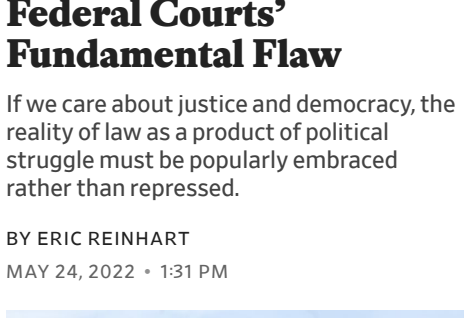
JURISPRUDENCE

The Only Way to Fix the Federal Courts' Fundamental Flaw

If we care about justice and democracy, the reality of law as a product of political struggle must be popularly embraced rather than repressed.

BY ERIC REINHART

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A view of the U.S. Supreme Court Building on May 20, 2022 in Washington, DC. Anna Moneymaker/Getty Images

The federal court system exercises enormous power over Americans' everyday lives. Its decisions in just the last two decades have determined the outcome of a presidential election, the legality of unregulated corporate influence over elections, the use of torture and executions, the mass detention of migrant children separated from their families, and a wide range of executive decisions affecting both domestic policy and international affairs. Now, the Supreme Court is preparing to overturn the constitutional right to abortion.

The furor over Justice Ruth Bader Ginsburg's death and replacement prior to the 2020 presidential election reflects the degree of influence that a single court of nine unelected judges exercises over American life and death. Now, as Justice Stephen Breyer prepares to retire and Ketanji Brown Jackson waits to assume her seat on what will remain an overwhelmingly conservative court, a troubling reality is again both incredibly obvious and intensely repressed.

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What is this public secret that American society writ large – lawmakers, lawyers, and judges most of all – collectively refuses to acknowledge or address? The entire American legal system, and the supposed democracy it claims to uphold, is predicated on a myth.

Political impartiality and personal disinterestedness are key to the official function of a judge in the American legal system. These values are the basis of legal ethics and the legal system's claims to legitimacy. Judges themselves repeatedly affirm, and in fact this affirmation is a requirement for assuming a federal judicial position, an exceptional capacity to detach the way that they interpret and judge from all political investments, partisan loyalties, public opinions, and personal concerns. The demands of justice and constitutional procedure alone are to guide judicial behavior, or so the story goes.

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The trouble is that both sophisticated analyses of historical evidence and simple real-world observation indicate that judges and their decisions are neither impartial nor apolitical. And while this has always been the case, it's a reality that has been becoming progressively more pronounced in recent decades. Indeed, it's increasingly difficult to deny that judicial decision-making is thoroughly permeated by political motivations and private personal conditions, including intersections of class, race, gender, sexuality, religion, and commitment to a variety of irrational belief systems and morality plays.

Such concerns find broad support in a wide variety of studies. For example, analyses of judicial decisions suggest systematic racial and gender bias. Republican-appointed federal judges sentence Black defendants more severely and female defendants more leniently. Male judges systematically differ in the way they write about gender compared with their female colleagues and these differences are predictive of how they decide gender rights cases. Federal judges behave more politically before presidential elections, especially those residing in states with close electoral races. A judge's political party of appointment can be predicted by the citations they choose to motivate their decisions.

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Study after study shows that a judge's identity matters and that their partisan affiliations significantly affect how they decide key issues on cases ranging from voting rights and gay rights to abortion, affirmative action, and capital punishment.

Judges, including judges appointed with life tenure who are imagined to be thereby liberated from bias, exhibit sustained bias that corresponds both with the identity of the judge and also with trivialities like whether or not a judge's hometown football team won or lost in a given week, whether a defendant shares with a judge the same first letter in their name, whether it is the litigant's birthday, etc. Furthermore, unsurprisingly within a nation explicitly founded on an economic system of chattel slavery and that remains characterized by structural racism at all levels of government and social organization, minoritized groups consistently bear the punitive brunt of these deviations from the legal fantasy of objectivity.

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All of these findings, however, cannot establish a deliberate intent behind these biased decisions. One might still say that judges are doing their best to be impartial and politically independent, and these patterns are simply reflective of unconscious dynamics, differences in philosophy or moral principles, or other factors that should not necessarily impugn the good character of judges nor the faith our legal system places in judicial impartiality and partisan independence.

But there is a more straightforward metric available that reveals what appears to be a calculated, deliberate political motivation in judicial decision-making: the timing of judges' retirements. Although retirement is another kind of judicial decision that does not appear as a written statement nor set legal precedent, the timing of a federal judge's departure from the bench and thus of their successor's nomination is a decision with long-term consequences for the legal system and American government writ large.

