original doctrine explicated by the Supreme Court, but since the Court had almost nothing to say about the case from 1983 to 2005, the courts had ample room to improvise. See generally Susan Bandes, *The Rooker-Feldman Doctrine: Evaluating Its Jurisdictional Status*, 74 NOTRE DAME L. REV. 1175 (1999). Whether the Court's recent pronouncement on the scope of the doctrine, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), will rein in the lower courts remains to be seen.

<sup>56</sup> Friedman, *supra* note 51, at 300-01.

<sup>57</sup> *Id.*

<sup>58</sup> LIEBMAN ET AL., *supra* note 19, at 398.

<sup>59</sup> For an example of a federal judge apparently caving in to direct political pressure, see the opinions of Judge Harold Baer of the District Court for the Southern District of New York in *United States v. Bayless*. Compare *U.S. v. Bayless*, 913 F. Supp. 232, 242-43 (S.D.N.Y. 1996) (holding that police had no reasonable suspicion to stop an alleged drug trafficker, opining that running from police in that area of the Bronx was not unusual because "residents of this neighborhood tended to regard police officers as corrupt, abusive and violent," and, ultimately, suppressing evidence seized during the stop), with *U.S. v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996) (vacating the previous opinion on reconsideration on the grounds that reasonable suspicion did exist, granting the suppression motion, and apologizing for hyperbolic language in the first opinion—an opinion that drew outraged reactions, including calls for Judge Baer's impeachment or resignation, from several highly placed government officials). See generally Don Van Natta, Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, March 29, 1996, at B1.

<sup>60</sup> Geyh, *supra* note 1, at 934.

<sup>61</sup> *Id.* at 915.

on the basis of reasons that an existing legal culture recognizes as appropriate” supports by negative implication an inference that judges may be sanctioned for “decisions that fall outside the boundaries of what the legal culture regards as appropriate.”<sup>62</sup> I read these scholars as arguing, instead, that as a broad matter, one purpose of judicial independence is to maximize the chances that judges will reach decisions that fall within these boundaries.<sup>63</sup> And at the Supreme Court level, judges need the latitude to fall outside those boundaries on occasion. Robert Post eloquently explained that “the Court has been known to gamble on what it perceives to be the future development of American political vision, and it has been known both to inspire and to misjudge the nation.”<sup>64</sup>

The obvious recent candidate for a deliberate usurpation of political power, a willful imposition of personal values, is *Bush v. Gore*.<sup>65</sup> Indeed, some have argued not only for the impeachment of some of its authors, but for their criminal prosecution.<sup>66</sup> A much greater number of scholars have suggested that there is evidence of just the sort of intent Geyh seeks to target. The case seems tailor-made for the appellation “disingenuous power-grab.”<sup>67</sup> Therefore, it might be helpful to examine the critiques of the decision and see whether Geyh’s proposed taxonomy sheds light on how it should be evaluated and what consequences it should engender. Is an intent standard workable or advisable for determining the imposition of sanctions?

The overarching critique about *Bush v. Gore* is that the majority decision was partisan in the lowest sense of the term, unsupportable as a matter of principle or precedent, and understandable only as a vehicle for ensuring a victory for one litigant—George Bush. As many have noted, it is difficult to imagine the case coming out as it did had the candidates’ positions been switched.<sup>68</sup> In this sense, the decision violated the rule of law in its most basic sense. As Peggy Radin put it:

[I]nstead of deciding the case in accordance with preexisting legal principles, fairly interpreted or even stretched if need

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<sup>62</sup> *Id.* at 926 (citation omitted).

<sup>63</sup> Ferejohn & Kramer, *supra* note 39, at 969-70 (“The principle underlying judicial independence calls for hindering political pressures of every kind, from any source, if they would interfere with a well-functioning judiciary by distorting its decisionmaking process.”).

<sup>64</sup> Robert Post, *Sustaining the Premise of Legality: Learning To Live with Bush v. Gore*, in *BUSH V. GORE* 96, 98 (Bruce Ackerman ed., 2002).

<sup>65</sup> 531 U.S. 98 (2000).

<sup>66</sup> *E.g.*, Vincent Bugliosi, *None Dare Call It Treason*, *THE NATION*, Feb. 5, 2001, at 11.

<sup>67</sup> Geyh, *supra* note 1, at 915.

