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## JUDGES ARE (AND OUGHT TO BE) DIFFERENT

*Peter D. Webster*\*

Scott Hawkins's *Perspective on Judicial Merit Retention in Florida*<sup>1</sup> makes a number of important points, one of which in particular warrants emphasis as Florida voters prepare to go to the polls to determine the fate of the justices and appellate judges standing for retention. The role a judge plays in our society is (and ought to be) fundamentally different from that played by a politician or other elected representative. Judges do not (and should not) have a constituency. They do not represent anyone;<sup>2</sup> rather, their sole allegiance must be to the rule of law.

Judges do not enjoy the luxury of being able to choose from among the issues brought before them those they will decide. They are frequently called on to address contentious issues as to which our society is sharply divided. Regardless of the outcome, one or more segments of society are likely to be displeased.<sup>3</sup> This is especially true with regard to one of the judiciary's most important responsibilities—its counter-majoritarian role as guardian of the rights of individuals, minorities, and groups lacking financial or political power.<sup>4</sup> Frequently, the performance of this duty is irreconcilable with popular sentiment;<sup>5</sup> but this is precisely what was intended by our Founding Fathers.<sup>6</sup>

By virtue of the oath they take, judges are obliged to decide cases based exclusively on the facts and the controlling law. This is not

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1. 64 FLA. L. REV. 1421 (2012).

2. See *Dennis v. United States*, 341 U.S. 494, 525 (1951) (“Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. . . . Their essential quality is detachment, founded on independence.”) (Frankfurter, J., concurring).

3. See IRVING R. KAUFMAN, CHILLING JUDICIAL INDEPENDENCE 10 (1979) (noting that “[n]o institution . . . can hope to resolve issues of such significance without frequently incurring the wrath of many members of society”).

4. See *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (“Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”); see also 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 303 (1926) (quoting Judge William Cranch) (“In dangerous times, it becomes the duty of the Judiciary calmly to poise the scale of justice, unmoved by armed power, undisturbed by the clamor of the multitude.”). The view that such a counter-majoritarian role might be critical in the adjudication of certain types of constitutional issues is expressed in the famous footnote 4 of the *Carolene Products* opinion. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

5. See *Chisom v. Roemer*, 501 U.S. 380, 400 (1991) (“[P]ublic opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment.”).

6. See THE FEDERALIST NO. 78, at 527 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

always easy, particularly when the case is high-profile, the issues are emotionally charged, and the law does not provide a clear answer.<sup>7</sup> Yet, this principle forms the very foundation of the concept of a rule of law, rather than of individuals.

We are, of course, all products of our life experiences. Those experiences are, to a large extent, what distinguish us from one another. To the extent that wisdom ever comes, it comes only from experience. We all acquire biases and prejudices over the course of our lives. We would not be human if we did not.<sup>8</sup> When one becomes a judge, however, he or she is expected (to the extent humanly possible) to put aside or, perhaps more accurately, to recognize those biases and prejudices and not allow them to influence the outcome of cases.

There are those in America today who insist that the process of judging involves unbridled discretion—that judicial decisions are in reality nothing more than political choices disguised by legal jargon.<sup>9</sup> Such people insist that, like other public officials, judges must be held directly accountable for their decisions, usually by the electorate.<sup>10</sup> In fact, this is the premise upon which Restore Justice 2012 appears to base its opposition to the three Florida justices standing for retention in November.<sup>11</sup> According to that organization:

Throughout our country and our state, judicial activism represents a serious threat to our liberty. Judges play partisan politics and cater to special interests, ignoring the constitution and threatening our protection under the law. Fortunately, here in Florida, we have a recourse. Every judge is periodically reviewed and placed on the ballot for a

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7. Judge Benjamin Cardozo referred to such cases as those “where a decision will advance or retard . . . the development of the law.” BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 165 (1921). According to him, “many of [such cases] might be decided either way” because “reasons plausible and fairly persuasive might be found for one conclusion as for another.” *Id.*

8. *See id.* at 12–13.

9. This is the position of those in legal academia who consider themselves members of the Critical Legal Studies movement. *See, e.g.*, David Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 11, 16–17 (David Kairys ed., 1982).

10. Shortly after the 1996 defeat of Tennessee Supreme Court Justice Penny White in a retention election marked by a vitriolic campaign in which her opponents blatantly distorted her record, Tennessee Governor Don Sundquist said: “Should a judge look over his shoulder [when making decisions] about whether [he’s] going to be thrown out of office? I hope so.” Stephen B. Bright, *Political Attacks on the Judiciary*, 80 *JUDICATURE* 165, 166 (1997) (first alteration in original) (quoting Paula Wade, *White’s Defeat Poses a Legal Dilemma: How Is a Replacement Justice Picked?*, *MEMPHIS COM. APPEAL*, Aug. 3, 1996, at A1) (internal quotation marks omitted).

11. *See* RESTORE JUSTICE 2012, <http://www.restorejustice2012.com> (last visited Oct. 24, 2012).

merit retention vote.<sup>12</sup>

Such an impression regarding our judiciary is irreconcilable with the principle that forms the very foundation of the concept of a rule of law. It is also refuted by reality.

In the United States, and in the State of Florida, we have wagered much on the proposition that judges will, to the extent humanly possible, decide cases based exclusively on the facts and the applicable law. Every day, in courthouses all around America, jurors are told that they must not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party influence their decision; rather, they must base their verdict exclusively on the evidence presented and the law given to them by the judge. We expect jurors to follow that instruction, and we trust that they will. The same is true of judges. Every day, in courthouses all around America, judges decide cases based exclusively on the relevant facts and the applicable law. We expect judges to abide by the oath they took, and (as with jurors) we must trust that they will. It is this, perhaps more than anything else, that distinguishes the judicial branch from the other two.<sup>13</sup>

So, when Florida voters go to the polls in November to decide the fate of the three supreme court justices and fifteen district court of appeal judges standing for retention, they would be well-advised to bear in mind the difficulty of the work those judges perform—especially in those cases where the law offers no clearly correct answer, as is often true of cases before the highest court in a jurisdiction.<sup>14</sup> They would also be well-advised to remember, as our Founding Fathers understood,<sup>15</sup> that faithful performance by these judges of their work will frequently result in outcomes at odds with popular opinion or the views of those in one or both of the other branches of government.<sup>16</sup> That is, after all, precisely why our Founding Fathers chose to insulate the federal judiciary from extraneous influences, whether emanating from another branch of government, popular opinion, or special interests. It is also what makes our system (which is the envy of the

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12. *Connect*, RESTORE JUSTICE 2012, <http://www.restorejustice2012.com/action/connect/> (last visited Oct. 24, 2012).

13. As Karl Llewellyn observed, judges are trained in a particular way—they are “law-conditioned officials.” See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 19 (1960). They have “a felt duty to Justice [and] a felt duty to The Law . . .” *Id.* at 59. There are, moreover, a number of unifying and stabilizing influences at work in the judicial branch. Our court system is hierarchical—decisions of lower courts are reviewable by higher ones. Appellate courts are multi-judge tribunals—cases are decided by panels of judges, rather than by an individual. Appellate decisions are generally handed down in writing—judges must justify their decisions.

14. See *supra* note 7 and accompanying text.

15. See THE FEDERALIST NO. 78, *supra* note 6, at 527–29.

16. See *supra* notes 3–6 and accompanying text.

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world) one of *justice* rather than of the rich and powerful.