

# JUSTICE O'CONNOR AND "THE THREAT TO JUDICIAL INDEPENDENCE": The Cowgirl Who Cried Wolf?

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Early this year, when Justice Sandra Day O'Connor swore in a group of newly elected Arizona state officials, she was heard to say, "I'm just an unemployed cowgirl now."<sup>1</sup> Well, not quite. Justice O'Connor may have retired from active service on the United States Supreme Court, but she is hardly unemployed. As Newsweek magazine reported in February, "[h]er current schedule—packed with appeals court hearings, law school lectures, speechmaking and book writing—can make her days on the court look practically languorous."<sup>2</sup>

In this whirlwind of activity, one topic stands out. As her principal "retirement project," Justice O'Connor has taken on the task of defending the independence of the judiciary. She began her campaign even before she retired, with a dedicatory address at the University of Florida School of Law in September 2005. In that speech she reviewed recent controversies and warned: "The experience of developing countries, former communist countries, and our own political culture teaches us that we must be ever vigilant against those who would strong-arm the judiciary into adopting their preferred policies."<sup>3</sup> Two months later, she delivered a similar speech in Washington at the meeting of the American Academy of Appellate Lawyers.

Since then, Justice O'Connor has spoken on the subject in speeches and public interviews in Virginia (William & Mary), North Carolina (Wake Forest), New York (NYU), Massachusetts (Harvard), and many other places. She has also published a hard-hitting op-ed in the Wall Street

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1. *Pelosipalooza is Duplicated by Democrats in Arizona*, ARIZ. REPUBLIC, Jan. 7, 2007, at B6.

2. Debra Rosenberg, *Bench Player*, NEWSWEEK, Feb. 12, 2007, at 32.

3. Sandra Day O'Connor, *Remarks on Judicial Independence*, 58 U. FLA. L. REV. 1, 6 (2006).

Journal with the title, “The Threat to Judicial Independence.”<sup>4</sup> The op-ed was part of the rollout for a conference that soon led to the creation of the “Sandra Day O’Connor Project on the State of the Judiciary” at the Georgetown University Law Center. Justice O’Connor will “partner” with the project to help educate the public about the importance of judicial independence.

When California Chief Justice Ronald George introduced Justice O’Connor before a speech in November 2006, he said that when he searched the Internet for the terms “Sandra Day O’Connor” and “judicial independence,” he found almost 100,000 references.<sup>5</sup> He aptly observed that “Sandra Day O’Connor” and “judicial independence” have become “virtually synonymous.”<sup>6</sup>

Justice O’Connor could not have chosen a better theme for her public appearances as a retired Justice. There is no need to belabor the importance of an independent judiciary to preserving the individual freedoms and economic opportunities that we as Americans take for granted.<sup>7</sup> And Justice O’Connor is in a uniquely appropriate position to bring the issue to public attention. As a jurist who served on the United States Supreme Court for twenty-five years and, before that, on state courts and in a state legislature, she has a wealth of experience on which to draw. At the same time, having retired from participation in Supreme Court decision making, she is freed from the suspicion that she is attempting to aggrandize her own power.

So Justice O’Connor has done the nation a service by bringing the subject of judicial independence to center stage and by calling attention to the important values it serves. Unfortunately, however, in describing the threats to that independence, she has presented a picture that is in some respects overstated and, in others, incomplete.

Three points in particular deserve comment. First, Justice O’Connor has painted with too broad a brush in identifying what might be called “external” threats to the independence of the judiciary. Second, she has not adequately emphasized what I will call the “internal” aspects of judicial independence. Finally, although she has discussed the threat to judicial independence posed by the election of judges in the states, she has said little about the current process for judicial nominations in the federal system, a

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4. Sandra Day O’Connor, Op-Ed., *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

5. Matthew Hirsch, *Swing Voter’s Lament: At Least One Case Still Bugs O’Connor*, THE RECORDER, Nov. 8, 2006, available at <http://www.law.com/jsp/LawArchiveFriendly.jsp?id=Alexander/1162893919695>.

6. *Id.* (commenting on Chief Justice George’s remarks).

7. The classic exposition is, of course, Alexander Hamilton’s *The Federalist* No. 78.

development that may pose as serious a threat as any of the recent events that she does discuss.

Before elaborating on these concerns, there are two preliminary points that I would like to acknowledge. First, I am not suggesting that Justice O'Connor is alone in expressing views such as those I will be quoting here. On the contrary, many of the same themes have been sounded in recent months by other judges (including some of Justice O'Connor's active colleagues on the Supreme Court), by commentators, and even by some political figures. But because "Justice O'Connor" and "judicial independence" have become "virtually synonymous," it is likely that Justice O'Connor's formulations are the ones that future writers will quote.

Second, even before Justice O'Connor began to speak out, the subject of judicial independence had generated an enormous amount of academic commentary. In the last few years, the body of writings has expanded even further. Not only are there numerous individual articles in law journals and elsewhere, but there have been entire symposia; and the symposia, as Professor Charles Geyh has aptly stated, have themselves "proliferated like rabbits."<sup>8</sup> So I have no illusion that I can add any substantial new dimension to the discussion. Nevertheless, because Justice O'Connor's many speeches and public interviews have become so central to the debate, I think it is useful to look closely at what she has said and what we can learn from her warnings.

### I. "EXTERNAL" THREATS

In her various speeches and the Wall Street Journal op-ed, Justice O'Connor has talked about several developments that she views with alarm, including four that I would like to focus on today: acts of violence or threats of violence directed against judges; proposals to impeach or otherwise punish judges for their decisions; legislation to strip federal courts of jurisdiction over particular classes of cases; and other legislation that would limit the decisional autonomy of state or federal courts. From the perspective of assessing threats to judicial independence, these examples represent four very distinct categories, and it is important to differentiate among them.

The first category encompasses acts of violence and threats of violence directed at judges or their families. It should go without saying that these are plainly and indisputably illegitimate. No responsible person or

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8. Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 911 (2006).

organization asserts that killing or injuring judges is an appropriate response even to the most wrong-headed judicial decision. It is unfortunately true that a federal judge's husband and mother were murdered in 2005 by an embittered plaintiff whose malpractice suit the judge had dismissed.<sup>9</sup> And a Georgia state judge was shot dead by a criminal defendant who was being tried in his courtroom.<sup>10</sup> But these killings were unrelated to any of the judicial decisions that have aroused controversy in recent years.

Justice O'Connor, however, after commenting that "death threats [to federal judges] have become increasingly common," added: "It doesn't help when a high-profile senator . . . suggests there may [be] 'a cause-and-effect connection' between [judicial] activism and the 'recent episodes of courthouse violence in this country.'"<sup>11</sup> The "high-profile senator" was Senator John Cornyn of Texas, and Justice O'Connor was not alone in interpreting his remarks in the way she did. But it would be misleading to use the Cornyn statement as evidence that "courthouse violence" poses a threat to judicial independence in America today, or that any responsible person believes that these acts of violence have occurred as a response to controversial judicial decisions.

To begin with, Senator Cornyn is himself a former judge, having served for thirteen years on the Texas state courts, including the Supreme Court of Texas.<sup>12</sup> It is hardly credible that he intended to suggest that violence could ever be a legitimate response to judicial decisions that a person thinks are wrong. But if there was any doubt, he made a strong statement on the Senate floor on the day immediately following the day on which he made the remarks Justice O'Connor referred to. He stated without qualification that "there is no possible justification for courthouse violence."<sup>13</sup>

Justice O'Connor is on stronger ground on the specific point she attributed to Senator Cornyn. In the course of an apparently extemporized speech on the Senate floor, Senator Cornyn said this:

I don't know if there is a cause-and-effect connection, but we have seen some recent episodes of courthouse violence in this country—certainly nothing new; we seem to have run through a spate of courthouse violence recently that has been on the news. I wonder whether there may be some connection between the perception in some quarters on some occasions where judges are

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9. *Judge Killed in Atlanta Courtroom*, CBS NEWS, Mar. 11, 2005, <http://www.cbsnews.com/stories/2005/03/11/national/main679651.shtml> (noting recent murder of the husband and mother of federal judge Joan Humphrey Lefkowitz in Chicago).