<sup>68</sup> *E.g.*, Bugliosi, *supra* note 66.

be, five Republican members of the Court decided the case in a way that is recognizably nothing more than a naked expression of these justices' preference for the Republican party.<sup>69</sup>

Others have stated the problem in less measured tones. Lawyer Vincent Bugliosi said the following:

The stark reality . . . is that the institution Americans trust the most to protect its freedoms and principles committed one of the biggest and more serious crimes this nation has ever seen—pure and simple, the theft of the presidency.<sup>70</sup>

Though legal scholars tend to stop short of Bugliosi's demand for criminal indictment, they nevertheless describe a rupture that is well outside the normal boundaries of bad decision-making. Jed Rubenfeld, for example, calls his article "Not as Bad as *Plessy*. Worse."<sup>71</sup> He describes both the majority decision and the concurrence as "indefensible."<sup>72</sup> Robert Post says the opinion "seemed to undermine the very practice of constitutional adjudication."<sup>73</sup> He notes that the justices had the potential for a grave conflict of interests—in that the President nominates Supreme Court justices—and that their resolution of this case gave at least the appearance of impropriety.<sup>74</sup> Louise Weinberg says that when the Court becomes prematurely involved in the electoral process, "the Court not only attacks our republican form of government, and our democracy, but also the powers of the political branches, and the independence of the future judiciary."<sup>75</sup>

In short, *Bush v. Gore*, in the eyes of many respected legal scholars, exemplifies the worst case scenario that Geyh describes. It is an example of a violation of institutional and decisional norms that compromises the rule of law, threatens or breaches the separation of powers, casts a shadow on the integrity of the Court, and undermines public confidence in the Court as an institution. Yet what is striking about the scholarship on the case is how reluctant scholars are to delve into judicial intent or motive.

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<sup>69</sup> Margaret Jane Radin, *Can the Rule of Law Survive Bush v. Gore?*, in BUSH V. GORE, *supra* note 64, at 111, 114.

<sup>70</sup> Bugliosi, *supra* note 66, at 12.

<sup>71</sup> Jed Rubenfeld, *Not as Bad as Plessy. Worse*, in BUSH V. GORE, *supra* note 64, at 20.

<sup>72</sup> *Id.* at 29.

<sup>73</sup> Post, *supra* note 64, at 100.

<sup>74</sup> *Id.* at 102.

<sup>75</sup> Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U.L. REV. 609, 665 (2002).

Rubinfeld does assume intentionality in several respects. On the issue of the Court's "deference" to the Florida Supreme Court's alleged decision that December 12 was the cutoff date for the recount, he accuses the Court of pretending the Florida court had thus decided and of "making up" the deadline.<sup>76</sup> Of the equal protection ground on which the Court ultimately rested its holding, he calls the Court's reliance on this ground "suspicious," based on the Court's attempt to confine the holding to that case alone, the fact that it showed no concern for the many other similar or worse inequalities in vote counting occurring in the same election, and the disparity between the principle enunciated and the previously stated convictions of those who enunciated it.<sup>77</sup> Yet he repeatedly disclaims any intention to impugn or even inquire into the majority's motives.<sup>78</sup> He concludes by saying:

[I]n the hearts of most justices is a desire to see their views made into law and to see the law they have made carried forward after they are gone, not in dissenting opinions, but in the opinions of the Court. This desire—entirely aside from any crude considerations of partisanship—can exert a deep and improper influence when the justices undertake to decide a presidential election. It might make them intervene on thin or indefensible grounds . . . . All this could happen without the slightest subjective bad faith.<sup>79</sup>

Bugliosi, who does claim bad faith, and who would like to see the majority justices indicted, points to much of the same evidence, arguing that it shows an "unmistakable consciousness of guilt on their part."<sup>80</sup> He mentions the stay that stopped the recount on the legally insupportable ground that it cast a cloud on what Bush claimed to be the legitimacy of his election; he mentions the ultimate reliance on an equal protection argument on which the Court had previously denied *certiorari*, the indefensible holding on the December 12 safe harbor date, the language attempting to limit the holding to the present case, and the judges' departure from their own previously held convictions on federalism, equal protection, and other matters of constitutional principle.<sup>81</sup>

We are unlikely, let us hope, to see a case in which a stronger argument for bad faith or scienter can be made. Is it, then, possible to

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<sup>76</sup> Rubinfeld, *supra* note 71, at 26.

<sup>77</sup> *Id.* at 20-29.

<sup>78</sup> *Id.* at 27, 37.

<sup>79</sup> *Id.* at 37.

<sup>80</sup> Bugliosi, *supra* note 66, at 13.

<sup>81</sup> *Id.*



resolve these scienter issues in any consistent way? Even if it is, is the game worth the candle? I do not think we want to develop a body of law considering when individual judges' decisions are insufficiently consonant with their settled convictions. (I am also curious how such rules would apply to justices outside the majority opinion—should their culpability turn on whether at least four other justices join them?)

Finally, what should the remedy be if bad faith can be shown? Geyh's paper never makes clear what remedy he advocates for intentional decisional malfeasance. It is not always obvious whether he is making claims about what is done, what can be done, or what ought to be done. He argues, as he has elsewhere, that there exists a zone of judicial independence customarily observed by Congress.<sup>82</sup> He argues that norms around impeachment and court-stripping, for example, reflect an unwillingness to interfere with judicial decision-making. I would like to suggest that historical and current practice regarding court-stripping and impeachment, and in other areas as well, do not provide strong support for Geyh's argument.

