Judicial Independence and the Rule of Law

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I

There is common agreement that an independent judiciary is essential for the preservation of constitutional government. Judicial independence serves to protect and enhance the rule of law in a democratic regime. A judiciary which turns a deaf ear to charges of corruption in local government, as in Mayor Daley's Chicago, contributes to the corruption of political institutions. Even more serious would be the alliance of the courts with a government which sought systematically to destroy the rights of its citizens. Thus, measures which compromise the judiciary's enforcement of the rule of law should be viewed with considerable caution.

We are told that popular election of judges endangers the independence of the judiciary because it threatens to replace judges who follow the law, even though such decisions are unpopular, with more pliant judges whose oath to uphold the Constitution and the laws of the state will be tempered by political expediency. Indeed, proponents of this view could cite as authority the usually prescient Alexis de Tocqueville, who wrote:

I am aware that a secret tendency to diminish the judicial power exists in the United States; and by most of the constitutions of the several states the government can, upon the demand of the two houses of the legislature, remove judges from their station. Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power, but the democratic republic itself.¹

Tocqueville suggests that popular election of judges will eventually weaken the independence of the judiciary and thus remove an obstacle to the formation of a tyranny by the majority. It is the judge's fidelity to the rule of law which offers this obstacle to majority tyranny. The judge is not to be swayed by personal or public opinion on a legal matter, but must uphold the law, whether it be in the form of the Constitution, a statute, or common law precedent.

In defense of her retention as Chief Justice of the California Supreme Court, Rose Bird makes a similar argument by comparing the task of a judge with that of a baseball umpire. Chief Justice Bird's analogy between judging and umpiring bears extended quotation:

The role of judges is very much like that of umpires in the game of baseball. Umpires are not players, nor are they fans. They observe the facts of play and apply the rules of the game fairly and even handedly when decisions must be made in order for play to continue. The umpires do not create the situations that call for a decision, but they cannot shirk their duty when such situations arise. However close a play may be, however vociferously both teams may argue, however partisan the crowd may be—however unpopular the umpires' role—they must follow the rules of the game.

When an umpire has called "strike three," the batter is out, no matter how loudly he, his team or his team's fans may protest. The crowd may yell that the rule should read that a batter gets

¹ A. de Tocqueville, Democracy in America 289 (Bradley ed. 1945).
four strikes. But unless and until the league decides to change the rule to "four strikes and you're out," the umpire remains duty-bound to enforce the three-strike rule.

Were the umpire to do otherwise, there would be no order left to the game. Bats would be used as clubs, rival fans would fight in the stands, rancor would take the field, and baseball would become just a memory.

To be sure, there would be some who would defend the umpire’s new four-strike rule to the death, but then again, there would be no real umpires left to defend. That is why umpires and judges alike must constantly place principle above popularity and steadfastly discharge their duties in the face of impatience.

Apart from the accuracy of this account of fan discontent with umpires, the analogy does present a good picture of the role of the judge in enforcing the rule of law. The image presented here is one of the decision-maker as "strict-constructionist." That is, the judge, like the umpire, may not make or alter the rules without the consent of the relevant governing body. To follow the argument of Chief Justice Bird, it would create chaos, and constitutional government as we know it "would become just a memory" if the judges were to follow the example of the hypothetical umpire who allowed the batter a fourth strike.

A commitment to strict construction of the rules cannot be the sole qualification for an umpire, or for a judge. Strict construction does not abrogate the need to use judgment in interpreting the rules. There are, for example, disagreements among umpires on such matters as the precise location of the strike zone or how long a pitcher must come to a stop with a runner on base before throwing to the plate. Likewise, reasonable minds will differ as to the contours of "due process" or "foreseeability of the harm." We do expect, however, that the interpretations will be principled and reasonable, rather than idiosyncratic or unreasonable.

Most important of all is the exercise of judgment in applying the rules to a particular situation. There will be considerable judgment here. We cannot expect that the umpire will not make mistakes in the exercise of judgment, but we can expect that his judgment will be fair and evenhanded. For example, we now know that the first base umpire in the sixth game of the 1985 World Series made an erroneous call. Though very unfortunate, mistakes like that can happen. It would be inexcusable, however, if the reason for the call was an underlying policy by the umpire to favor American league teams, either out of personal preference or a view that such decisions were necessary in order to equalize the competitive balance between the teams. With judges, we can expect that their application of the rules will be fair and evenhanded. As Circuit Judge Irving Kaufman has written: "The essence of judicial independence, therefore, is the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality."

It is at this point, it may be argued, that the analogy between umpiring and judging begins to break down. If an umpire regularly made bad calls or bizarre interpretations of the rules, or even attempted to change the fundamental rules of the game, this would become reasonably self-evident and removal would be justified. If a judge were to behave in a similar manner, it would be less self-evident. This is due in part to the fact that the rules of law in many areas are considerably less precise than the rules of baseball.