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It is widely suspected – often even expected in the case of Supreme Court justices – that judges decide the timing of planned retirements in relation to the political party in control of their replacement. Surprisingly, this expected political motivation in judicial retirement has not been reflected in years of studies on the topic. In surveys of both retired and acting federal judges in which they have been asked to report the degree of importance they attach to the political party in power when deciding their time of retirement, nearly all judges report that they do not consider this factor in their retirement decisions. And past studies of their actual retirement patterns had suggested they were telling the truth.

In light of a widespread belief that the federal judiciary has undergone increasing politicization in recent decades, my colleague Daniel Chen and I undertook yet another analysis of this question, but with a slight difference relative to past studies: we considered not just whether judges retired the year before or after an election, as others had done, but also whether they retired in the first quarter before or after an election.

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Using data from 1802 to 2019, we examined whether judges' retirements corresponded with electoral cycles. Between 1802-1975, we found that, relative to the regular distribution of departures from the bench over time, an additional 6 percent of all judicial exits corresponded with electoral cycles and appear to have been politically motivated. When the President comes from a different political party from that of a judge's party of appointment, federal judges are less likely to retire before a presidential election. In contrast, judges are more likely to resign after a presidential election when the president comes from the judge's party of appointment.

Additionally, our data confirm widespread suspicions that political motivation in the judiciary has increased in recent years. We see a significant uptick in politically motivated retirements since the 1970s – a historical inflection point corresponding with *Roe v. Wade* and the ascent of right-wing evangelical politics. This has continued to intensify up to our present moment. Between 1976-2019, nearly 15 percent of (40 of 273) federal judicial retirements appear in our data to have been politically motivated. Notably, especially in light of the intensifying rightward drift of the federal judiciary, Republican-affiliated judges were slightly more likely to engage in this partisan behavior. This, in turn, has affected thousands of court opinions with very real consequences for U.S. residents' lives.

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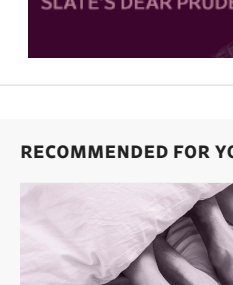
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It would be a short-sighted mistake to take these findings, which are corroborated by a parallel recent analysis, as a condemnation of individual judges for failing to be superhuman machines who implement a floating ideal of justice that is detached from real-world political demands. . But judges, along with most legal scholars who provide a major ideological bulwark to prop up an unequal and unjust legal system, should be roundly criticized for refusing to acknowledge – let alone productively confront – the myths that bolster a profoundly anti-democratic legal system. By doing so, they are not preserving the integrity of law, as they self-servingly claim to believe. They are instead abetting its quickening dissolution and facilitating its ongoing use as an instrument of anti-democratic political suppression.

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What is gained, and by whom, to insist that law is 'apolitical' and independent of identity rather than the product of an ongoing struggle between those who benefit and those who suffer from the inequalities our legal system enforces? This disavowal of law's political nature fits into a broader, well-orchestrated denigration of 'politics' – which is misleadingly conflated with partisan loyalties rather than with political ideals like equality, justice, and freedom. But genuine political struggle is not and can never be reducible to party. Politics is instead the means by which ordinary citizens in a democracy have the power to remake an unjust society and to push back against unequal distributions of rights and power. If we care about justice and democracy, the reality of law as a product of political struggle must be popularly embraced rather than repressed. To deny the political nature of law, to misleadingly criticize its 'politicization' (as if it were not already political), and to falsely claim it is or should be "beyond politics" is yet another effort to suppress mass democratic participation and demands for change.

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What is ultimately damned by the false premises that prop up the U.S. legal system is not just the legitimacy of the courts but the legitimacy of American claims to democracy itself. We should all be asking what it means for American democracy, which has never appeared so hollow to so many as it has in recent years, that it depends on an illusion of law as the impartial administration of 'apolitical' justice when, in reality, law very clearly operates as yet another arm of political power. Against this backdrop, to institute transformational changes to the Supreme Court and to overhaul the broader judiciary so as to reduce its anti-democratic power and restore this to the people is not a short-sighted transgression against some supposed sanctity of law.

It's instead the bare minimum required for realizing any semblance of democracy after confronting the reality that the only sanctity worth protecting lies not in law but in the unending political struggle to make it just.

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