First, Geyh underestimates the amount of court-stripping Congress has recently accomplished. Moreover, the court-stripping provisions that have been enacted do not appear to address prior decisional error, whether ill motivated or not.<sup>83</sup> They appear to address dissatisfaction with the volume of litigation generated by judicial review in certain substantive areas. Perhaps not coincidentally, the groups they deprive of judicial review—such as immigrants and prisoners—tend to have little political clout.

As to the history of impeachment, Geyh argues that this history, and specifically the Senate's refusal to impeach or convict based solely on errant decision-making, supports a rebuttable presumption that such decisions are made in good faith and should not be grounds for impeachment.<sup>84</sup> Although it seems uncontroversial that we have established a custom against impeachment for good-faith errors, I would further argue that history cannot be read to offer any support for a presumption in favor of impeachment for ill-motivated deci-

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<sup>82</sup> Geyh, *supra* note 1, at 919 (noting that "Congress has traditionally afforded the courts considerably greater branch independence than the text of the Constitution requires"); see also Charles Gardner Geyh, *Customary Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 40, at 160, 160-61 (arguing that judicial independence must be defined in terms of congressional norms in addition to constitutional considerations).

<sup>83</sup> See Vicki C. Jackson, *Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2445-46 (1998) (citing several laws restricting the jurisdiction and remedial powers of the federal courts across a range of litigation brought by prisoners and immigrants).

<sup>84</sup> Geyh, *supra* note 1, at 915.

sional errors either, unless they rise to the level of criminal conduct. The first successful impeachment and conviction of a federal judge—that of Judge John Pickering of the New Hampshire federal district court—shows the difficulty of drawing conclusions from the Senate’s actions. Though (or indeed because) Pickering was, in the words of historian Richard Ellis, both “hopelessly insane” and an alcoholic, the Senate faced a dilemma in determining whether he possessed the intent to violate his oath of office.<sup>85</sup> Ellis concludes, “The partisan and contradictory manner in which the trial was conducted has prevented the Pickering impeachment from ever being considered a strong precedent for anything.”<sup>86</sup> With no record of the Senate’s reasoning, we cannot know why Samuel Chase was not convicted. We know only that he made several arguments, but not which of them was accepted; one argument that persuaded at least some senators was that impeachment and conviction should be reserved for criminal conduct.<sup>87</sup> For Ellis, the most important explanation was that the acquittal was the product of conflict between moderate and radical Republicans for control of their party.<sup>88</sup> In the aftermath of these early cases, we seem to have established a tradition in which impeachment is reserved for criminal conduct. Any conclusions about history’s lessons for non-criminal errors in decision-making can only be speculative.

In any case, I am sure Geyh would agree that there are few well settled legal barriers to impeaching judges or stripping them of decisional power—or to doing so for reasons having nothing to do with intentional decisional error. The Court has held challenges to the judicial impeachment process nonjusticiable.<sup>89</sup> As to the question of whether a decision is so far beyond the pale that it implies a judge’s individual bad faith, Congress and the Court have dealt with this issue by granting absolute immunity, broadly defined, to judges. Indeed, it did so in a case involving the unnecessary, nonconsensual, secret, entirely *ultra vires* sterilization of an adolescent girl.<sup>90</sup>

Geyh is also making a normative argument about when sanctions ought to be imposed, though he never specifies what sorts of sanctions he would consider appropriate. For example, what sanctions would he recommend for the members of the majority—or the

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<sup>85</sup> RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS 70-75* (Norton 1974) (1971).

<sup>86</sup> *Id.* at 74.

<sup>87</sup> *Id.* at 102.

<sup>88</sup> *Id.* at 103.

<sup>89</sup> *Nixon v. United States*, 506 U.S. 224, 237 (1993) (holding that challenges to judicial impeachment process are non-justiciable political questions).

<sup>90</sup> *See, e.g., Stump v. Sparkman*, 435 U.S. 349, 364 (1978) (upholding grant of absolute immunity to judge who ordered the unjustified nonconsensual sterilization of a teenage girl in an ex parte proceeding despite the fact that the order exceeded his jurisdiction).

concurrence—in *Bush v. Gore*? And what is the significance of the fact that an argument for any such sanctions can never be more than entirely hypothetical? *Bush v. Gore*, in my view, shows the futility of targeting individual decisional misfeasance. Like the problems I earlier discussed with state court accountability, the problem at the heart of *Bush v. Gore* is institutional and, therefore, unavoidably political. The Constitution situates the appointment and discipline of federal judges, as well as oversight of the federal courts, in the political realm. We hope that the conduct of the judges on the bench will “rise above” politics, and perhaps each of us knows what we mean when we say that, but no consensus is possible. The only absolutes are that the political process will continue to play out, that it will do so in the context of shifting national values and assumptions, and that the parameters of acceptable judging will be shaped and reshaped as a result.