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JUDICIAL AUTONOMY IN A POLITICAL ENVIRONMENT

Richard A. Posner[†]

Thank you very much, Randy, for a most generous introduction. It is a pleasure to be here to talk about judicial autonomy. Of course, judges are biased in favor of judicial autonomy, so you will have to be critical as you listen to me. Actually, I'm not as strong a proponent of judicial autonomy as some judges are, and I don't think I would have titled my talk, as the organizers suggested, "maintaining judicial autonomy in a hostile climate," although I certainly agree that there are serious issues concerning judicial autonomy.

And I know that it is a very timely issue for Arizona, making this a very good time and place to be talking about the subject. It is important in the state court system of Arizona because there is pressure, I understand, to alter your system of selecting judges, either by requiring confirmation by the Arizona Senate or by having judges elected rather than appointed; we have elected state judges in Illinois and Wisconsin, two of the Seventh Circuit states, which is my domain. Another issue of judicial autonomy that is important to Arizona concerns the federal courts, because Arizona is part of the Ninth Circuit and there is a movement afoot to split the Circuit into two circuits—a movement that has been gaining momentum for many years and may be on the verge of adoption.

Let me say first of all that I think your present system of selecting state judges is very good and that proposals to alter the system are misconceived. I am much more sympathetic to the suggestion for dividing the Ninth Circuit in two. I will explain these points, but the main point that I want to make in this talk is that judicial autonomy cannot be the be-all and end-all of thinking about the courts because the issue of autonomy is the issue of the place of courts in a democratic system, and our democracy requires a degree of judicial autonomy but also of checks and balances. Just as the other branches of government are subject to checks and balances, judges must not be treated as monarchical or oligarchical figures immune from all democratic control. Moreover, judges themselves have a certain

[†] Judge, United States Court of Appeals, Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is the revised text of an address sponsored by the Antitrust Section of the Arizona State Bar, delivered on March 6, 2006 at the Sandra Day O'Connor College of Law at Arizona State University.

responsibility for maintaining judicial autonomy. There is such a thing as irresponsible judicial action that supports movements to restrict judicial autonomy, so we judges have to operate with a degree of self-restraint if we want to preserve our privileged position.

I have said that the real issue of judicial autonomy is the place of courts in a democratic system. So the first thing we have to understand is what we mean or should mean or want to mean by democracy¹—it is very much a contested term. The purest form of democracy—and one with echoes in America, particularly in those western states, such as Arizona, that have referenda and in the New England town meeting—is the democracy that flourished for several hundred years in ancient Athens. It was what political scientists call direct democracy or popular democracy. It was democracy in quite a literal sense, once one allows for the fact that only a fraction of the Athenian population consisted of citizens—maybe 25,000 in a much greater population, the rest being women, slaves, and resident aliens—and only citizens participated in the democratic process. But allowing for that important qualification, Athens really was a pure democracy. There was no legislature in the sense of a body of representatives; the citizens were the legislators, just as they are in the case of our modern referenda. Any citizen who chose to attend the Athenian Assembly would be a participating legislator. And just as there were no professional legislators, there were no professional judges either—just juries. There was no legal profession; there were no lawyers; and there were no law schools. The closest Athens came to having a legal profession was in permitting litigants to hire orators, such as Demosthenes, to write the speeches they would make to the jury. Orators thus constituted a kind of nascent legal profession, but one very far from what we think of as a profession. Executive officials, with very few exceptions, were chosen by lot. That might not seem like a particularly democratic process, but actually it was critical to the Athenian concept of democracy. The Athenians believed, I think correctly, that only if officials were chosen by lot could the emergence of a ruling class be prevented.

What I have described was what was understood to *be* democracy until the eighteenth century and the creation of the United States, rather than just one form of democracy. Democracy was the political system in which the citizens made all political decisions. Representative democracy was unknown.