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3. During many years of attending baseball games, this author has never heard anyone criticize the umpire for not adopting a four-strike rule, although it is common for many fans to criticize the umpire's judgment as to whether a particular pitch is a ball or a strike.


5. It is also due in part to the fact that members of the practicing bar have usually been reluctant to criticize judges before whom they may have to appear in the future. See, e.g., G. Anastaplo, THE CONSTITUTIONALIST 317-18 (1971).
Some have suggested therefore that the review of judges' performance be narrowly restricted to matters of physical and mental competency because judging is so imprecise that any broader inquiry would necessarily be political and would thereby impinge upon the independence of the judiciary. This argument, however, creates its own problems. If judging is so imprecise that we cannot tell whether a judge knows the difference between the legal equivalents of balls and strikes, then why is it important to have an independent judiciary? The concept of an independent judiciary is premised upon fidelity to the rule of law. If the concept of the rule of law proves to be an illusion, then insistence upon an independent judiciary to enforce an illusion makes no sense.

There must be some accountability in the performance of judicial duties. Otherwise, judges would in effect be "above the Law." Chief Justice John Marshall provided the most sensible guideline when he said in *Marbury v. Madison* that the Constitution was intended "as a rule for the government of courts, as well as of the legislature." State court judges have sworn an oath to uphold the Constitution of the United States and the constitution and laws of their respective States. It is appropriate to hold them accountable for the discharge of this duty to which they have sworn.

II

Although the image of the judge as umpire is helpful in providing a framework for viewing the work of judges, it does not accurately depict the operation of the present California Supreme Court. To understand what the Court actually does, let us turn to a former colleague and mentor of Chief Justice Bird, Matthew Tobriner. In a short essay on the California Supreme Court, Justice Tobriner suggested that the influence of individual judges had been decisive in the workings of the Court:

[I]t is hard to conceive of the grand developments in these economic phases of California law without recognizing the role of Traynor. Nor can we overlook the contributions of Chief Justice Gibson and Justice Peters; whatever the truth of Pound's observation [that the "great man" interpretation of history has never played much part in the literature of the law], the opinions of these outstanding justices played an undeniably influential role in shaping the law.9

The description of these men sounds like they are the law's equivalent of Babe Ruth or Hank Aaron, not Ron Luciano. Such praise is usually reserved for players, not umpires.10

Probably the chief area where the disparity is the greatest between the image of the judge as umpire and the reality of the judge as policy-maker is in the area of constitutional law. The current state of constitutional doctrine is such that judges have considerable discretion in the adjudication of disputes involving government practices and public policy. Judges are said to be interpreters of a "living Constitution." Professor Leo Pfeffer, an influential lawyer and writer on constitutional issues, put the matter most candidly in describing the United States Supreme Court:

In short, while the Constitution provides formal methods for its amendment, the Supreme Court can be considered a de facto continuing convention expanding or rewriting the Constitution as the need arises. This,

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10. See Earl Strom: "Officiating is the only occupation in the world where the highest accolade is silence." B. Abel & M. Valenti, *Sports Quotes: The Insiders' View of the Sports World* 18 (1983). A similar observation from an American League umpire is that you can tell the umpires are doing a good job when you don't notice them.

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of course, applies not only to the Establishment and Free Exercise clauses but to all other parts of the Constitution, and explains why it has remained, with so few formal amendments, a vital and viable charter for almost two centuries.\footnote{11. L. Pfeffer, \textit{GOD, CAESAR, AND THE CONSTITUTION} 31 (1975).}

Justice Tobriner affirmed that the California Supreme Court has been engaged in much the same process:

Other doctrines like procedural due process, equal protection, and, indeed, other concepts, are being renewed, remolded, and pressed into service because of the tensions of a society suffering from economic imbalance.\footnote{12. Tobriner, \textit{supra} note 9, at 12.}

The renewing, remolding, and pressing of constitutional concepts into the service of redressing economic or social imbalances is clearly a policy-making role for the Court. The malleability of these concepts allows the Court, in many cases, to shape public policy more decisively than either the legislative or executive branches of government. It would also be fair to say that the shaping of policy by the Bird Court has been in a decidedly liberal direction.\footnote{13. See Barnett, \textit{The Supreme Court of California, 1981-1982—Foreword: The Emerging Court}, 71 Calif. L. Rev. 1134, 1141 (1983): Labels are problematic, but Chief Justice Bird has described herself as a "liberal, progressive judge." One might further describe the majority position as innovative and activist, sympathetic toward the poor, especially careful of the rights of civil plaintiffs and criminal defendants, inclined toward the expansion of individual rights against government and business enterprises, and less concerned about property and corporate rights.}