10. *Id.*

11. O'Connor, *supra* note 3, at 5 (quoting Sen. John Cornyn).

12. 151 CONG. REC. S3235 (daily ed. Apr. 5, 2005) (remarks of Sen. Cornyn).

13. *Id.*

making political decisions yet are unaccountable to the public, that it builds and builds to the point where some people engage in violence, certainly without any justification, but that is a concern I have that I wanted to share.<sup>14</sup>

This was a foolish and thoughtless thing to say, and Senator Cornyn deserves to be criticized for saying it. But it would be a mistake to elevate his rambling comment into a major policy pronouncement. Most of his lengthy speech was devoted to a detailed critique of Supreme Court decisions, particularly those that have invoked foreign law in support of rulings interpreting the Constitution of the United States. Given that context, I am inclined to accept the clarification (or disclaimer) he offered in his statement the day after the original remarks: “I am not aware of any evidence whatsoever linking recent acts of courthouse violence to the various controversial rulings that have captured the Nation’s attention in recent years.”<sup>15</sup>

So there is no basis for thinking that any responsible political figure endorses or condones violence against judges. And, as far as I am aware, no one is asserting, as a descriptive matter, that recent acts of courthouse violence have been prompted by judges’ rulings on political or social issues.

In this light, I find it troubling that Justice O’Connor, in her speeches about judicial independence, not only refers to courthouse violence and death threats in the United States; she narrates at some length an episode of strong-arming and violence directed against judges in a country in Africa.<sup>16</sup> She also alludes more briefly to similar episodes in Russia and Bulgaria in the last decade of the twentieth century.<sup>17</sup>

These portions of her speeches are troubling for two reasons. First, they make the position of the judiciary seem much more threatened than it is. Judicial independence *would* be very much at risk if judges were facing threats of death or violent attack if they decided cases in a way that did not meet with the approval of some particular faction or of the citizenry as a whole. But that is not remotely the reality in the United States today. Individual judges do face threats to their security from individual malefactors and Congress is appropriately taking action to deal with that kind of problem.<sup>18</sup> But it does no service to suggest that judges must fear for

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14. 151 CONG. REC. S3126 (daily ed. Apr. 4, 2005) (remarks of Sen. Cornyn).

15. 151 CONG. REC. S3235 (daily ed. Apr. 5, 2005) (remarks of Sen. Cornyn).

16. O’Connor, *supra* note 3, at 3–4.

17. *Id.* at 2.

18. *See, e.g.*, Court Security Improvement Act of 2007, H.R. 660, 110th Cong. (2007) (as reported by H. Comm. on the Judiciary, July 10, 2007); Court Security Improvement Act of 2007, S. 378, 110th Cong. (2007) (as passed by Senate, Apr. 11, 2007).

their physical safety if they hand down decisions that are seen as wrong or harmful by one group or another.

The second troubling aspect is that by interspersing accounts of violence and physical intimidation with references to peaceful (if debatable) legislative measures, Justice O'Connor subtly (and no doubt unintentionally) implies that the latter are only one step removed from the former. There is no justification for equivocation on this point: legislation—even if unwise, even if unconstitutional—is not violence or the threat of violence.

I turn now to the second category of threats Justice O'Connor has identified. This category encompasses nonviolent political measures that would indeed imperil judicial independence if they had substantial support within the polity—but they do not. Justice O'Connor has discussed two such measures, one aimed at federal courts and one aimed at state courts.

In her speeches in 2005, Justice O'Connor described a “conservative conference” where speakers “advocated ‘mass impeachment’” of federal judges.<sup>19</sup> She added: “Mass impeachments—now that is something we have not heard suggested until lately. Impeachment for a judge’s judicial acts has been politically taboo since the failure of Justice Samuel Chase’s impeachment back in 1805.”<sup>20</sup>

Anyone reading or hearing Justice O'Connor’s remarks would probably get the impression this “conservative conference” represented a movement to be reckoned with on the political scene. The impression would be reinforced by Justice O'Connor’s use of quotations from “a prominent House leader” who spoke at the conference. The “prominent House leader” was in fact Tom DeLay, then the Majority Leader in the House of Representatives.

I’m confident we would all agree with Justice O'Connor’s premise: the prospect that judges would be impeached and removed from office based on their decisions would threaten judicial independence in a serious way. But how real is that prospect today?

Certainly there has been more than talk at a conference. In 2004, the Constitution Restoration Act was introduced in the House; a companion bill was introduced in the Senate. The House bill, with the number H.R. 3799, withdrew jurisdiction from the federal courts to hear suits seeking relief against governments “by reason of that [government’s] acknowledgement of God as the sovereign source of law, liberty, or government.”<sup>21</sup> The bill was awkwardly worded, but it was aimed at litigation challenging displays

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19. O'Connor, *supra* note 3, at 4.

20. *Id.* at 4–5.

21. Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 101 (2004).

of the Ten Commandments in public places. And it went further. It provided that if any federal judge should engage in activity that exceeds the jurisdiction defined by the legislation, “engaging in that activity shall be deemed to constitute the commission of an offense for which the judge may be removed upon impeachment and conviction.”<sup>22</sup>

House Bill 3799 had thirty-seven cosponsors—more than a trivial number—and, what is more significant, the bill was the subject of a hearing before a subcommittee of the House Judiciary Committee. So it might appear that the threat of impeaching judges for their decisions was quite real, at least in the 108th Congress. But appearances are deceiving. If you look at the list of the bill’s sponsors, what stands out is the names that are not there. F. James Sensenbrenner, who was then Chairman of the House Judiciary Committee, was not a sponsor. Nor was Lamar Smith, then the Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property. Nor was Howard Coble, now the Ranking Member on that subcommittee. In short, the Republican leadership of the Judiciary Committee kept its distance from this bill. Moreover, Chairman Sensenbrenner made clear, in a lecture at Stanford University in 2005, that he opposed the use of impeachment as a means of “neuter[ing] the courts.”<sup>23</sup> He has stated unequivocally that “impeachment ought not lie simply because Congress may disagree with a judge’s ‘judicial philosophy,’ or because Congress considers a judge’s ruling ‘unwise or out of keeping with the times.’”<sup>24</sup>

I do not want to overstate the point. Although Congressman Smith did not cosponsor House Bill 3799, he has expressed some sympathy for the idea of impeaching judges “who willfully ignore the law and the Constitution.”<sup>25</sup> But it is telling that, as chairman of the Courts subcommittee, he did not schedule the bill for markup, and it died with the 108th Congress.<sup>26</sup> Additionally, bills like House Bill 3799 get no support

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22. *Id.* § 302.

23. F. James Sensenbrenner Jr., Zale Lecture in Public Policy at Stanford University 4 (May 9, 2005) (transcript available at [http://judiciary.house.gov/media/pdfs/stanfordjudges\\_speechpressversion505.pdf](http://judiciary.house.gov/media/pdfs/stanfordjudges_speechpressversion505.pdf)).

24. F. James Sensenbrenner Jr., Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary (March 16, 2004) (transcript available at <http://judiciary.house.gov/legacy/news031604.htm>).

25. See Chuck Lindell, *Smith Echoes DeLay in Criticizing Judges*, AUSTIN AMERICAN-STATESMAN, Apr. 8, 2005, at A11. For the full text of Representative Smith’s remarks, see <http://lamarsmith.house.gov/news.asp?FormMode=Detail&ID=611>.