Athenian-style democracy was regarded as an unworkable system. It had worked for Athens for a while, but after the end of Athenian democracy in

1. The thoughts on democratic theory presented here are developed at greater length in my book *Law, Pragmatism, and Democracy* (2003).

the fourth century B.C., there were no democratic polities until the United States. And our system, as formulated in the Constitution of 1787, was not actually a democratic system. That is what we call it now, and that is what we think of it as being, but in fact it was and is a mixed system. There are democratic elements; there are also oligarchic elements; there are even monarchical elements. The framers took the existing English monarchy and adapted its structure to American conditions and values. They gave the president the monarchical prerogatives of pardoning, command of the armed forces, conduct of foreign relations, and the general executive power, that is, the power of executing laws and administering the executive branch. They gave to Congress the powers of Parliament. And they gave to the judiciary the independent authority that the English judiciary had gradually accrued. The framers did not think of the judiciary as a democratic body; it was an aristocratic body, and that was also how the framers envisaged the Senate. The judges were to be appointed by the President (subject to Senate confirmation), and the Senators were to be selected by the state legislatures. The House of Representatives, consisting of popularly elected legislators, was the only fully democratic part of the federal government because the President and Vice President, the only elected executive officials, were to be elected indirectly through the electoral college.

Of course, there have been changes—in particular, Senators are now popularly elected and the presidential electors are selected by popular vote—but the basic structure of 1787 remains, and it is a structure that is best described as a mixed system with democratic, oligarchic, and monarchical elements. When we call it “democracy” or, with greater precision, “representative democracy,” we are not misspeaking as long as we understand that these terms describe a structure of government that is remote from populist, or direct, democracy.

The best theorist of our actual existing democratic system is the economist Joseph Schumpeter, who in 1942 published a book called *Capitalism, Socialism, and Democracy* that in just a few pages explained American democracy. He defined it simply but accurately as a system in which the highest officials are forced to stand for election at relatively short intervals. That is the long and the short of it. We have the President and the governors of the states and the federal and state legislators and at the state level other officials, including in many states judges. All these have to go before the electorate periodically, and that is the democratic system. It has nothing to do with citizens’ being “self-governing” in any realistic sense. It has nothing to do with not having a governing or ruling class; we have one—they are the politicians and the higher appointed officials. It is just

that the principal rulers do have to submit to occasional vetting (and vetoing) by the general public, the electorate.

The significance of this realistic picture of the American political system is that there is nothing in Schumpeter's theory, or I think in the reality of our system, which suggests that the citizens are, or should even feel obligated to become, well informed about issues. They do not vote on issues. They vote for people. And all they have to know—all they do know, in most cases—is whether they want this person rather than that person to be their representative (whether legislative, judicial, or executive) and, after he has served a term, whether he should be kicked out. There is a certain charm to this system, remote as it is from “deliberate” democracy (of which more in a moment), because by limiting the participation of the public in the political process largely to intermittent voting, it leaves plenty of time for people to pursue their other pursuits, commercial and personal, which are just as important to them and to the society as participation in politics is.

Some people, such as the political theorist Hannah Arendt, are appalled by this conception of democracy. They have argued that people should regard civic issues as the most important thing in their lives and should spend much time debating and reflecting on those issues. Well, that certainly is not the actual American practice, or even theory, of government. In a nation of hundreds of millions of people who are committed to spending 99% of their time on their private pursuits and, therefore, will have very limited time to become involved in the political process, government is bound to be a government of officials and civil servants and judges, not government “by the people” (in Lincoln's phrase), checked only by the occasional election.

Now Schumpeter, as I said, was an economist. Although he did not articulate his democratic theory in economic terms, the theory is built on an analogy between the democratic process and the market. For, as consumers, we do not expect to know a lot about the production of the goods and services that we buy. That production is a kind of black box. We just decide whether we want this product or that product, this service or that service. And if we are not satisfied with our choice, we “vote” against that producer by ceasing to buy from him. We know almost nothing about the production of the goods and services that we consume, but we do not need to know more because, as consumers, we have a kind of electoral check on the producers, and that is sufficient. And similarly in Schumpeter's conception of our political system, the voters are not expected to know much about policy; they are expected to know only what they like and do not like. If they do not like an official, out he goes.