One doctrine not mentioned by Justice Tobriner, but one which the present Court uses frequently, is the doctrine of independent and adequate state grounds. Under this doctrine, the United States Supreme Court will not review decisions if the state grounds of the decisions are independent, \textit{i.e.}, based on the California Constitution, and adequate, \textit{i.e.}, not in violation of the U.S. Constitution. The California Supreme Court becomes, in effect, the final court and has the discretion to decide whether it will impose higher constitutional standards than the United States Supreme Court. This only works one way, like a ratchet, in the direction of an activist court. The state court may not impose lower standards, but has the discretion to impose higher ones.\footnote{14. For discussion of this doctrine, see Deukmejian \& Thompson, \textit{All Sail and No Anchor—Judicial Review Under the California Constitution}, 6 Hastings Const. L. Q. 975 (1979); Note, \textit{The New Federalism: Toward a Principled Interpretation of the State Constitution}, 29 Stan. L. Rev. 297 (1977).}

In the civil law area, Justice Tobriner described how the Court developed several doctrines in response to "a society that is becoming more and more integrated and collectivized at the same time that its economic imbalance becomes more acute."\footnote{15. \textit{Supra} note 9, at 5.} This accurately describes the Court as shaping and sometimes creating public policy. But by what right does the Court assume the role of policy-maker? What gives the Court the right to impose its vision of justice — social, economic, or otherwise — upon a democratic people? Tobriner attempted to deflect these questions by saying that society actually generated the changes:

The reasons for these drastic changes in the approach of the courts and the development of the law reach far deeper than the doctrinal garb in which they are clothed. The doctrines can claim no inherent predestined imperatives of growth; the stimulation for their expansion and application lies in the society which generated them.\footnote{16. \textit{Id.} at 11.}

Judges indeed have brought about changes in the law through reform of rules designed to apply to different times and circumstances. The growth of the English common law through the centuries illustrates this. When the reason for the rule ceases, the
judge should consider whether the rule itself should cease. When the reason for the rule changes, judges have traditionally exercised judgment in deciding whether to modify the rule as well.

Tobriner believes that the actions of the California Supreme Court are well within this established tradition. But we should be careful that the Court has not used this tradition to conceal a judicial revolution. In the words of Gideon Kanner:

Judicial discerning of widely shared, bedrock values subscribed to by a society, and animating developing common law with a measured perception of changes in those values is one thing—imposing an idiosyncratic inner vision of wished-for instant societal goodness on a free people is quite another.  

An illustration of the difference may be seen in Justice Thurgood Marshall’s opinions in the death penalty cases. Marshall argued, in 1972, that the death penalty was “morally unacceptable to the people of the United States at this time in their history.” Later, after legislatures in 35 states had enacted new statutes authorizing the death penalty, Marshall insisted that such actions made little difference:

[I]f the constitutionality of the death penalty turns, as I have urged, on the opinion of an informed citizenry, then even the enactment of new death statutes cannot be viewed as conclusive . . . A recent study, conducted after the enactment of the [new] statutes confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.  

The role of the Court in interpreting a “living Constitution” would be, in this view, to decide issues in the stead and on behalf of the citizenry, because the citizens themselves do not have the time, the interest, or the capacity to be fully informed on constitutional and legal issues. Actually, what the citizenry may not be fully informed about is the extent to which this vicarious theory of judging has convinced judges to read their own views into the law.

III

A review of the cases decided by the Bird Court indicates that the Court is not attempting to base reform of the law upon a careful discernment of the values subscribed to by society. The reform appears instead to be animated by an implicit hostility to them. Chief Justice Bird would no doubt respond that the Court is not obliged to follow popular opinion, particularly in constitutional cases, when enforcing the rule of law. But note the difficulty with this argument. Having unhinged the Constitution from the original intentions of its Framers and transformed it into a “living Constitution,” what else animates this living document, if it is not the deeply held values of society? And what is it that shapes the Court’s vision of an evolving common law?

The chief suspicion, of course, is that members of the Court are not enforcing the rule of law, but instead are using judicial power to transform private visions into public law. This suspicion could be refuted by showing that the decisions are principled and reasonably consistent. The governing principles could be derived from the text, or from the purposes which motivated the drafters, or, in the case of the common law, from other established principles. The principles should also be applied with some consistency from case to case.

A. The Shifting Contours of Free Speech. The inconsistency of the Court may be seen by comparing two cases dealing with free speech issues. In Robins v. Pruneyard

Shopping Center, the Court considered a challenge to the policy of a privately owned shopping mall to prohibit the circulation of political petitions on the mall premises. The United States Supreme Court had upheld such a policy in 1972 as not violative of the First Amendment. The only issue for the California Supreme Court was whether such policy violated the free speech provision of the California Constitution, which reads:

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for abuse of this right. A law may not restrain or abridge liberty of speech or press.

