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Civic Education, the Rule of Law, and the Judiciary: “A Republic...If You can Keep it”

Don Burnett

This story never grows old. On September 17, 1787, in Philadelphia, citizens gathered outside Independence Hall as word spread that the deliberations of the Constitutional Convention had concluded. Seeing Benjamin Franklin emerge from the building, a woman in the crowd asked him: “[W]hat have we got — a republic or a monarchy?” Without hesitation, Franklin responded, “A republic . . . if you can keep it.”¹

The framers created a distinctive republic — a *constitutional* republic — in which representative government was combined with the constraint of a written charter. In a single document, the framers addressed two historical abuses of power — the tyranny of the few over the many, and the tyranny of the many over the few. To prevent concentrations of power leading to the tyranny of the few over the many, the charter dispersed power horizontally among three separate (but connected) branches of government, and vertically between the nation and the states. To protect the few from tyranny by the many, the charter, as amended during the ratification process, set forth fundamental rights that could not be infringed or extinguished by majorities of the moment. The result — the Constitution of the United States — was, and still is, a stunning achievement.

The role of the judiciary

The framers entrusted the task of safeguarding this achievement — of maintaining the dispersion of power

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and preserving the enumeration of rights — to an independent and impartial judiciary. This was the most innovative and unique feature of the Constitution. Alexander Hamilton declared in the Federalist Papers that the independence of judges was “one of the most valuable of the modern improvements in the practice of government.... [I]n a republic it is a[n] ... excellent barrier to the encroachments and oppressions of the representative body.”² “[T]he independence of judges,” Hamilton continued, “may be an essential safeguard against the effects of occasional ill humors in the society” and against “injury of the private rights of particular classes of citizens, by unjust and partial laws.”³ Hamilton also explained that the courts would be obliged to treat as void any statutes contrary to the Constitution, thereby laying the foundation of judicial review.⁴ To the question of whether such a judiciary would become too powerful, Hamilton replied that the judges themselves would be subject to the rule of law:

[A] voluminous code of laws is one of the inconveniences necessarily connected with the ad-

vantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them⁵

Thus, judicial independence, as envisioned by Hamilton and the framers of the Constitution, was not a privilege to decide cases according to a judge’s personal preferences. It was instead a solemnly conferred duty to decide cases impartially, to avoid an “arbitrary discretion,” and to abide by applicable “rules and precedents.” Judicial independence in this sense carried an obligation, echoed in today’s codes of judicial conduct for Idaho’s federal and state judges, to act “without fear or favor. Although judges should be independent, they must comply with the law....”⁶ The independence of judges is predicated upon their impartiality and their adherence to the rule of law. These are the anchors that enable them, in the memorable words of Justice Hugo Black, to “stand against any winds that blow....”⁷

Impartiality and public perception

For more than two centuries, the constitutional imperative of an impartial, independent judiciary has endured, although popular support for it has waxed and waned. After all, the concept is not intuitively grasped by the ordinary citizen who has heard since childhood that “the majority rules.” Nor is it easily accepted by the citizen who views our courts as just another political branch of government — shaped by the same political forces and making the same political decisions that characterize the work of the other two branches.

Exploiting this perception, powerful political and economic interest groups throughout American history have sought to influence the selection of federal and state judges. Today, special interests overtly seek to populate the courts with judges vetted for their viewpoints rather than for their capabilities. The acerbic partisanship of recent federal judicial appointments, coupled with the rising tide of money flowing into the judicial elections of many states, is disturbing evidence that we have entered a waning period of support for judicial impartiality as a core value of our constitutional republic.

If this circumstance were only a phase in a long historical cycle, perhaps we could simply wait for the republican ship to right itself. But there are reasons to doubt that the problem will be self-correcting. Surveys show that many Americans today are ambivalent, even skeptical, about the concept of impartiality. In one illustrative poll, conducted by Syracuse University’s Campbell Public Affairs Institute, nearly 70% of respondents said judges should be shielded from outside pressure

and allowed to make decisions on their own independent reading of the law; but this leaves a very substantial fraction of respondents who did not agree. Nor did most respondents believe our judicial system is living up to its goal of impartiality. Almost 87% said partisanship has at least some influence on judicial decisions, and 42% said it has “a lot” of influence. One commentator opined that the Syracuse survey shows “[e]veryone wants to have a neutral and fair system of dispute resolution and everyone also wants to make sure that his or her own side prevails.”⁸

Public perceptions matter to the health of our republic. Theodore Roosevelt famously observed that the long-term durability of a republic depends upon the “average citizenship of the nation.”⁹ If today’s “average citizen” does not accept, or does not understand, the importance of an impartial judiciary, the perceived legitimacy of American courts — and the respect accorded to the courts’ judgments — will (continue to) erode.