26. Indeed, although the legislation was again introduced in the 109th Congress—this time with fifty cosponsors—Chairman Smith did not even hold a hearing. Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. (2005).

from Democrats. I conclude, therefore, that the notion of impeaching judges for their judicial acts has more than fringe support, but not much more.<sup>27</sup>

In her Wall Street Journal op-ed, Justice O'Connor discussed a counterpart to impeachment that would affect judicial independence in state courts.<sup>28</sup> This was the "JAIL 4 Judges" initiative that had been placed on the November 2006 ballot in South Dakota as a proposed amendment to the state constitution.<sup>29</sup> The amendment would have cut back substantially on judicial immunity; it would also have created an elaborate system of special grand juries that would "investigate, indict, and initiate criminal prosecution of wayward judges" for a variety of infractions, including "deliberate violation of law" and "blocking of a lawful conclusion of a case."<sup>30</sup>

The proponents of the "JAIL 4 Judges" initiative have made no secret about what they are trying to do: they want to intimidate judges. They have proudly proclaimed that by wearing their JAIL T-shirts they send "that intimidation factor flowing through the judicial system."<sup>31</sup> So there is no ambiguity as to their goal; an independent judiciary is exactly what they are trying to destroy. But they are little more than a fringe group. Their initiative received only eleven percent of the vote—and that was in the "Red State" of South Dakota.

I don't want to overstate this point either. A poll taken on September 19, 2006, about six weeks before the election, showed sixty-seven percent support for the initiative.<sup>32</sup> The ultimate failure of the measure can be attributed in part to a vigorous grass-roots campaign led by the executive director of the State Bar of South Dakota, Thomas Barnett. His "No on E" Committee gained support "from a broad range of organizations, including the South Dakota Chamber of Commerce, the State Bar of South Dakota and the state AFL-CIO."<sup>33</sup> By the end of September, Barnett was saying,

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27. It might be argued that even if actual removal of a judge through impeachment proceedings is unlikely, the *process* of dragging the judge through a bruising and humiliating impeachment inquiry would be punishment enough to intimidate the judge into acquiescence. This may be true, but intimidation would result only if the judge reasonably believed that the process would be initiated. Especially in view of Chairman Sensenbrenner's strongly expressed views, I do not think any federal judge could have had any fear of impeachment proceedings based on "activist" or other controversial decisions—even during the era of Republican control of the House.

28. O'Connor, *supra* note 4, at A18.

29. For a detailed discussion of the "JAIL 4 Judges" movement, see William E. Raftery, *J.A.I.L. 4 Judges: Opponents of an Impartial Justice System?*, JUDGES J., Winter 2007, at 25.

30. *See id.* (discussing the JAIL 4 Judges movement).

31. Barbie, *FAQ: Psychology Behind JAIL T-shirt Design*, [http://www.jail4judges.org/FAQ\\_File/tshirttext.htm](http://www.jail4judges.org/FAQ_File/tshirttext.htm) (last visited Nov. 7, 2007).

32. Richard Clough, *Initiative Would Let Citizens Sue Judges*, CHI. TRIB., Nov. 6, 2006, at 6.

33. Wendy Davis, *Getting Out the 'No' Vote*, A.B.A. J., Nov. 2006, at 15.



“We’re going to kill them dead here . . . so no other state has to go through what we’re going through.”<sup>34</sup> And his group did “kill them dead.” In fact, a poll taken in mid-October showed only twelve percent support, closely anticipating the outcome on Election Day.<sup>35</sup>

The lesson to be drawn from the initially favorable response to Amendment E by the citizens of South Dakota is that demagogic attacks on the judiciary do have some appeal. We cannot assume that the destructive consequences of such measures will be immediately obvious to everyone. But once the public understands what is really at stake, the support dwindles—in this instance to little more than one voter in ten.<sup>36</sup>

So I certainly do not criticize Justice O’Connor for speaking out against the “JAIL 4 Judges” initiative—or, indeed, against proposals to impeach federal judges for their decisions. On the contrary, I think it is important to point out why these measures are dangerous and how far they depart from our traditions. But it is also important not to exaggerate the degree of support they have among political leaders and citizens.

This brings me to the third category of threats that Justice O’Connor has identified. This category embraces political measures that do have substantial support, but should not be viewed as imperiling judicial independence—although they may be unwise for other reasons.

In particular, Justice O’Connor has expressed concern about legislation that would strip federal courts of jurisdiction over particular classes of cases.<sup>37</sup> She listed some of the issues (past and present) that have prompted proposals of this kind, then added: “The merits of all these measures are debatable—as long as they’re not retaliation for past federal court decisions.”<sup>38</sup>

Justice O’Connor is correct in saying that recent years have brought a proliferation of these “court-stripping” proposals.<sup>39</sup> Moreover, in contrast to the idea of impeaching judges for their decisions, at least two of the court-stripping bills have enjoyed substantial support in Congress. One example is the Pledge Protection Act, which would have eliminated both district court jurisdiction and the appellate jurisdiction of the Supreme Court over any

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34. *Id.*

35. Clough, *supra* note 32, at 6.

36. Ron Branson, who promoted the South Dakota measure, has pledged to continue the campaign elsewhere in the country. He has predicted that the idea will take hold “in one of several states with active chapters in the ‘Jail4Judges’ campaign.” Matt Apuzzo, *Despite Election Setbacks, Supporters Will Keep Fighting ‘Judicial Activism,’* S.F. DAILY J., Nov. 14, 2006, at 4.

37. *See* O’Connor, *supra* note 3, at 4–5.

38. *Id.* at 5.

39. *See id.* at 4–5.

“question” involving the constitutionality of the Pledge of Allegiance.<sup>40</sup> The bill was approved by the House in 2006 by a vote of 260 to 167, with thirty-nine Democrats, as well as most Republicans, in the majority.<sup>41</sup> That is a strong bipartisan showing. Two years earlier, the House passed a similar bill removing jurisdiction over challenges to the Defense of Marriage Act.<sup>42</sup> The vote was 233 to 194, with twenty-seven Democrats voting in favor.<sup>43</sup>

Measures like these are generally unwise, and some may be unconstitutional. But that does not mean that they are properly viewed as threats to judicial independence. Judicial independence is threatened by legislative acts that may intimidate judges or (in Justice O’Connor’s words) “strong-arm the judiciary into adopting [the legislature’s] preferred policies.”<sup>44</sup> I do not think that court-stripping bills—or at least those that have made substantial headway in Congress—fall within that category.

Preliminarily, there is some uncertainty about how broad a point Justice O’Connor is making. She accepts the legitimacy of some jurisdiction-limiting legislation; what she rejects are measures that can be described as “*retaliation* for past federal court decisions.”<sup>45</sup> The implication is that she sees a threat to judicial independence whenever legislators promote court-stripping bills with the *intent* of intimidating judges—irrespective of the success of their efforts, and even if there is no realistic prospect that any judges will be influenced by the campaign.

On this premise, Justice O’Connor is probably right in including recent bills such as those I have described. There is good reason to believe that at least some supporters of these measures, like the proponents of the “JAIL 4 Judges” initiative, *hope* that by pressing for such legislation they will send an “intimidation factor flowing through the judicial system.”<sup>46</sup> But if this is what Justice O’Connor is saying, I disagree with the premise. In my view, hopes alone do not pose a threat to judicial independence. What should concern us is the prospect that judges will alter their behavior in response to legislative initiatives.

Consider, then, the two bills that passed the House in recent years—one that would have removed jurisdiction over cases involving the Pledge of Allegiance,<sup>47</sup> the other centering on the Defense of Marriage Act.<sup>48</sup> Is it

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40. H.R. 2389, 109th Cong. § 2(a) (2006).

41. 152 CONG. REC. 95, H5433 (2006).

42. H.R. 3313, 108th Cong. (2004).

43. 150 CONG. REC. 103, H6612 (2004).

44. O’Connor, *supra* note 3, at 6.

45. *Id.* at 5 (emphasis added).

46. Barbie, *supra* note 31.

47. H.R. 2389, 109th Cong. § 2(a) (2006).

48. H.R. 3313, 108th Cong. (2004).

plausible to suggest that a federal judge would reject a challenge to a governmental practice within the scope of either of these measures out of fear that the decision would lend fuel to efforts to remove federal-court jurisdiction over suits of that kind? I do not think so.

Some will argue that this conclusion rests on an idealized view of the judicial personality. There is a developing literature that talks about judges as self-interested actors who want to maximize their prestige and their power.<sup>49</sup> Taking away jurisdiction is taking away power. Is it really so implausible that judges might trim their sails to avoid that outcome?