Note that there was no law involved in this case, only the policy of a private company to bar activities which interfered with the primary commercial purpose of the shopping center.

The Court, in an opinion by Newman (Bird, Tobriner, and Mosk concurring), applied this provision to the defendant and held that the defendant's policy violated the California Constitution. The Court expressly declined to follow the prior U.S. Supreme Court decision saying "[a] protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press." In dissent, Justice Richardson charged the majority with relegating "the private property rights of the shopping center owner to a secondary, disfavored, and subservient position vis-a-vis the 'free speech' claims of the plaintiffs." Because there was nothing in the constitutional provisions requiring this result, it is clear that the Court made a policy choice in favoring the rights of the plaintiffs over the rights of the defendant.

In Metromedia, Inc. v. City of San Diego, the Court considered the constitutionality of a city ordinance banning all off-site advertising billboards and requiring removal of existing billboards over a period of time. Coming one year after the Robins case, one would think that the Court would rely on the special protections of speech afforded by the California Constitution. But that was not the case. The Court, in an opinion by Tobriner (Bird, Mosk, and Manuel concurring), upheld the ordinance as a reasonable time, place, and manner restriction. The Court did not even cite the Robins case in its discussion. So much for the special protections afforded by the California Constitution. The Court concluded its decision with the following lines:

To hold that a city cannot prohibit off-site commercial billboards for the purpose of protecting and preserving the beauty of the environment is to succumb to a bleak materialism. We conclude with the pungent words of Ogden Nash:

"I think that I shall never see
A billboard lovely as a tree
Indeed, unless the billboards fall,
I'll never see a tree at all."

This language implies an aesthetic approach to constitutional rights. Billboards are not protected because they are "tacky." According to the Court, speech concerning commercial matters is not entitled to the special protections of the California Constitution or the protections of the First Amendment to the Federal Constitution. There is nothing in either the California Constitution or the U.S. Constitution which would require this result. In fact, the simple language of these provisions suggests that no distinction should be drawn against commercial speech. This distinction is a creation of the courts.

When the case was appealed to the United States Supreme Court, that Court struck

22. CAL. CONST. art. 1, § 2.
23. 23 Cal. 3d at 908.
25. Id. at 886.
down the ordinance as violative of the First Amendment. In other words, the California Supreme Court decision did not even extend the “minimum” protection afforded by the First Amendment. It appears reasonably clear that the California Supreme Court’s reading of the constitutional provisions turns upon who is asserting the right of free speech, not upon the right itself.

B. The Autonomous Individual and the Captive Landlord. If one were to explain the difference between Robins and Metromedia in terms of the traditional deference accorded zoning ordinances, then the Court’s decision in City of Santa Barbara v. Adamson becomes problematic. In this case, the City of Santa Barbara sought to enforce a zoning ordinance which restricted the number of unrelated individuals living together in one housing unit to five. Defendant Adamson owned a large house and sought compatible tenants with whom to share the house. At the time of the suit, there were twelve unrelated adults living in the house. The United States Supreme Court had previously considered this question and had ruled in favor of the local government’s power to zone for specified uses.

The California Supreme Court, in an opinion by Newman (Bird, Tobriner, and Mosk concurring), ruled in favor of the individuals, asserting that such result was based on the provision of the California Constitution which guarantees the right to pursue and obtain “happiness and privacy.” Curiously, language in the Metromedia case extolling the right of the government to regulate the quality of the local environment was neither cited nor discussed. This omission could not have been due to the passage of time because Adamson was decided one month after Metromedia. What appears to be the cause is the majority’s underlying sympathy for non-traditional living arrangements.

The Court’s sympathy for Ms. Adamson was not extended, however, to other landlords in California. In Nash v. City of Santa Monica, the Court (by Grodin, with Kraus, Broussard, and Reynoso concurring, and Bird, concurring in the result) upheld a local ordinance which in practice prevented a landlord from demolishing rental units, even though the units could not be operated profitably under the city’s rent control ordinance. Nash claimed that his property was being taken by the local government without just compensation, therefore, and that the ordinance constituted a form of involuntary servitude. The Court, however, applied the deferential standard of review in upholding the ordinance.

In dissent, Justice Mosk said the fundamental issue was how one stated the question before the Court:

In this case if the question is whether a municipality may exercise its police power to reasonably regulate the rental business, the answer is: generally it may do so. But if the question is whether a city may compel a landlord to remain in business against his will, and give him only the alternative of a forced sale, the answer is: not in a democratic society.

The flexibility with which the Court may apply or withhold the stricter standard of review gives the very distinct impression that the Justices will defer when they approve of the ordinance and intervene when they don’t. Perhaps Nash should have offered to set up a commune instead.