Social science literature shows, unsurprisingly, that the greater a citizen’s knowledge of the judicial system (whether acquired through formal education or actual experience such as sitting on a jury), the more favorable is that citizen’s opinion of the courts and of the duty to decide

cases impartially.¹⁰ Most people, however, have limited experience with the courts, and the knowledge they acquire and retain from formal education is — to use report card terminology — “in need of improvement.”

In a survey cited several years ago by the U.S. House of Representatives, more teenagers could name the Three Stooges and the three judges of the “American Idol” television program, than could name the three branches of government.¹¹ The National Assessment of Educational Progress has reported that only 27% of high school seniors — many of whom are old enough to vote — have scored at the proficiency level or better on recent national civics tests.¹²

A survey conducted by Xavier University’s Center for the Study of the American Dream¹³ has revealed that more than one-third of native-born Americans would fail the basic civic literacy test taken by foreign-born persons seeking to become naturalized citizens of the United States. (97.5% of the immigrants reportedly pass the test; of course, they have studied for it!) Notably, on questions relating to the Constitution and to legal and political structures of the American constitutional republic, the native-born Americans did especially poorly:

If today’s “average citizen” does not accept, or does not understand, the importance of an impartial judiciary, the perceived legitimacy of American courts will (continue to) erode.

- 85% did not know the meaning of the “rule of law.”
- 82% could not name “two rights stated in the Declaration of Independence.”
- 77% could not identify even one power of the states under the Constitution.
- 75% could not answer correctly the question, “What does the judiciary branch do?”
- 71% were unable to identify the Constitution as the “supreme law of the land.”
- 62% could not identify “what happened at the Constitutional Convention.”

This, unfortunately, is the current knowledge base of the “average citizen” in our constitutional republic.

Civic education about the judiciary and the rule of law

As lawyers and judges, we have work to do. We cannot leave law-related civic education entirely up to the public school system. Our profession has a responsibility to advance public understanding of the rule of law. As former American Bar Association President Jerome Shestack has written, “The justice system is our trust and our ministry.... [W]e bear the brunt of public dissatisfaction with the justice system’s flaws and deficiencies...” To make that limping legal structure stride upright is the obligation of every lawyer.¹⁴

Fortunately, Idaho has already taken steps in a positive direction. Our state requires high school students to take five credits of civics instruction including government (two credits), U.S. history (two credits), and economics (one credit).¹⁵ School districts have authority to augment these requirements, and

some have done so. The mandated instruction provides a valuable foundation for future citizenship; it does not, however, address in depth the “average citizen’s” deficit in understanding the role of the judiciary and the rule of law.

To help address this deficit, the Idaho federal courts, the Idaho Supreme Court, and the University of Idaho College of Law are collaboratively planning an institute for Idaho secondary schoolteachers, to be con-

It may also provide a foundation for other law-related civic education programs developed and presented at the forthcoming Idaho Law & Justice Learning Center, a collaborative undertaking of the Idaho Supreme Court and the University of Idaho.



ducted at the United States Courthouse in Boise, during the first week of June, 2015. The institute, taught with a hands-on, workshop-style pedagogy, will utilize as instructors a number of judges, lawyers, and master teachers/facilitators from Idaho high schools and postsecondary institutions. The institute is expected to cover the meaning of the rule of law; distinctive features of the United States Constitution, including the independent and impartial judiciary; the judge’s role as guardian of the

national and state constitutions; the judge’s dual tasks of interpreting and following the law; federal and state appellate justice processes; methods for enhancing public understanding of the judiciary; and current challenges in the administration of justice. Participating schoolteachers will develop lesson plans and materials to take back to their classrooms.

If the institute is well received, it may be offered periodically in the future. It may also provide a foundation for other law-related civic education programs developed and presented at the forthcoming Idaho Law & Justice Learning Center, a collaborative undertaking of the Idaho Supreme Court and the University of Idaho. The Center, to be housed in the historic old Ada County Courthouse on the Capitol Mall in Boise, is expected to begin operation when renovation of the building is complete in the fall of 2015. The Center will put Idaho “on the map” along with other states where law-related civics education programs are offered.¹⁶

The role of the media

The most powerful “teacher” of lessons in civics, however, is mass media. News stories — whether in print or electronic form — profoundly shape public perceptions of the justice system. Journalists have long shared, at least in spirit, the judiciary’s goals of independence and impartiality. Indeed, the vocabulary used to express these goals is remarkably similar. In 1896, Adolph S. Ochs, founder of the modern *New York Times*, published a declaration of principles including a commitment “to give the news impartially, without fear or favor, regardless of party, sect, or interests involved.”¹⁷

Today, it is widely accepted that “[t]he basic responsibility of reporters covering governmental institutions is to inform the public of what officials are doing and about official policies and goals.”¹⁸ Regrettably, in reporting the work of the courts, the media generally provide sparse and selective coverage of what “officials [judges] are doing” and even more cursory coverage about “official policies and goals [i.e., court rules, sources of law, and the analytical content of judicial decisions].” The problem manifests itself in numerous ways, a few of which will be briefly mentioned here.