Maybe this could happen—but not when the legislation would affect only a narrow class of cases like those involving the Pledge of Allegiance or the Defense of Marriage Act. Suppose, though, that the proposal is to take away jurisdiction over any claim involving freedom of religion or rights of privacy, including reproduction. There's a bill in the current Congress that would do just that.<sup>50</sup> It's called the "We the People Act," and it has been introduced in each of the last two Congresses as well.<sup>51</sup> Maybe some judges would be influenced by the prospect of losing power on that scale—although I would like to think otherwise. But the "We the People Act" has never had more than six co-sponsors.<sup>52</sup> It has never been the subject of a hearing. It is not a serious threat.

One other scenario may come to mind. Suppose that Congress were to pass one of the narrow bills I have referred to—the Pledge Protection Act, for example. Might some judges then hesitate before issuing counter-majoritarian rulings involving other issues out of fear that an unpopular decision would spur Congress to enact additional or broader restrictions on federal court jurisdiction? It could happen—but the fact is that even the Pledge Protection Act could not gain sufficient support to become law in a Congress controlled by Republicans. And speculation based on counterfactual hypotheticals is of minimal value in assessing threats to judicial independence.

It would be going too far to say that no court-stripping measure could ever have the effect of strong-arming a federal judge into adopting Congressional policies rather than the judge's own view of what the law requires. But I am confident that this will not occur as a consequence of any

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49. See, e.g., LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 *SUPERIOR COURT ECON. REV.* 1 (1993).

50. See H.R. 300, 110th Cong. (2007).

51. See H.R. 5739, 109th Cong. (2006); H.R. 4379, 109th Cong. (2005); H.R. 3893, 108th Cong. (2004).

52. See generally *id.*

of the bills that have been considered by Congress in recent years. It is not relevant that some of the proponents are motivated by a desire to retaliate for past rulings, and there is no reason to fear that judges will be intimidated in their future decisions by the threat of “retaliation” of this kind.<sup>53</sup>

There is, however, another way of looking at these bills—one that focuses on what would happen if one of these measures were actually enacted and signed into law. Even if no *individual* judge is intimidated, is there a threat to judicial independence if Congress removes the *institutional* authority of the judiciary to consider particular claims or issues?

My answer is “no,” because I think it is analytically confusing to treat questions of the proper or necessary role of the federal *courts* as bearing on the preservation of independence for federal *judges*. One can argue, based on Article III or due process or structural considerations, that a federal judicial forum should be available for this or that constitutional claim. But that kind of argument is simply not relevant to judicial independence, which focuses on the ability of judges to apply their own judgment, limited only by the rule of law, in the cases before them.

Now at this point those of you who are familiar with constitutional history may be wondering: What about *Ex Parte McCordle*?<sup>54</sup> In that much-discussed 1868 case, the Supreme Court conspicuously avoided deciding the constitutionality of Congress’s Reconstruction legislation.<sup>55</sup> It did this by giving effect to a Congressional limitation on the Supreme Court’s own

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53. The 109th Congress did enact some limitations on the power of federal courts to consider claims by alien enemy combatants. *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109-366 (2006). There is no evidence that this legislation has “neutered” the federal judiciary (to use Congressman Sensenbrenner’s term); on the contrary, judges have continued to issue bold rulings rejecting executive claims arising out of the prosecution of the war on terrorism. *See, e.g.*, *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007). *See generally* Andrew C. McCarthy, *Lawfare Strikes Again*, NAT’L REV. ONLINE, June 12, 2007, <http://search.nationalreview.com/> (search “National Review Online” for “Lawfare Strikes Again” start date “06/12/2007” end date “06/12/2007,” then follow “Lawfare Strikes Again” hyperlink) (characterizing the Fourth Circuit decision as “[t]he use of the American people’s courts as a weapon against the American people in a war prosecuted by the president . . . [a]nd all for the benefit of an alien sent here to attack us”). Federal judges have reacted in similar fashion to Congressional legislation restricting judicial review of deportation orders involving asylum claims. *See, e.g.*, *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007) (en banc). One commentator described the *Lolong* decision as “a conservative’s message to Congress that it can’t eliminate judicial review.” John Roemer, *Reversing Itself, 9th Circuit to Hear Asylum Cases*, S.F. DAILY J., May 8, 2007, at 2.

54. 74 U.S. 506 (1869).

55. *Id.* at 514.

jurisdiction—a limitation that was enacted for that very purpose.<sup>56</sup> The effect, of course, was to leave the Reconstruction legislation in place.<sup>57</sup>

Was this an instance of Congress' using court-stripping legislation to strong-arm the judiciary into adopting its preferred policies—the paradigm of interference with judicial independence? Perhaps—though it's important to point out (as the Court itself did) that Congress had not taken away all access to the Supreme Court for litigants like *McCardle*.

Yet even if we view the decision in the worst possible light—as a craven capitulation to Congressional pressure—I don't think it tells us much about the situation in the twenty-first century. The case grew out of tumultuous events that occurred nearly 140 years ago. The constitutional traditions that we rely on so much today were in a relatively early stage of development. Nor was the judiciary as strong as it is now. More important, the setting was unique. The nation had just emerged from a bloody civil war. Congress was engaged in a bitter struggle with an unelected President over the direction of Reconstruction. Indeed, while *McCardle's* case was pending, the Senate failed by a single vote to sustain articles of impeachment and remove the President from office. It was truly a moment of constitutional crisis that is not likely to be replicated in the foreseeable future.

In my view, then, today's court-stripping legislation should not be viewed as a threat to judicial independence. But as Justice O'Connor noted in her *Wall Street Journal* op-ed, Congress has also been considering legislation of a different kind—legislation that seeks to limit the legal sources that courts may rely on in interpreting the Constitution.<sup>58</sup> The Constitution Restoration Act actually contained two provisions of this kind; one addressed to state judges and one addressed to federal judges.<sup>59</sup> Section 301 stated that any decision of a federal court, whether made prior to or after the effective date of the Act, “to the extent that the decision relates to an issue removed from Federal jurisdiction [by the Act], is not binding precedent on any State court.”<sup>60</sup> Section 201 would have prohibited federal courts from relying on foreign or international law in interpreting the Federal Constitution.<sup>61</sup>

Here we are much closer to the heart of the judicial function and thus to the independence of the judiciary. I testified at the House Judiciary Committee hearing on the Constitution Restoration Act, and as I said there,

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56. *Id.* at 514–15.

57. *Id.* at 515.

58. O'Connor, *supra* note 4, at A18.

59. See Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 101 (2004).

60. *Id.* § 301.

61. *Id.* § 201.

I believe that both of these provisions are unconstitutional. I am also convinced that the Supreme Court would take that view. So we are presented with the question: Is judicial independence threatened by measures that would intrude on the judicial role if they were to take effect, but which we can confidently predict will be struck down by the courts?

I find it hard to answer a question that requires so much speculation about events that have not occurred and probably never will. Unlike court-stripping legislation, proposals to constrain judicial decision making in constitutional cases have made little headway in Congress. If such legislation does pose a threat to judicial independence, it is a threat that is more theoretical than real.

To sum up, the threats to judicial independence that Justice O'Connor has identified fall into four categories. First, there is the threat of violent retaliation for judicial decisions. Violence is always an illegitimate tactic, and no responsible person or organization in this country endorses it. Second, there are nonviolent, political measures that would indeed imperil judicial independence if they had substantial support within the polity—but they do not. Third, there are political measures that do have substantial support but which should not be viewed as imperiling judicial independence. Finally, there are measures that would intrude on the judicial function and thus may be seen as a threat to judicial independence, but which will never go into effect.

Putting this all together, you might conclude that Justice O'Connor is indeed "crying wolf." There are movements and leaders on the political scene who would like to "strong-arm the judiciary into adopting their preferred policies,"<sup>62</sup> but their proposals have no chance of achieving success. There are some proposals that could possibly become law, but those do not pose a genuine threat to judicial independence. However, that is not the end of the story.