C. The Right to File Frivolous Lawsuits. The Court’s interpretation of constitutional provisions has not been, as Chief Justice Bird suggests, a simple matter of enforcing the rule of law in spite of the wishes of an impatient majority. Sometimes the Court creates new rights without support of prior precedent or coherent reasoning from estab-

27. 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).
30. Id. at 111.
lished principles. In *City of Long Beach v. Bozek*, for example, the Court held that an individual had an *absolute* right to sue a governmental entity. The defendant, Bozek, had filed suit against the City of Long Beach and two city police officers for false imprisonment, false arrest, negligent hiring, assault, and battery. A jury found in favor of the city and the officers. The City then sued Bozek and alleged that he had filed the action without probable cause and with knowledge that the allegations in his complaint were false; in short, that Bozek had filed a frivolous lawsuit and he knew it.

Traditionally, the right to sue was tempered by the tort of malicious prosecution, which made a party to a prior lawsuit liable for damages if the prior lawsuit had no credible basis in fact, law or equity, and was initiated by the party with malice. The Supreme Court, however, in an opinion by Mosk (Bird, Newman, and Broussard, concurring), said that Bozek’s right to sue the government was absolutely protected by the First Amendment, which guarantees the right of citizens to petition government for redress of grievances. The Court thus carved out a new exception for the rule prohibiting frivolous lawsuits and grounded it upon their interpretation of the First Amendment.

Justice Kaus, in dissent, stated that “the majority’s novel constitutional thesis is riddled with fundamental and fatal flaws.” First, there was no way to make a principled distinction between suits against government and private lawsuits because the precedents clearly established that private litigation was also protected by the First Amendment, which guarantees the right of citizens to petition government for redress of grievances. The Court thus carved out a new exception for the rule prohibiting frivolous lawsuits and grounded it upon their interpretation of the First Amendment.

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First, there was no way to make a principled distinction between suits against government and private lawsuits because the precedents clearly established that private litigation was also protected by the right to petition. This called into question all prohibitions against frivolous lawsuits, whether they be public or private. Moreover, even if one restricted the logic of the holding to claims against the government, the Court’s position was still untenable, as Justice Kaus pointed out. The filing of the original lawsuit was for the purpose of making a false claim against the government. We know that if one files a false income tax return, or if one submits a false claim to a governmental entity, one is subject to criminal prosecution and ultimate imprisonment. Thus, the Court’s creation of an absolute privilege to file frivolous lawsuits against government stands alone and marks the extent to which the Court has gone in protecting certain litigation from any accountability.

D. Market Share Liability. The Court’s active participation in the making of public policy was not limited to constitutional questions. In the area of tort liability, the Court developed what Justice Tobriner called “status obligations.” Unlike traditional tort analysis which sought to assess damages on account of fault or culpability, the new status obligations imposed liability on the basis of role, function or status.

The full fruition of the status concept of liability may be found in *Sindell v. Abbott Laboratories*. In this case, the plaintiff brought a class action against several defendants who manufactured a drug known as DES. The drug was manufactured for the purpose of preventing miscarriages, but allegedly had the side effects of causing cancer in the daughters exposed to the drug before birth. The plaintiff sued eleven different companies who manufactured DES, admitting that she did not know who sold the DES taken by her mother. The Court, in an opinion by Mosk (Bird, Newman, and

33. The case did not end with this decision. The city appealed to the United States Supreme Court, which granted certiorari and vacated the judgment. The case was then remanded back to the California Supreme Court for clarification whether the decision was based upon the First Amendment to the Federal Constitution or the California Constitution. The California Supreme Court then stated that the decision rested on the provisions of the California Constitution and reissued its opinion unchanged. It should be noted that the language regarding the right to petition government for redress of grievances is virtually the same in both the Federal and California Constitutions.

34. *Supra* note 9, at 5-6. This concept was more fully explored in Tobriner & Grodin, *The Individual And The Public Service Enterprise In The New Industrial State*, 55 Calif. L. Rev. 1247 (1967). Justice Tobriner’s co-author, Joseph Grodin, was appointed to the Court in 1982.

35. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).
White concurring), reversed the normal burden of proof and held that the burden was on each defendant to prove that it could not have made the drug which injured the plaintiff. Absent such proof, each defendant would be liable to the plaintiff according to its proportionate share of the market in this drug. Under this rule, there need not be a demonstration of personal culpability, other than engaging in the business. Liability is based on status, rather than upon what one has done.

This result is even more astounding when one considers the fact that the plaintiff sought, in addition to compensatory damages, punitive damages in the amount of $10 million. The imposition of punitive damages on the basis of market share makes no sense because the purpose of such damages is to punish a clearly culpable defendant for wrongful conduct. The concept of status obligations is class analysis brought to the civil arena. Rights and obligations are based upon assumptions filled with political ideology, not on the particular facts of the case.