The states have more of a populist tinge than the federal government does. I mentioned referendums, in which voters vote on policies. The Federal Constitution does not authorize referendums, initiatives, recalls, or any other practice of direct popular democracy. Similarly, a number of the states in the United States provide for election of judges, but the Federal Constitution does not.

The election of judges violates Schumpeter's conception of democratic rule. In that conception, the people vote only on the top officials, the ones who make the really consequential decisions, so that the people have some sense of whether those are the officials they want ruling them. The people are not busy monitoring the activities of the civil servants. That is not their function. They are not to waste their time trying to master issues and to figure out whether the dog catcher is catching enough dogs.

In fact, from the Schumpeterian standpoint, the states have altogether too many elected officials, and not just judges. In the executive branch of the federal government, the only elected officials are the President and the Vice President, whereas in the states elected state officials include the attorney general, the state treasurer, and countless others—not just the governor and lieutenant governor. That is not entirely anti-Schumpeterian because he would have acknowledged that citizens have greater knowledge of state and local issues than they do of federal issues because they are closer to them. So maybe they can cast informed votes for more numerous state and local officials and even participate directly in the legislative process by voting on referenda.

But the election of judges even at the state or local level is contrary to the core of Schumpeter's insight, which is that we do not want our citizens to spend their time trying to master technical issues of governance. That is not an efficient division of labor. Most of what courts do is opaque to people who are not lawyers. It is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently. That is a decisive objection to Arizona or any other state deciding to elect judges. In states like Wisconsin and Indiana in my circuit, states that have partisan elections of state supreme court justices, the system is putting an unfair burden on the voter of trying to figure out which candidates would be good judges. American law is extremely complicated, and a further problem with judicial elections at the state level is that much of what state judges do in controversial cases is dictated by the U.S. Supreme Court; the voters do not know that, and their tendency is to blame the state judges for unpopular decisions that actually emanate from the U.S. Supreme Court.

One of the first things that happens in a revolution is that the soldiers decide that they should elect the officers. That is, of course, extremely unprofessional and never lasts. The idea of having people elect the judges is similar. It means that people whom society wants to be exercising a professional judgment, have to engage in a popularity contest instead, and the most popular are unlikely to be the most professional. A related point is that electing judges greatly narrows the field of selection. Most people do not have the skills or personality to be a campaigning candidate. Nor is there any correlation between the skills of a judge and the skills of a political candidate. So we lose a lot of people who would be excellent judges but would be total flops as political candidates. And that is certainly bad.

Still another objection to the judicial elections has to do with how they are financed. They are usually financed, at least in the Midwest, by contributions from practicing lawyers. The result is the same kind of quasi-corruption that campaign financing generally produces. The people who contribute heavily are doing so, at least in part, in order either to obtain the kind of judge who will make their practice more successful or a judge who will be inclined to favor them out of gratitude or hope for future support. The combination of the financing and selection effects of judicial elections is very bad.

In Arizona a nominating commission presents several judicial candidates to the governor for each vacancy, the governor appoints one, and that is it. This system seems to work well. I am not a student of Arizona jurisprudence, but I notice that of the five Arizona Supreme Court justices, three are former U.S. Supreme Court law clerks. That is 60%, which is a very impressive percentage, albeit of a small sample. On the U.S. Supreme Court, the corresponding percentage is only 33%. Of course, one does not want to evaluate a court just by the credentials of its members. But I would guess that some of the best candidates for the Arizona Supreme Court would not be particularly good campaigners and either would not run or if they did run would be defeated by populist or demagogic candidates.

The potential weakness of this approach—the approach illustrated by Missouri Plan states, such as Arizona, and by the appointive federal judiciary—is its dependence on the notion of the judge as a technician. If a judge is a real professional and if adjudication is a technical, analytical activity, like engineering, then all that I have said so far is right and argues compellingly against a populist conception of the judiciary. But if the judge ceases to be a technician and becomes a politician, then it becomes not only understandable, but to a considerable degree justifiable, for people to ask,

“since judges are just politicians in robes, shouldn’t there be democratic control over them?”