## II. "INTERNAL" THREATS

The threats to judicial independence that Justice O'Connor has described are a diverse group, but they have one important element in common: they all come from forces outside the judiciary. I believe that there is a second aspect of judicial independence—the "internal" aspect. I use this term with some hesitation, because it has been used by other commentators in a

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62. O'Connor, *supra* note 3, at 6.

variety of different ways.<sup>63</sup> But I haven't yet come up with a better label, so I will go ahead and use this one.<sup>64</sup> By "internal," I refer to things that judges themselves do that may threaten their independence. What might those be? I see at least two possibilities.

At the core, an internal threat arises whenever judges allow themselves to be influenced in their decisions by considerations that have no proper role in judicial decision making. Justice Anthony Kennedy captured the idea nicely in his recent testimony before the Senate Judiciary Committee. He said: "Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must."<sup>65</sup> A judge who does as he pleases is not acting with the independence that Article III contemplates.

There are a number of ways in which a judge might violate this precept. One illustration comes from an oft-quoted comment by Professor Mark Tushnet. Professor Tushnet said that if he were a judge, he would decide a close constitutional case by "mak[ing] an explicitly political judgment: which result is, in the circumstances now existing, likely to advance the cause of socialism?"<sup>66</sup> That kind of judgment is, as Professors Ferejohn and Kramer put it, a reason "that [the] existing legal culture [does not] recognize[] as appropriate."<sup>67</sup> The same could be said if a judge were to decide a case in a particular way in order to advance the fortunes of a political party. Or if a judge were to reach the result that would most likely aid his own promotion to a higher court or garner praise from newspaper editorial writers. In situations like these, the judges are deciding cases for "unacceptable reasons."<sup>68</sup> And that kind of behavior, in my view, poses a threat to judicial independence.

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63. For example, Professors Ferejohn and Kramer have called for "[a] more internal view" of judicial independence, but they rely primarily on "the way courts define their role through doctrinal development." John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1038 (2002).

64. The analysis here draws upon remarks by Chief Judge Danny Boggs of the Sixth Circuit at a conference sponsored by the American Bar Association. Judge Boggs's remarks have not been published. I am grateful to Linda Campbell of the Fort Worth Star-Telegram for sharing note material on the conference proceedings. For a somewhat similar treatment, see Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221 (2003).

65. *Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter *Senate Hearing on Judicial Independence*] (statement of Justice Anthony M. Kennedy), available at [http://judiciary.senate.gov/testimony.cfm?id=2526&wit\\_id=6070](http://judiciary.senate.gov/testimony.cfm?id=2526&wit_id=6070).

66. Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

67. Ferejohn & Kramer, *supra* note 63, at 972.

68. *Id.* at 971.

There are two ways of reaching that conclusion. One is what might be called essentialist. That is the view that I take Justice Kennedy to be articulating. For a judge to decide a case in order to advance an agenda—whether ideological, or political, or personal—rather than through application of the rule of law is to pervert the very concept of judicial independence.

It might be argued that what I am talking about here is not a lack of independence, but a lack of impartiality. And it is true that the behavior I've described does not fit the paradigm relied on by Justice O'Connor (and others). No one is attempting to strong-arm the judge into deciding a case one way rather than another. But there is strong-arming and there is also sweet-talking. I believe that the latter can be as destructive of independence as the former. A judge whose strings are being pulled by someone else is not independent even if the strings are wholly metaphorical, and even if the hand pulling the strings is benevolent rather than hostile.

Consider these two situations. Judge A holds that an act of Congress is constitutional out of fear that he will face impeachment proceedings if he rules otherwise. Judge B strikes down an act of Congress because she looks forward to the New York Times editorial praising her wisdom and her courage. There are differences, of course, between the two kinds of influence, but in both, the judge's independence has been compromised.

Judge Carolyn Dineen King of the Fifth Circuit Court of Appeals made this same point recently using an analogous example. In her Hallows Lecture at Marquette Law School, she quoted a remark by Judge Guido Calabresi of the Second Circuit to the effect that “the greatest threats to judicial independence [are] judges with ambition.”<sup>69</sup> As Judge King explained, “a judge with ambition constantly has his eye on what the Administration or the Senate Judiciary Committee would think about a decision under consideration and how the decision would affect his chances for advancement.”<sup>70</sup> Like the judge who seeks approbation from the editorial pages from the New York Times, the judge who seeks to enhance his chances for promotion to a higher judicial office departs from the path of independence laid out in Article III. Again there is no strong-arming—there is not even sweet-talking, except perhaps in the judge's own mind—but if there is substance to Judge Calabresi's perception, the threat to independence is far more real than the empty talk of “mass impeachment” that so concerned Justice O'Connor.

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69. Honorable Carolyn Dineen King, *Hallows Lecture: Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 MARQ. L. REV. 765, 777 (2007).

70. *Id.*



Independent of this analysis, one can reach the same conclusion by viewing the matter from a consequentialist perspective. If judges are deciding cases for nonlegal reasons—that is, “reasons that [the] existing legal culture [does not] recognize[] as appropriate”<sup>71</sup>—it is only to be expected that citizens will come to see judicial independence as a liability rather than a benefit to society. Similarly, the elected officials who represent the people in the political branches will no longer see any reason to protect judges from the reprisals that they themselves expect if they act in ways that are contrary to the wishes of their constituents.

In her Hallows Lecture, Judge King identified a form of judicial behavior that does not quite fit the paradigm I have been discussing, but it is close enough—and her account is alarming enough—that it warrants mention here. Judge King refers to the phenomenon as “clique voting.”<sup>72</sup> As she describes it, what happens is that judges on a court of appeals panel vote “with or at the direction of other like-minded judges simply because they share common ideological objectives . . . without a good grasp of the record or [the] governing law.”<sup>73</sup>

“Clique voting” has come about, Judge King argues, through a combination of three circumstances.<sup>74</sup> First, because of the politicization of the appointment process (a development I’ll be discussing in the next section of this lecture), some judges come to the federal appellate bench primed to view cases through the prism of an ideology.<sup>75</sup> Second, because of “the sheer volume of cases,” many appeals receive the “full attention” of only one judge on a three-judge panel.<sup>76</sup> What this means is that “judges are often effectively forced to rely on ‘borrowed intelligence.’”<sup>77</sup> Finally, in contrast to the United States Supreme Court, most court of appeals decisions “do not receive thoughtful review by anyone other than the parties.”<sup>78</sup> Thus—and this is my summary—it’s easy (and almost risk-free) for a “clique” to ride roughshod over the law and the facts in pursuit of an ideologically driven outcome.

Judge King reports that “clique voting happens, albeit infrequently, in more than one (but, I think, not many) of our intermediate federal appellate courts.”<sup>79</sup> This is a disturbing assertion. As Judge King states, the practice

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71. Ferejohn & Kramer, *supra* note 63, at 972.

72. King, *supra* note 69, at 784.

73. *Id.*

74. *See id.* at 782–84.

75. *Id.* at 784.

76. *Id.* at 783.

77. *Id.* at 784.

78. *Id.* at 783.

79. *Id.* at 784.

she describes is inconsistent with the rule of law; and because the rule of law is so closely tied to judicial independence, a threat to one is a threat to the other.<sup>80</sup>

At the same time, I cannot help wondering about the accuracy of Judge King's account. Her own experience as a judge is limited to the Fifth Circuit, so any information she may have about other courts is necessarily secondhand, filtered through the perceptions and predispositions of other judges. Moreover, I think she underestimates the amount of scrutiny that court of appeals decisions get today. There is now an array of generalist and specialized blogs that monitor the federal courts of appeals quite closely. Even "unpublished" opinions do not necessarily escape scrutiny.

So I think we must reserve judgment on whether there is something going on that we should worry about. Perhaps now that Judge King has spoken out about the practice we will hear more—or the practice will stop.