E. The Thief as Agent. Underlying much of the development in the torts area was a policy of providing recovery whenever possible to those who had been injured. Many have charged that the Court’s analysis was influenced by its search for the “deep pocket,” i.e., the party or entity with the ability to pay for the victim’s injuries. The extent of this policy may be seen in Palma v. U.S. Industrial Fasteners.37 Palma had been injured by the negligent driving of a man who had stolen a truck from U.S. Fasteners. Palma sought to hold U.S. Fasteners liable as the owner of the vehicle. The law had long held owners of vehicles responsible for accidents occurring through the fault of one driving the vehicle with the owner’s permission. Here, of course, the driver did not have the owner’s permission. The Court, in an unanimous opinion by Grodin, said U.S. Fasteners could be held liable on the theory that they had negligently allowed the vehicle to be left unlocked in a high crime area, thus inviting theft by a person who might not operate the vehicle safely. If the “deep pocket” explanation of the Court’s actions needed any support, this is it.

F. The Court As Policy-Maker. The Court’s articulation of principles is more self-generated than can be comfortably accommodated with the image of the judge as umpire. Members of the Court have chosen to regard constitutional provisions as flexible and have read them in an uneven manner to suit their own purposes. In so doing, they preside over what is in effect a continuing constitutional convention. Outside of the area of constitutional law, the Court has had a substantial influence over basic policy decisions concerning commerce, labor, and property relationships. In a democracy, policy-makers ought to be accountable to the people.

IV

The shaping and creating of public policy by the California Supreme Court has not been limited to areas where the relevant legal principles have become flexible or are broadly defined. Consider what the Court has done when interpreting statutes enacted by the Legislature.

A. The Unruh Act. One of the basic anti-discrimination provisions in California is found in the Unruh Act, Section 51 of the Civil Code, which reads in pertinent part:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever.

Read this paragraph again until you are sure you understand it. Now answer this question: does the Unruh Act prohibit landlords from excluding tenants with minor children? If you answered no, then you lack the imagination of a California Supreme Court Justice.

36. This case was decided by a vote of 4-3, with one of the majority votes provided by Justice White, who had been assigned to the case by Chief Justice Bird.
In *Marina Point, Ltd. v. Wolfson*, the Court (by Tobriner, with Bird, Newman, Broussard and White concurring) held that the categories of sex, race, color, etc. were "illustrative rather than restrictive." This reading gives the Court the ability to add prohibited categories if it so chooses. What is important in this statute, according to the Court, is that the Legislature intended to "prohibit all arbitrary discrimination by business establishments." But is the exclusion of children arbitrary? The trial court found that the facilities at the apartment complex were "designed for use by adults, not children, and pose dangers to children who are not accompanied by adults." It would appear that the policy excluding children was not arbitrary, but based on common sense and experience. The *Marina Point* decision poses additional problems for landlords because a subsequent decision held landlords strictly liable for injuries resulting from latent defects in the premises, even though the landlord had no knowledge of the defects. Premises which are suitable for adults may be defective when tested by the special propensities of children.

Read section 51 of the Civil Code again. May the Boy’s Club, a nonprofit charitable organization, exclude girls from membership in the organization? According to the Court, it may not because it is a "business establishment" (decision by Grodin, Broussard, Reynoso, and Chesney, with Bird concurring specially). The Boy’s Club had a "functional similarity to a commercial business," with its paid staff and physical plant used for public purposes.

Justice Mosk, in dissent, wrote: "The incredible concept that a private, charitably funded recreational club for boys cannot be allowed to exist as such because it is a 'business establishment' would be an irresistible subject for ridicule and humor if it were not so serious in its impact." Justice Kaus concluded his dissenting opinion with the following observations:

For obvious reasons the majority admits that there are certain activities which even section 51 permits to be carried on in sex-segregated fashion. The real problem is the extent of this immunity from the reach of section 51. Evidently those responsible for the Club’s policy have decided that it is beneficial for boys to have some time when they do not have to adjust their behavior to the presence of girls. There is, of course, a vast professional literature on the subject. Who are we to say that it is unreasonable for the Club’s management to believe that there is a rational basis for giving boys a few hours a day when they do not have to carry their machismo on their sleeves? Whether or not we share these [views] is immaterial. What matters is that we have no right to force contrary theories on those who have devoted considerable time, energy, devotion and financial resources to the problem.

If I may suggest, the basic mistake of the majority opinion is that it views the Club’s policies as being pointed toward the exclusion of girls. With that chip on the majority’s shoulder, pejoratives come easily. If the court looked at the Club’s activities more benignly as providing a service for boys—a service tailored to their needs—it would not find it necessary to reach such a wondrous result.