First, news stories typically focus on high-profile or unusual cases, leaving the ordinary administration of justice largely unreported. This may be unavoidable. Journalism is a fast-paced business, focusing on the attention-grabbing events of each day (that’s presumably why the French term “jour” is rooted in “journalism”). Accordingly, the media do not report the safe landings of airplanes, but they do report air crashes. Consumers of such news reports are well aware, however, that nearly all planes land safely, and that crashes are uncommon. Consumers of news about the courts, on the other hand, are usually not so familiar with the routine workings of justice. What they learn from the media about the justice system, in story after story, can be characterized as crash ... crash ... crash!

Second, public perception of the judiciary can be distorted if a high-profile case acquires a theme or “story line” from which the media are reluctant to retreat, even in the face of nonconforming facts. A classic example is trial in the infamous McDonald’s “hot coffee” case, *Liebeck v. McDonald’s*, widely charac-

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terized in the media as an alchemy of a frivolous claim and a runaway jury. The actual facts (third-degree burns, pelvic scarring, substantial hospital and medical costs, hundreds of prior complaints about the scalding temperature at which coffee was handed to drive-in window customers, and the judge’s reduction of the jury verdict) were under-reported;¹⁹ indeed, they were submerged in a sea of sneering commentary. The case was not without genuine controversy, though. It could have provided a civics “teaching moment” on the distinction between compensatory and punitive damages; the legal standards for making each type of award, as set forth in the court’s instructions to the jury; and the scope of a judge’s authority in modifying a jury verdict. Each of these teaching points would have illustrated the rule of law. Instead, the lesson conveyed to the public by mass media was that the civil justice system resembles a lottery.

Third, the focus of media reporting can be misplaced when, as often occurs in constitutional litigation, the court’s task is not to determine who should prevail in a controversy, but rather to determine who should decide. This task illustrates the judiciary’s role in maintaining the horizontal and vertical separation of powers as set forth in the Constitu-

tion. In the well-known “medical marijuana” case, *Gonzales v. Maich*,²⁰ the Supreme Court held, pursuant to the Commerce Clause and the Supremacy Clause of the United States Constitution, that federal laws governing marijuana as a controlled substance displaced a conflicting state statute (the California Compassionate Use Act). The Court was not tasked with deciding whether “medical marijuana” ought to be compassionately allowed. That was an issue for Congress to decide — or would have been an issue for California, and any other state, to decide if Congress had not acted. Congress, however, had chosen to act. The case thus presented a “teaching moment” in federalism and the rule of law; instead, the Supreme Court was characterized in some media reports as unsympathetic to the idea of compassionate use.²¹

Fourth, when a court is confronted with a case involving a sensitive public issue, some constituency or advocacy group will almost invariably decry the decision as a product of “judicial activism.” The assertion ignores the fact that the judiciary is the one branch of government that usually cannot “decide not to decide.” In contrast to the legislative branch which has vast leeway to decide whether and when to address a public issue, and in contrast to the

executive branch which possesses considerable discretion in promulgating and enforcing administrative regulations, the judiciary must take cases as they are presented and usually must render a public, written decision.²² A judge may wish he or she had not been handed this task, and at least one of the litigants might wish he or she had not been forced to appear and argue in court; but the case will be decided. Although activism may lurk in some judicial minds, the courts' inability to "decide not to decide" provides a more cogent reason than activism as to why courts are occasionally thrust into sensitive public issues. In such cases, it is especially important that media reports contain the rule of law identified in the judge's decision. Otherwise, the public may be forgiven for assuming that a judge reached out and took a case in order to advance a personal viewpoint.

This problem is exacerbated by "result and reaction" reporting, which describes the outcome of a case and, rather than identifying the rule of law underlying the decision, constructs a narrative of conflicting reactions by the parties or other persons interested in the case. This type of reporting is consistent with a "story model" of journalism. Unfortunately, the narrative makes it appear that the judge "favored" one litigant over another, and the rule of law is further obscured.