The area in which the conception of the judge as a technician is under greatest strain is federal constitutional law as fashioned by the U.S. Supreme Court. Whatever the Supreme Court does will percolate down into the lowest levels of the state and federal judiciaries, and then all judges when they are carrying out the dictates of the Supreme Court will be contaminated by whatever political influences are thought to be the dominant factor in the Court’s constitutional decisions.

Over the years, constitutional law has become an ever larger part of the Supreme Court’s business. Today almost 50% of the cases the Supreme Court decides are constitutional cases. Moreover, and in part explaining this very high percentage, the Supreme Court has been very aggressive as a constitutional court. Not that that is new. But the aggressiveness of the Supreme Court has been especially conspicuous since the 1960s, the heyday of the Warren Court, continuing into the 1970s with *Roe v. Wade*, and it continues today in such diverse areas as capital punishment and the power of Congress to regulate commerce or the employment practices of state and local government.

What the Court is doing in a large percentage of its constitutional cases must be regarded as political rather than as legal-technical.² It is not the Justices’ fault as much as it is the inevitable consequence of the character of U.S. constitutional law, built as it is out of the Constitution of 1787 and the Bill of Rights of 1789 and the Fourteenth Amendment of 1868. Those are the most important documents that generate constitutional cases, and they are extremely old. They reflect the culture and the politics and the moral beliefs of a small pre-industrial and pre-technological nation, a nation different in every way from what it is today. There is no way, whatever “originalists” or “textualists” may say, in which you can take the documents of 1787, 1789, and 1868 and lay them beside some contemporary issue and read off an answer and, if you are criticized as taking sides in a political controversy, respond by saying, “No, I just looked at what the Constitution says, and I looked at what the case before me is about. I just read carefully and came up with an answer to the question presented by the case and anybody who reads carefully and is trained as a lawyer would come up with the same answer.” Constitutional law is something that the Supreme Court has created, creates, and uncreates continuously.

2. See Richard A. Posner, *The Supreme Court, 2004 Term – Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005).

And because its constitutional decisions are not generated by some algorithmic method whereby everybody can be brought to agree that this is a correct or an incorrect result, evaluations of Supreme Court decisions are basically matters of do I agree or do I disagree. And whether you agree or disagree will depend on your values, your temperament, your life experiences, your political commitments, your ideology, your religious values—all sorts of influences that cannot be subjected to or dispelled by independent, objective arbitration because they are so personal. When people are arguing from different premises, there is no mechanism by which they can be brought into agreement. Often when we describe a “legal” issue as being really “political,” all we mean is that there is going to be disagreement that can be resolved only by force or voting (the peaceful force-substitute) because you are not going to be able to persuade the contestants to agree. One of the beauties of the democratic system is that people lose out in Congress not because they have been forced to agree that they are wrong, but simply because they have been out-voted. They retain their self-respect, their belief that they are right, but accept that because they are in the minority they must give way.

When judicial decisions are political in the sense just suggested, they begin to look very much like legislative decisions. When the Supreme Court splits five to four, the five in the majority will make persuasive arguments, but the four in the minority will make equally persuasive arguments—not equally persuasive to the five, but equally persuasive to thousands, or perhaps millions, of people.

Those of you who watched any of the recent confirmation hearings of the Supreme Court will remember a memorable exchange in which Judge Roberts—now, of course, Chief Justice Roberts—compared the role of a Supreme Court Justice in voting on a case to that of a baseball umpire calling balls and strikes. The umpire is neutral and he is just doing his job and there is nothing political about what he does, and the suggestion is that judges, even at the Supreme Court level, are doing the same sort of thing. The analogy in one respect was sound and in another preposterous. It is sound in the sense that the judges for the most part really are neutral between the litigants in the same way that a good umpire is neutral between the teams. And this is the sense of neutrality that is the basis of the important concept of the “rule of law,” and is symbolized by the image of justice as a blindfolded goddess. Blindfolded because she is not seeing the individual characteristics of the parties and their lawyers: their party affiliation, family, personal attractiveness, social class, ethnicity, and so forth. Our Supreme Court Justices fit that model. They do not play favorites among litigants.