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40. 30 Cal. 3d at 725.
43. Id. at 84.
44. Id. at 92.
45. Id. at 100-101.
The "chip" on the Court's shoulder is born of a political ideology which overrides judgment and fairmindedness. Unable to restrain her own enthusiasm, Chief Justice Bird, sounding much more like a cheerleader than an umpire, concurred specially with selected passages from the dissenting opinion in the court below. Bird did not want the "persuasive force" of these arguments to be lost, particularly the reference to the Ku Klux Klan and neo-Nazis and the argument that any other reading of the statute would "insulate a select few from the 20th century."46

B. The Meaning of "Vested." Section 227.3 of the Labor Code provides, in part, that whenever an employee is discharged "without having taken off his vested vacation time, all vested vacation shall be paid him as wages at his final rate in accordance with . . . [the] employer policy respecting eligibility or time served. . . ." In Suastez v. Plastic Dress-Up Co.,47 the employer's stated policy was that an employee was not entitled to vacation benefits until he or she had been employed for one year. The Court, nevertheless, in a unanimous opinion by Chief Justice Bird, held that vacation benefits began to vest upon commencement of employment, not upon the anniversary date of employment.

C. The Proposition 13 Cases. In the prior three cases, the Court took great pains to point out the underlying purposes of the respective statutes and reminded us each time that the provision should be read in light of these underlying purposes so as to give full effect to the legislative intent. The Court, however, does not always follow this advice. Similar to the readings of the Constitution, it depends upon the statute whether the Court chooses to give an expansive or narrow reading.

Two cases arising in the aftermath of Proposition 13 illustrate this point. Section 4 of Proposition 13 provided:

Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.48

The purpose of this provision was to place restrictions on the imposition of new taxes, such that the property tax relief resulting from sections 1 and 2 of Proposition 13 could not be evaded by local government, except by approval of a two-thirds majority. In Los Angeles County Transp. Com'n v. Richmond,49 the issue was whether the Los Angeles County Transportation Commission was a special district and thus subject to the two-thirds majority requirement. The Court, in an opinion by Mosk (Bird and Broussard concurring, and Kaus and Newman concurring separately), said that it was not, relying primarily on a newly fashioned canon of construction:

In view of the fundamentally undemocratic nature of the requirement for an extraordinary majority . . . the language of section 4 must be strictly construed and ambiguities resolved in favor of permitting voters of cities, counties and 'special districts' to enact 'special taxes' by a majority rather than a two-thirds vote.50

As pointed out in Justice Richardson's dissent, the majority cited no authority for such a rule of strict construction. Indeed, one would have to look a long time to find canons of strict construction in the opinions of the California Supreme Court.

The Court also found another ambiguity in the term "special taxes." In City and County of San Francisco v. Farrell,51 the Court (by Mosk, with Bird, Newman,  

46. Id. at 92.
47. 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982).
49. 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982).
50. Id. at 205.
51. 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982).
Broussard and Reynoso concurring), held that the City's payroll and gross receipts tax was not a special tax, requiring two-thirds approval. A special tax, according to the Court, is a tax revenue designated for a special purpose. New taxes which are not levied for a specific purpose, but simply to increase the general revenues of the government, are not special taxes within the meaning of the statute. This reading is clearly antithetical to the purpose of section 4. As argued by Justice Richardson in dissent:

In effect, petitioner City is allowed to replace the general revenues concededly lost to it by article XIII A's limitation on real property taxes through the simple device of a new tax, adopted by a bare majority rather than by a "two-thirds" vote of the electorate. The purpose of the new tax remains identical with that of the old—namely, to increase the general revenue of the City. Thus, the constitutional limitations of section 4 are easily circumvented except in that extremely narrow category of taxes which the majority defines as 'special.' With due respect to my colleagues, it seems to me that the majority thereby rejects the clearly expressed intent of the people.52

The Court's use of a canon of strict construction against the intended meaning of the statute, instead of reading the statute in light of its underlying purpose, is probably best explained by what appears to be the Court's hostile attitude to the tax limitation initiative.

D. The Court as Interpreter. One would think that statutory interpretation would present the clearest case for Chief Justice Bird's model of the judge as disinterested umpire. The Court is called upon to apply the rule of law generated by another governing body. Yet even here we see that the readings of provisions vary in accordance with the underlying politics. We would like to think that judges, in interpreting and applying statutory provisions, would, like the umpire, "call them as they see them."

However, when reading the opinions of the Court, one is reminded of the line of Umpire Bill Klem: "It ain't nothin' till I call it."53

V

Judicial independence is intended to give judges the distance and perspective necessary to render an impartial judgment in a dispute. Judicial independence is severely compromized if the judges themselves become committed participants along with the litigants. We expect that the judges will be impartial and fair-minded.