These issues in media coverage of the judiciary highlight the importance of law-related civic education focusing on the judiciary and the rule of law. The issues are not products of ill will by the media against the courts; as noted, the media and the courts share a common heritage of devotion to independence and impartiality. Rather, the issues

reflect structural and mission differences between these two venerable institutions, as well as time and resource constraints preventing journalists from taking time to identify and convey the rule of law in judicial decisions, and preventing judges or lawyers and court staff from assisting reporters in this constitutionally vital task.

A shared commitment

Judges, lawyers, teachers, and journalists should search for ways to collaborate on law-related civic education. The great American innovation — the independent and impartial judiciary — is being tested. Much is at stake. The "average citizen's" understanding of the rule of law, and of the judiciary's distinctive constitutional role, ultimately will determine whether our courts remain standing "against any winds that blow."

This is how we keep our republic.

Endnotes

1. 11 AM. HIST. REV. 618 (1906); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, App. A, at 85 (Max Farrand ed. 1937).
2. *The Federalist No. 78*, compiled in THE FEDERALIST PAPERS (Clinton Rossiter, ed., 1961).
3. *Id.* at 469.

4. *Id.* at 465-466.

5. *Id.* at 470.

6. Commentary to Canon 1, *Code of Conduct for United States Judges*, and the *Idaho Code of Judicial Conduct*.

7. *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (unanimous opinion authored by Justice Black).

8. Keith J. Bybee, *U.S. Public Perception of the Judiciary: Mixed Law and Politics*, JURIST ACADEMIC COMMENTARY (April 10, 2011), available online at <http://jurist.org/forum/2011/04/us-public-perception-of-the-judiciary-mixed-law-and-politics>.

9. Theodore Roosevelt, "Citizenship in a Republic," speech delivered at the Sorbonne, Paris, France, April 23, 1910, available online at <http://www.leadershipnow.com/tr-citizenship.html>.

10. See, e.g., Gregory A. Caldeira and Kevin T. McGuire, *What Americans Know about the Courts and Why It Matters*, INSTITUTIONS OF AMERICAN DEMOCRACY: THE JUDICIAL BRANCH 262 (Oxford University Press, 2005).

11. H. Res. 686, September 14, 2009 (calling for increased civic education in high schools). The resolution was adopted unanimously. The same resolution recited that only 46% of young adults passed a test of civic literacy and that persons over age 65 passed by the same percentage.

12. "Most Students Lack Civics Proficiency on NAEP," *Education Week*, May 4, 2011 (updated March 24, 2012), available online at <http://www.edweek.org/ew/articles/2011/05/04/30naep.h30.html>.

13. News release, "Civic Illiteracy: A Threat to the American Dream," Xavier University Center for the Study of the

The issues are not products of ill will by the media against the courts; as noted, the media and the courts share a common heritage of devotion to independence and impartiality.

American Dream, April 26, 2012, available online at <http://xuamericandream.blogspot.com/2012/04/civic-illiteracy-threat-to-American.html>.

14. Jerome Shestack, "President's Message: Defining Our Calling," 83 *American Bar Association Journal* 8 (September, 1997).

15. IDAPA 08.02.03 107.06; see generally, Education Commission of the States, "State Notes: High School Graduation Requirements – Citizenship," available online at <http://mb2.ecs.org/reports/Report.aspx?id=115>.

16. See "Civics Education Resource Guide," National Center for State Courts, available online at <http://ncsc.org/Education-and-Careers/civics-education/Resource-Guide.aspx>

17. *New York Times* Archives, "Without Fear or Favor," published August 19, 1996 (the 100th anniversary of Ochs' declaration of principles), available online at <http://www.nytimes.com/1996/08/19/opinion/without-fear-or-favor.html>

18. Martha Joynt Kumar and Alex Jones, *Government and the Press: Issues and Trends*, AMERICAN INSTITUTIONS OF DEMOCRACY: THE PRESS 226, 231 (Oxford

University Press, 2005).

19. See Gerald N. Rosenberg, *The Impact of Courts on American Life*, INSTITUTIONS OF DEMOCRACY: THE JUDICIAL BRANCH 280, 295-296 (Oxford University Press, 2005).

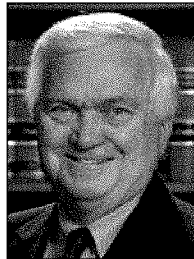
20. 545 U.S. 1 (2005).

21. E.g., "Court Snuffs Medicinal Pot," headline story on Page 1 of the *Arizona Republic*, June 7, 2005.

22. There are of course, exceptions to the duty of a court to decide every case presented. Some cases involve issues that are neither ripe nor justiciable, or that involve parties who lack standing. These exceptions are narrow, however, and they provide the judiciary nothing resembling the wide exits available to the other branches of government.

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The great American innovation
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