But now imagine that umpires, in addition to calling balls and strikes, actually made the rules. Suppose some umpires thought that pitchers were too powerful and so they decided that instead of three strikes and you're out, six strikes and you're out. And other umpires were very protective of pitchers and thought there were too many hits, too many people running around, too much commotion, and therefore they decreed that there would be only one strike and you're out, and baseball scores would be like soccer scores. And maybe still other umpires did not like the idea of "errors." They worried that it hurt the feelings of a fielder to be assigned an error, so they decreed that errors would no longer be called.

That is essentially the situation in the Supreme Court and other high appellate courts; the higher judges, as well as doing their job of calling the balls and strikes, are also changing the rules. And those changes are political in character, especially in constitutional cases, because the changes are not dictated by the unambiguous language of authoritative documents, such as constitutional text.

There are various ways of holding in check the political dimension of constitutional law. Some of them would work very badly. For example, one might reason that the judges really are politicians and should therefore be elected. But apart from the points I made earlier against judicial elections, if the concern is that judges are too political, making them elected officials will not make them less so but more so, because it will attract into the judiciary lawyers who have political instincts and aptitudes.

Another frequently advocated change would be to limit the terms of Supreme Court Justices. It is not quite true that people do not die any more in the United States. It just seems that way. Still, there is an understandable concern that a Supreme Court Justice these days may well serve for 30 years, which used to be considered very long, perhaps soon we will have Justices serving 50 or 60 years. But I think term limits for Justices would be a bad idea, though this depends partly on how long the term was. There would be two problems. One would be that Justices who were approaching the expiration of their term would realize that this was the time to be throwing their weight around because they were not going to be able to do so much longer. They might become more political, more willful, having less time to make a real splash. Second, they would be thinking about their next job, and you really don't want judges to be thinking about their next job. You want the judicial appointment to be terminal so that judges will not think to themselves how their decisions and their judicial philosophy might affect their postjudicial career.

The English, who worried tremendously about judicial willfulness, were the first nation (I believe) to create a genuinely independent judiciary,

which they did in the early eighteenth century. They adopted three techniques for reining in the judges. One was rigid adherence to precedent, which enables a judge to say, "Look, I am not being willful. I am not making my own decisions. I am simply following what has been laid down by previous judges." Transposed to the U.S. constitutional arena, rigid adherence to precedent would enable a Supreme Court Justice to say, "I have to interpret two things. I have to interpret the document, which is old and vague, but fortunately I have as well the easier interpretive task of interpreting decisions by my predecessors, to which I am bound, and so mine is a genuinely interpretive, rather than creative or innovative or discretionary, task." Our Justices cannot say this because they can overrule previous decisions. So any time they follow a precedent, they are making a decision—to follow this precedent. And obviously that is not a decision that is itself dictated by precedent; it is a discretionary judgment. Yet because the Constitution is so vague and so difficult to amend, the Justices must reserve to themselves the power to correct their mistakes or those of their predecessors, and so they cannot adhere rigidly to precedent, as the English judges, not having a written constitution to interpret and apply, could do.

The next thing that the English had to help rein in the judges was the principle of "orality," which meant that judges had to do everything in public. They had no staff, read no briefs (there were no briefs), and did not deliberate. They knew nothing of the case when it was presented to them. Oral arguments might last a week because the judges would be sitting on the bench reading the statutes, cases, and other authorities that the lawyers were relying on and would hand up to the judges. The British thought that since the judges were doing nothing that was not visible to the public, the public could monitor their performance. The English have had to abandon this system due to workload pressures. We, of course, have never had such a system; nor could we, because of those pressures.

The third stabilizing or constraining feature of the English judiciary was that the judges were picked from a homogenous social and professional sliver of the nation. They were the senior barristers, and you were unlikely to become a barrister unless you were upper class because it was almost impossible to earn a living as a barrister until one had established oneself in practice; firms of barristers were forbidden.