Consider the problem of reapportionment of legislative districts. This has always been a difficult issue, in large part because the legislators have a direct interest in the drawing of district lines. Reapportionment after the 1980 census was certainly no exception. The Democrat-controlled Legislature passed a redistricting plan [Plan I] in 1981. Referendum petitions challenging this plan were circulated by the Republicans and the requisite number of signatures were obtained. This had the effect, under the California Constitution, of staying the implementation of the new plan until it could be approved by the electorate. If the plan was not effective until approval by the voters at the next election, then which districts would be used at that same election, the new ones or the old ones? The Court considered this problem in Assembly v. Deukmejian,54 and held, in an opinion by Chief Justice Bird [Newman, Broussard and Tamura (sitting by appointment) concurring], that the new districts should be used. This was directly contrary to the reapportionment case decided only ten years earlier, holding that the old districts should be used until a new plan was approved.55

53. Supra note 10 at 201. I am indebted to colleague John Hagemann for this quote and other insightful comments on the analogy between umpiring and judging.

54. 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297 (1982). This was another 4-3 decision, with one of the majority votes provided by Justice Tamura, assigned to the case by the Chief Justice.

The election was then conducted and the voters rejected the Legislature's redistricting plan. The legislators (elected under the now rejected plan) then came up with another redistricting package [Plan II], bearing a suspicious resemblance to the rejected plan. This time they denominated it an "urgency" measure and thereby prevented signatures for another referendum from being gathered in time. The Republicans then sought by way of an initiative to reapportion the State Legislature. In Legislature v. Deukmejian,56 the Court held that redistricting may occur only once within the ten year period following a Federal census and thus the initiative could not be held. This does not explain why the Court allowed the Legislature to adopt a second plan after the first had been rejected. The Court's impartiality here seems highly questionable.

Justice Richardson, the sole dissenter, charged the Court with removing a valuable check on abuse of power:

Using the referendum in 1982, the people spoke to the Legislature very loudly in rejecting Plan I. In 1983 the people might have shouted if they had been given the opportunity to vote on Plan II. In a democratic society so heavily dependent upon a system of interlocking governmental checks and balances, surely we cannot sacrifice the salutary protection of the initiative.

If the people are denied any right to approve or disapprove a blatantly gerrymandered reapportionment plan, then there is absolutely no check on the Legislature's abuse of power. The concept of a Legislature perpetuating its tenure by devising a reapportionment plan wholly immune from review or revision by the people themselves is dangerous and repugnant to constitutional principles.57

As a result of the 1984 elections, the Democrats held two-thirds of the seats in the State Legislature despite the fact that less than half the votes were cast for Democrats.58 We see once again the wisdom of the principle that one should not be a judge in one's own case. Judicial independence also is surely compromised when the Court becomes a committed participant in a scheme to perpetuate the political power of a political party. The neutrality expected of judges requires an evenhandedness not displayed by the Court in these cases.

VI

Tocqueville's fear that pressures on the judiciary would remove an obstacle to majority tyranny is still an important concern today. Tocqueville's apprehension, however, was primarily a concern for the rule of law. The reason for judicial independence, then and now, is not to establish judicial independence as an end in itself, but to serve as a means for the enforcement of the rule of law. Ultimately, it is the rule of law, not the judges, which provides the foundation of personal freedom and responsible government.

Chief Justice Bird's analogy between umpiring and judging was intended as a defense of what she and her colleagues are required to do as Justices, sworn to uphold the law. It should be evident that this account is quite misleading and is either deliberately so or displays a reckless disregard for the truth. Instead of enforcing the rule of law, members of the Court have used judicial power for their own political and private purposes.

While the umpiring model is hardly descriptive of the operations of the present Court, it does, however, provide a sensible basis upon which to measure how a judge enforces the rule of law. An umpire who attempts to alter the fundamental rules of the game, who harbors bizarre interpretations of the rules, or whose judgment is consistently poor, may properly be censured or removed. In judging the judges, it may be asked whether the judges are creating or altering the fundamental rules without the consent of the governed, whether their interpretations of the rules are principled

57. Id. at 690.
and reasonable, and whether they are applying the rules fairly and evenhandedly. A judiciary that has declared independence from the rule of law is a threat to constitutional government.

Can the people discern fairly and accurately whether an individual judge has discharged his or her obligations? One answer has been provided by Chief Justice Bird who stated: "I believe in the good sense and fairness of the voters of California." Let us hope that she is right. □

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QUOTE-OF-THE-MONTH

If a judge pronounce a judgment and afterward reverse it, he shall pay twelvefold the damages which were awarded, and they shall expel him from his seat of judgment, and he shall not return.

Code of Hammurabi, 2250 b.c.

When a judge departs from the letter of the law he becomes a lawbreaker.

Francis Bacon,

De Augmentis scientiarum, 1623

Judges ought to remember that their office is jus dicere, and not jus dare—to interpret law, and not to make or give law.

Francis Bacon, Essays, LVI, 1625