The second kind of internal threat arises when judges say things that step outside the judicial role. A well-known example is the remarks made by Judge Guido Calabresi of the Second Circuit at the conference of the American Constitution Society in the summer of 2004. Judge Calabresi made comments that, as he later acknowledged, were reasonably understood as opposing the reelection of President George W. Bush. Judge Calabresi "went on to make a direct comparison between the President and [the Italian dictator] Mussolini."<sup>81</sup>

Within days of making this speech, Judge Calabresi wrote a letter to the chief judge of the Second Circuit apologizing profusely—even abjectly—for his remarks.<sup>82</sup> The fact that he did so is, I think, some evidence of how harmful such behavior is to the judiciary as an institution. The reason is the one I have already stated: if judges start behaving like political actors, it is hard to justify the extraordinary protections that guard their independence.

Judges can also engage in this kind of behavior in the course of deciding cases. They do so, in my view, when they conspicuously applaud the purposes of the laws they uphold or condemn the policies underlying the laws they strike down. A good example is Justice Stevens's dissent in *Boy Scouts of America v. Dale*.<sup>83</sup> In that case, the Boy Scouts challenged a New Jersey decision holding that the state's public accommodation law prohibited the Scouts from revoking Dale's membership on the ground that

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80. *See id.* at 786–87.

81. *In re Charges of Judicial Misconduct*, 404 F.3d 688, 697 (Judicial Council of the 2d Cir. 2005).

82. *See id.* at 691–92.

83. 530 U.S. 640, 663 (2000) (Stevens, J., dissenting).

Dale was an avowed homosexual and gay rights activist.<sup>84</sup> The United States Supreme Court reversed, concluding that the Scouts' membership policies were protected by the First Amendment.<sup>85</sup> Justice Stevens dissented.<sup>86</sup> He began his dissent with these words: "New Jersey 'prides itself on judging each individual by his or her merits' and on being 'in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society.'"<sup>87</sup> In the paragraph that followed, he wrote that "every state law prohibiting discrimination is designed to replace prejudice with principle."<sup>88</sup>

Can anyone who reads those opening paragraphs doubt that Justice Stevens sympathized with the New Jersey policy and admired the state for enforcing it through law? And wouldn't you be at least a little suspicious that Justice Stevens's position on the constitutional question was influenced by his view of the underlying state policy?<sup>89</sup>

Of course judges and Justices have their views about policy, and it would be naïve to think that these views can be completely divorced from the legal issues that they generate. This is particularly so when, for example, the governing legal test requires a showing of a "compelling" or "substantial" governmental interest. But when a judge writes an opinion of the kind Justice Stevens wrote in *Dale*, the consequences are twofold. First, it legitimizes the approach to the judicial role that Justice Kennedy rejected so

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84. *Id.* at 643–44.

85. *Id.* at 659.

86. *See id.* at 663.

87. *Id.* at 663 (quoting *Pepper v. Princeton Univ. Bd. of Trs.*, 389 A.2d 465, 478 (N.J. 1978)).

88. *Id.* at 664.

89. Justice Ruth Bader Ginsburg's dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2178–88 (2007), may appear to present another example of this phenomenon. The Court held that the plaintiff's Title VII pay discrimination claim was time-barred because Congress has required employees to file charges with the Equal Opportunity Employment Commission within 180 days after a discrete unlawful practice by their employer. Justice Ginsburg wrote a strong dissent. As reported by Linda Greenhouse in the *New York Times*, Justice Ginsburg "summoned Congress to overturn what she called the majority's 'parsimonious reading' of the federal law against discrimination in the workplace." Linda Greenhouse, *Oral Dissents Give Ginsburg A New Voice on Court*, N.Y. TIMES, May 31, 2007, at A1. Thus, in Greenhouse's account, Justice Ginsburg was not simply urging Congress to clarify an ambiguous statute; she was stating her view on the policy that Congress should adopt. Like Justice Stevens's comments in *Dale*, this kind of exhortation embraces a legislative rather than a judicial judgment. What Justice Ginsburg said, however, was only that "the Legislature *may* act to correct this Court's parsimonious reading of Title VII." *Ledbetter*, 127 S. Ct. at 2188 (Ginsburg, J., dissenting) (emphasis added). Although the overall thrust of the dissent made clear that Justice Ginsburg thought that the majority's decision was bad policy as well as a mistaken interpretation of the statutory language, her actual language remained within the accepted framework of judicial argumentation.

emphatically—the notion that judges use their independence to do “as they please.” Second, from the citizen’s perspective, it lends support to the cynical view that law is simply politics carried on by other means. And as Professor Geyh has aptly observed, “[i]f we ultimately conclude that judges employ law as a shill to conceal nakedly political decision making of a sort best reserved for Congress or the people, then insulating such decision making from the influence of Congress or the people becomes largely indefensible.”<sup>90</sup>

There are many other judicial practices that raise questions in this context. I’d like to say a bit about the recent activities of one of Justice O’Connor’s former colleagues, Justice Antonin Scalia. Although Justice Scalia is still an active member of the Court, he seems to have become almost as much of a platform presence as Justice O’Connor. He pops up all over the country, primarily at law schools, speaking and debating and answering questions.

Now you’re probably asking: who could object to that? Here’s a Supreme Court Justice venturing outside the Marble Palace, going far beyond the Beltway, meeting and engaging with ordinary people (or at least ordinary lawyers and law students). He’s educating the public about the Court and the Constitution; he’s humanizing the law; and he’s making the judicial system less remote. How could that be anything but a good thing?

Maybe in the end we will all agree that it *is* a good thing. The problem, if there is a problem, arises out of the content of Justice Scalia’s speechifying. First, the central theme of his talks is the articulation and defense of an approach to constitutional interpretation that he refers to as “originalism.” Now that too seems unobjectionable. But the frequency and zest of Justice Scalia’s public appearances can easily give the impression that he is a Justice with an agenda. To be sure, it is not an ideological or political or socioeconomic agenda. Rather, his commitment is to a theory of constitutional jurisprudence. Nevertheless, evangelism, even in the service of constitutional theory, is hard to reconcile with the ideal of the judge impersonally applying the law.

This concern is reinforced by the second element of Justice Scalia’s public appearances: his willingness to discuss the application of his approach to current controversies of the kind that may and do come before the Court. In one instance, Justice Scalia commented so pointedly on a pending case that he felt obliged to disqualify himself from participating in its decision.<sup>91</sup> Yet even if his comments are not so direct or specific as to

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90. CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE 281 (2006).

91. See *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 916 (2004) (explaining recusal in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 961 (2004)).

require recusal, the impression he gives is that at least some judges come to cases with ready-formed opinions that will not be altered by the arguments of counsel or of the judge's colleagues. But one of the major purposes of judicial independence is to give judges the freedom to consider cases with an open mind. If that is not the way judges decide cases (or if the public comes to believe that it is not), it is harder to justify continued protection of judicial independence.

Justice Scalia is not the only member of the Court who engages in this kind of activity. Justice Breyer too has been touring the country—not just law schools, but television studios as well. He has been promoting the book that he wrote to set forth *his* theory of constitutional decision making—a theory that in many respects is framed as a response to Justice Scalia's. In fact, he and Justice Scalia sometimes appear together to debate one another. They're on their way to becoming a road-show version of James J. Kilpatrick and Shana Alexander's "Point Counterpoint" on 60 Minutes back in the 1970s.

In the Scalia-Breyer debates there's an element of showmanship that may be troubling apart from everything else. But the main concern is the one I've articulated: that public appearances of this kind promote the idea that judges approach cases with a view to advancing a jurisprudential agenda, not with an open mind focused on the particularized arguments of the parties.

In raising this question about Justices Scalia and Breyer, and, more generally, in offering these examples of possible internal threats, I want to be careful not to suggest that judicial independence is now seriously at risk from behavior of the kind I have described. I do not think it is. Some of the illustrations I have given are hypothetical. The others are widely scattered; they are exceptions rather than the rule. But just as I applaud Justice O'Connor for warning of the *possible* dangers of measures like "JAIL 4 Judges," I think it is useful to call attention to the *possible* dangers from the actions of judges who "do as they please."