When judges are as alike as peas in a pod, they think alike, and so they do not disagree very often but when they do they are arguing from shared premises and such arguments often do admit of an objective solution. Obviously, the United States does not have that kind of system. The pool from which judges are chosen is not homogeneous.

So the controls on judicial willfulness or, more politely, on judicial discretion that the English invented and long applied are unavailable to our constitutional judges. Nor do we have a career judiciary, which the Continental European countries and Japan, among others, have, where judges rise through the ranks on the basis of evaluations by their superiors. It is the docile who rise, because to be promoted they have to please their superiors; they do nothing wild, which would jeopardize their promotion. We do not have that system either.

In sum, we simply do not have a good set of checks for keeping our judges from exercising a degree of discretion that alarms people, especially those who lose out when the exercise of discretion goes against them. That is why we have, at the federal level, confirmation battles. It is one of the few occasions for a populist injection into the judicial selection process at the federal level. Its absence explains some of the pressure that Arizona is feeling to change its method of selecting judges.

The framers of the Constitution, whether consciously or not (I do not know how much they worried about the exercise of discretionary power by judges) built into the Constitution checks and balances against federal judges. This is something that we federal judges, at least, tend to forget—that the Constitution limits *every* branch of the federal government by setting every branch into a competitive relation with every other branch. So the Constitution gives the Supreme Court an appellate jurisdiction but subjects it to such exceptions and regulations as Congress may decide to impose. That Congress should have some control over the Court's jurisdiction is appropriate, although resisted by some Justices. Congress also controls the budget of the federal court, a useful control because one doesn't want a situation in which any branch of government has unlimited control over resources.

The Constitution also creates strong protections for the right to jury trial, a right that limits judges' power by dividing the judicial power between them and the citizenry. They also lack power to enforce their judgments—that is an executive branch power—and they can only decide cases that are brought to them; they cannot declare a rule of constitutional law proactively but must wait for a case to be filed.

Of course, competition can turn into conspiracy, and there is in fact a kind of conspiracy among the federal judiciary, Congress, and the building industry to build huge and expensive federal courthouses. Congress does not like to pay high salaries to federal judges. There are no political dividends from setting high salaries for judges or any other civil servants; there are from funding large building projects. But on the whole competition between the branches of the federal government is healthy, and

we judges should not claim an immunity from it. I note in this connection that Congress has not used its control of the judicial budget to harass the judiciary, even in periods in which the Supreme Court has been unpopular. The scandals of judicial funding are found in state court systems in which the judges are underpaid, the facilities dilapidated, and, in short, resources greatly inadequate. That is not true at the federal level.

I suspect that the most important “control” over judicial discretion that the framers envisaged over the federal judiciary was simply that the judges and Justices would in fact be making technical legal judgments. They would be professionals doing a professional’s job, rather than being policy makers and politicians. Alexander Hamilton, in defending the judicial article of the proposed Constitution, said that the judges’ political independence was unthreatening because judges merely exercise judgment and not will. If that were true, the courts would be less controversial. It is the discretionary, political element of adjudication, especially at the Supreme Court level and especially when the Court is deciding constitutional cases, that disturbs people by seeming to put the judges and Justices on a collision course with democracy.

Was Hamilton being disingenuous (he surely was not naïve)? Not necessarily. An obvious but neglected point is simply that the Bill of Rights and the Fourteenth Amendment (indeed all the constitutional amendments) were adopted after the original Constitution of 1787 and after the *Federalist Papers*, in which Hamilton’s argument appears. The 1787 Constitution created relatively few justiciable rights. The Bill of Rights and the Fourteenth Amendment created a host of such rights, and did so in language often of considerable vagueness—so vague that Learned Hand, for example, thought that most of the Bill of Rights should be considered nonjusticiable because they provide insufficient guidance to judges—leaving them at large to make up constitutional law pretty much out of whole cloth.

With the check on judicial discretion exerted by professionalism waning (and for the further reason that the Constitution and its amendments become ever less directive as the passage of time alters the conditions and understandings on which they were based), there is rather little to rein in the judges except the confirmation battles and the kind of public indignation surprisingly engendered by the *Kelo* decision³ (surprising because it is a restrained decision that leaves the states free to curtail their eminent domain powers).

I see nothing on the horizon that is likely to defuse the tension between the courts and the other branches. It is inherent in the fundamental nature of

3. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

the U.S. Constitution and the U.S. judiciary, both federal and state. But it would be at least slightly alleviated if the judges, especially, but not only, the Supreme Court Justices (for think of the commotion created by the Massachusetts Supreme Judicial Court when it found a right to homosexual marriage in the Massachusetts Constitution), were less bold. Think of the decision of the Ninth Circuit striking “under God” from the pledge of allegiance. With that phrase, which no one is compelled to utter, we are terribly remote from the establishment clause of the U.S. Constitution, and is it really tenable that a normal person is injured by hearing its recitation? Don’t we just invite litigation by making such tenuous “injuries” (really affronts or irritations) actionable in constitutional cases? And would it not have been prudent for the Supreme Court, if it insisted in striking down the Texas abortion statute in *Roe v. Wade*, to have upheld the Georgia statute in the companion case of *Doe v. Bolton*, a more liberal statute that might have paved the way for a compromise resolution of the endless and bitter debate, to which the Constitution can hardly be seriously thought to be addressed, over abortion rights? Is it really necessary for the Supreme Court to involve itself, in the name of the Constitution, in contentious and legally indeterminate controversies over fleeing felons, juvenile murderers, homosexual rights, the spoils system, civil servants’ tenure contracts, and displays of the Ten Commandments? And is it really necessary for the Supreme Court, by promiscuous though also tendentious citation of decisions by foreign courts, to create the impression that we allow the Supreme Court of Zimbabwe to influence the interpretation of the U.S. Constitution? In short, would we not be better served by greater judicial modesty?

I mentioned the Ninth Circuit, and since Arizona is a part of that Circuit I would like in closing to mention briefly the current movement to split the Circuit in two. This movement is regarded in some quarters as motivated by hostility to courts in general or perhaps to the famously “liberal” Ninth Circuit in particular, and thus as an example of Congress’s beating up on the courts. But the configuration of the court of appeals system is surely a legislative prerogative, and whatever the motives behind the current movement, the case for splitting the Circuit is a strong one. Or so at least it seems to me, on the basis of a statistical study that I conducted several years ago that persuaded me that the Ninth Circuit underperforms the other circuits and does so in part because of its size.⁴ I am mindful that because California has most of the Ninth Circuit judgeships, the split will still leave

4. Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711 (2000).

an oversized circuit, and this detracts from the appeal of the proposed split. But I do believe that it would be a step in the right direction and might inspire a long overdue restructuring of the regional court of appeals system.

Editor's Note: On November 9, 2004, Arizona State University College of Law invested Professor Dennis S. Karjala as the Jack E. Brown Professor of Law. Professor Karjala is also a Faculty Fellow in the Center for the Study of Law, Science, & Technology at the College of Law. In 2001, he was designated as a Willard H. Pedrick Distinguished Research Scholar. Professor Karjala received a Bachelor of Science in Engineering from Princeton University. He also received Master's and Doctoral degrees in Electrical Engineering from the University of Illinois. Professor Karjala received his Juris Doctorate from University of California's Boalt Hall School of Law in Berkeley, California.

Professor Karjala's work in computer law and copyright is internationally recognized and complemented by his facility in written and spoken Japanese. His recent research has focused on intellectual property, especially its application to digital technologies. Professor Karjala was a Fulbright Senior Research Scholar at the Max Planck Institute in Munich from 1992-93. He was a Fulbright Teaching Fellow at the University of Hokkaido in 1980 and a Japan Foundation Fellow at the University of Tokyo in 1985-86. He has recently been very active in opposing the legislative proposals to extend the term of copyright protection by twenty years.

Professor Karjala spoke on copyright derivative works at his investiture ceremony. The University of Virginia's Mary and Daniel Loughran Professor of Law, Edmund W. Kitch, provided additional analysis and commentary. Their remarks have been reformatted for presentation here.