### III. THE FEDERAL JUDICIAL CONFIRMATION PROCESS

In several of her recent speeches and public interviews, Justice O'Connor has focused on a new aspect of her broader topic—judicial elections in the states. When she spoke at New York University in October

2006, she put “judicial elections” at the very top of her list of threats to judicial independence.<sup>92</sup>

The relationship between judicial elections and judicial independence is a large and complex subject. Each state is different, with its own Constitution and its own traditions. No state is obliged to follow the federal model—a model that seeks to insulate sitting judges, to the greatest extent possible, from the currents of popular preference and factional appeal. No one can deny that judicial elections may impinge on judicial independence, but it is also essential to recognize that the people in a particular state may want it that way.<sup>93</sup>

There is, however, a parallel phenomenon in the federal system which, as far as I am aware, Justice O’Connor has not discussed. That is the federal judicial confirmation process. And in my view the recent developments in that process may well pose a serious threat to the Framers’ ideal of a judiciary independent of factions and majorities alike.<sup>94</sup>

This too is a large topic. Fortunately, there is an excellent recent book on the subject. It is by commentator Benjamin Wittes, and its title is, appropriately, *Confirmation Wars*.<sup>95</sup> I encourage you to read that book for a more thorough treatment of the issue. In my remarks today I will address only two aspects of the process. Both involve the questions posed to nominees by members of the Senate Judiciary Committee at confirmation hearings.

The questions are familiar. In fact, we know exactly what they will be as soon as one of the Committee members is recognized by the Chairman. Republican Senator Arlen Specter will express horror at the decision in *United States v. Lopez*<sup>96</sup> on Congress’ powers under the Commerce Clause, and he will ask the nominee if he agrees with that decision. Democratic Senator Dianne Feinstein will announce (to everyone’s astonishment) that she is “pro-choice,” and she will ask if the nominee supports *Roe v. Wade*.<sup>97</sup>

There’s a slight variation in these interrogations, depending on whether the nomination is for the Supreme Court or one of the courts of appeals, but the basic thrust is the same, and so is the purpose. The purpose, as Mr. Wittes observes, is “to wring concessions from would-be [judges] or to tar

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92. See *O’Connor Celebrates IJA and the Judiciary*, IJA REP. (Dwight D. Opperman Inst. of Judicial Admin. at NYU Sch. of L.), Winter 2006–07, at 2, available at <http://www.law.nyu.edu/institutes/judicial/newsletters/newsletter5.pdf>.

93. At some point, due process concerns may be implicated, but consideration of that topic is beyond the scope of this article.

94. See THE FEDERALIST NO. 78 (Alexander Hamilton).

95. See BENJAMIN WITTES, CONFIRMATION WARS (2006).

96. 514 U.S. 549 (1995).

97. 410 U.S. 113 (1973).

them as unworthy.”<sup>98</sup> The Senators seek “to pressure nominees . . . either to swear allegiance to a particular set of ideas being actively contested in court or to offer opponents a ready ground for their opposition.”<sup>99</sup>

I hope it is evident why this process poses a threat to judicial independence. Consider this comment on the practice:

If this line of questioning were to be followed further any candidate for the federal judiciary would have to satisfy the majority of the Senate Judiciary Committee that he was in line with that majority’s view . . . . The danger of the particular kind of nonsense that has been going on in the Senate Judiciary Committee’s hearings is that the separation of powers between the legislative and judicial functions may be broken down.<sup>100</sup>

These words appeared in an editorial in the New York Times. What is remarkable is that they were written 50 years ago, and they were prompted by questions asked by Southern segregationist Senators at the confirmation hearing of Justice John Marshall Harlan. (I am indebted to Mr. Wittes for unearthing the editorial.) But they are equally apt today. And, as Mr. Wittes writes, questions like the ones that have become so familiar “create an irresolvable conflict for the conscientious nominee: He or she cannot provide what the Senate wants without either ceding to its members some little bit of his or her ability to decide controversial cases or misleadingly appearing to do so.”<sup>101</sup> If the nominee chooses the first course of action, he compromises his independence; if he chooses the second, he taints the process and sets higher hurdles for future nominees.

Interestingly, there is a counterpart to these interrogations in the setting of state judicial elections. In that setting, it is now commonplace for single-issue advocacy groups to send questionnaires to judicial candidates. As one judge reported at a recent conference, “if one doesn’t answer, one gets a bullet on the website indicating refusal to answer.”<sup>102</sup> The consequence, one supposes, is that the group will seek to mobilize its supporters to vote against that candidate.<sup>103</sup>

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98. WITTES, *supra* note 95, at 94.

99. *Id.*

100. *Id.* at 91 (quoting Editorial, *Dangerous Nonsense*, N.Y. TIMES, Feb. 27, 1955, at E8).

101. *Id.* at 102.

102. Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. APP. PRAC. & PROCESS 141, 150 (2006) (quoting comment by conference participant).

103. In this connection, I note that Justice O’Connor has expressed some second thoughts about her vote in *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002), to strike down a state court rule prohibiting candidates for judicial office from announcing their views on “disputed legal or political issues.” See Hirsch, *supra* note 5. Her comments can be interpreted

Certainly the spread of these questionnaires is a cause for concern. However, their impact on candidates is diluted by several circumstances: the organization's electioneering materials may or may not reach voters; voters may or may not care enough about that one issue to let it determine their votes.

The confirmation setting is very different. The effect is not diffuse but concentrated. The nominee knows that he will never become a judge unless his answers are satisfactory to the handful of Senators whose votes in committee will determine whether the nomination is reported out. The pressure to answer is thus far greater than it is in the state election setting. And for the reasons given by the New York Times half a century ago, that pressure poses a real threat to the ability of courts to serve, in Hamilton's words, as "the bulwarks of a limited Constitution against legislative encroachments."<sup>104</sup>

The second aspect of the confirmation hearings is more subtle, but equally disturbing. Here are some of the questions that have been asked of nominees to the federal courts of appeals:

- "[W]hat do you think of the Supreme Court's efforts to curtail Congress's power [under the Commerce Clause]?"<sup>105</sup>
- "[Why shouldn't Congress] pass a crime bill that would put cops on the streets of our cities?"<sup>106</sup>
- "In light of growing evidence that a substantial number of innocent people have been sentenced to the death penalty, does that provide support in your mind for the two federal district court judges who have recently struck down the death penalty as unconstitutional?"<sup>107</sup>

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as implying that the Court's decision upholding First Amendment rights in the context of judicial elections may contribute to the erosion of judicial independence in the states.

104. THE FEDERALIST NO. 78 (Alexander Hamilton).

105. *Confirmation Hearings on Federal Appointments: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 795 (2003) [hereinafter *Estrada Hearing*] (question from Sen. Herb Kohl).

106. *Confirmation Hearing on the Nominations of William H. Pryor, Jr. to Be Circuit Judge for the Eleventh Circuit and Diane M. Stuart to Be Director, Violence Against Women Office, Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 79 (2004) (question from Sen. Dianne Feinstein).

107. *Estrada Hearing*, *supra* note 105, at 796 (question from Sen. Kohl).



- “What is the government’s role in balancing protection of the environment against protecting private property rights?”<sup>108</sup>
- “Should a judge be required to balance the public’s right to know against a litigant’s right to privacy when the information sought to be sealed could keep secret a public health and safety hazard? And what [are] your views regarding the new local rule of the District of South Carolina on this issue, which [bans] the use of sealed settlements altogether?”<sup>109</sup>

What we see in these and other questions is that they blend policy and law, what the law is and what it ought to be. Anyone watching the hearings would get the message that there really is no difference.

Why is that troublesome? I see two levels of concern. For the first, I’ll draw again on the Wittes book. “To the extent that the public comes [to treat the task of judging merely as an exercise of raw political power], the prophecy will tend to fulfill itself. . . . We cannot have independent courts without believing in them, after all.”<sup>110</sup>

Now you might respond that only a handful of C-Span junkies watch enough of the hearings to absorb any sort of impression at all based on the specific questions asked of nominees, or even the recurring patterns in those questions. I would have to agree. But that’s not an adequate response, because the impressions that count are those held by political leaders, journalists, and others who influence the relations between the judiciary and the political branches. That’s what Mr. Wittes means when he speaks of the self-fulfilling prophecy.

And it’s not just a state of mind. That brings me to the second level of concern, and it harkens back to a point I’ve made earlier in these remarks in other contexts. To the extent that political actors believe that adjudication is simply politics in robes, there is no reason to provide the judiciary with any more independence than the political branches. If you don’t like the judges’ decisions, punish the judges. Or take away the judges’ authority to reach the kinds of results you don’t like. Or (if you *really* don’t like the decisions), remove the judges from office.

As Mr. Wittes points out, the protection of judicial independence derives more from norms and traditions than from the compulsion of the

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108. *Id.*

109. *Confirmation Hearing on Federal Appointments: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 77 (2003) (question from Sen. Kohl).

110. WITTES, *supra* note 95, at 103.

constitutional text.<sup>111</sup> If the political actors stop believing that law is something outside politics, there is little reason for them to adhere to those traditions.

Indeed, both Mr. Wittes and Professor Geyh have gone further. They fear that if the Senators succeed in imposing their will on nominees at confirmation hearings, this will embolden the Senate (and maybe the House as well) to cast off other norms that today protect judicial independence.<sup>112</sup>

Having said that, I will add that, like Mr. Wittes, I do not think we have yet reached the point where the protective traditions have gone by the board. As I have already said, impeaching judges for their decisions is a fringe idea; limits on the decision making powers of judges are a long way from enactment. But we should not be complacent about the corrosive effect of hearings that “treat[] the task of judging merely as an exercise of raw political power.”<sup>113</sup>

#### IV. CONCLUSION

I have strayed rather far from Justice O’Connor’s speeches and writings, but now I’d like to return to them. Toward the end of her Wall Street Journal op-ed, Justice O’Connor wrote: “An independent judiciary does not mean, of course, that it is somehow improper to criticize judicial decisions.”<sup>114</sup> But a few paragraphs earlier, she talked in a very different vein about criticisms of the judiciary. Here is what she said:

[T]he breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history. . . . Elected officials routinely score cheap points by railing against the “elitist judges,” who are purported to be out of touch with ordinary citizens and their values. Several jeremiads are published every year warning of the dangers of judicial supremacy and judicial tyranny. Though these attacks generally emit more heat than light, *using judges as punching bags presents a grave threat to the independent judiciary.*<sup>115</sup>

I do not see how that passage can be read other than as saying that when elected officials rail against elitist judges, or when writers publish “jeremiads” against “judicial tyranny,” they do present a threat—indeed a “grave threat”—to judicial independence. And Justice O’Connor is not

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111. *Id.* at 103–04.

112. *Id.* at 85, 103.

113. *Id.* at 103.

114. O’Connor, *supra* note 4, at A18.

115. *Id.* (emphasis added).

alone in expressing that view. Senator Patrick Leahy, the chairman of the Senate Judiciary Committee, sounded a similar note at the hearing that featured Justice Kennedy as its sole witness.<sup>116</sup> Here is some of what Senator Leahy said:

It is most unfortunate that some in this country have chosen to use dangerous and irresponsible rhetoric when talking about judges. We've seen federal judges compared to the Ku Klux Klan, called the focus of evil, and, in one unbelievable incident, referred to as more serious than a few bearded terrorists who fly into buildings. . . . The high-pitched rhetoric should stop for the sake of our judges and the independence of the judiciary. . . .<sup>117</sup>

A bit later in the hearing, Senator Leahy returned to this theme, saying:

I've noticed with great apprehension the rise in volume and vehemence [of] attacks on judges and their decisions, both from outside and sometimes [inside] the government. I know Justice O'Connor has criticized the uncivil tones of attacks on the judiciary in a speech. She said that this would actually endanger the independence of the judiciary.<sup>118</sup>

Senator Leahy invited Justice Kennedy to join in this condemnation,<sup>119</sup> and he had good reason to think that he would do so. After all, there is probably no one who has defended judicial independence with more passion than Justice Kennedy. And there is probably no one with a more exalted notion of the judicial role. But Justice Kennedy did not rise to the bait. He began his response by saying, "Democracy is a pretty hurly-burly operation, rough and tumble . . . ."<sup>120</sup> He reminded Senator Leahy of the "tremendous controversy over what the [Supreme Court] did" in *McCulloch v. Maryland*,<sup>121</sup> Chief Justice Marshall's decision upholding the power of Congress to create a national bank.<sup>122</sup> He then said: "So the idea of criticism and disagreement is nothing new. And I think that the scurrilous, really shameful remarks that you refer [to] are something that democracy has learned to live with."<sup>123</sup>

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116. *Senate Hearing on Judicial Independence*, *supra* note 65 (remarks of Sen. Leahy).

117. *Id.*

118. *Id.* This transcription differs from the one in NEXIS. Senator Leahy was swallowing some of his words, but I am confident that the version in the text represents what he was saying.

119. *See supra* Part I.

120. *Senate Hearing on Judicial Independence*, *supra* note 65 (testimony of Justice Kennedy).

121. 17 U.S. 316 (1819).

122. *Senate Hearing on Judicial Independence*, *supra* note 65 (testimony of Justice Kennedy).

123. *Id.*

Tellingly, Senator Leahy immediately slid into the question of impeaching judges for their decisions. He quoted Chief Justice Rehnquist on the point and elicited agreement from Justice Kennedy, who said: "It's part of our constitutional tradition that the decisions of the court . . . are not the bases for impeachment."<sup>124</sup>

We see here in microcosm two unfortunate aspects of the arguments made by some of those who defend judicial independence. First, there is a tendency to blur distinctions—here, between intemperate language and calls for impeachment; in Justice O'Connor's speeches, between threats of violence and political action. Second, notwithstanding Justice O'Connor's disclaimer, there is the belief that criticism of judges, if sufficiently "uncivil" or "high-pitched," is itself a threat to judicial independence.

That won't do. It is certainly legitimate to condemn those who criticize the judiciary in intemperate language or with over-the-top analogies. But to suggest that such criticism endangers the independence of the judiciary is itself irresponsible—and in the long run will only undermine that independence. Just as, in America, no one is above the law, no one is above criticism, including criticism that is nasty and ugly and stupid. To suggest that it's OK to criticize judges, but only as long as you do it in language appropriate for a debating club, is to lend force to assertions that judges have become the new kings in our society.

I think there has been extravagant rhetoric on both sides, and I would like to see it ratcheted down. But even if it is not, I don't think that any of the developments that Justice O'Connor and others have described have come close to threatening judicial independence, at least in the federal system. There is no evidence that either the rhetoric or the proposed legislation has succeeded in strong-arming any court or judge into deciding cases one way rather than another.

For example, I have already mentioned that the House Judiciary Committee held a hearing on a bill that would have prohibited federal judges from relying on foreign law in interpreting the United States Constitution.<sup>125</sup> That was in 2004. What happened in 2005? The Supreme Court handed down its decision in *Roper v. Simmons*,<sup>126</sup> holding that the Constitution prohibits capital punishment for murderers under the age of eighteen.<sup>127</sup> The Court once again cited foreign law.<sup>128</sup>

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124. *Id.*

125. *See supra* Part I.

126. 543 U.S. 551, 570–71 (2005).

127. *Id.* at 575–78.

128. *Id.*

That is what we would expect. That is how our independent judiciary carries out its work. And if I have taken issue today with some of Justice O'Connor's formulations, it is not from any doubt about her dedication to judicial institutions or the value of the enterprise she has undertaken. It is wrong to be alarmist, but it is equally wrong to be complacent. I hope that Justice O'Connor will continue to call attention to the importance of judicial independence—without exaggerating the threats posed by people who, wittingly or otherwise, would undermine it. And I would certainly be interested to hear her thoughts on the direction the judicial confirmation process has taken—a development which, if not restrained, could pose a genuine threat to the “independent spirit in the judges”<sup>129</sup> that is essential to the performance of their duties.

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129. THE FEDERALIST NO. 78 (Alexander Hamilton).