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Politics on the Bench—Iowa and Beyond

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In her opinion essay in *The National Law Journal* about special-interest spending in judicial elections, former Iowa Chief Justice Marsha Ternus urged "keeping politics out of the courtroom." ("Politics on the Bench—A Judge's View of Partisanship at Play," Jan. 20.) Her concern is understandable: She and two colleagues were ousted in a 2010 retention election after the court in 2009 ruled unanimously that an Iowa statute denying civil marriage to same-sex couples violated equal protection under the Iowa Constitution. But there's more politics here than meets the eye. In fact, it's the politics Ternus didn't mention that seems to have colored her idealized view of judging, shielding her from a deeper account of why our courts have become so politicized.

Far from the angels being all on one side, it turns out that Iowa's "nonpartisan" judicial screening commission and gubernatorial appointment process is deeply political. As a July 2010 report by *The Iowa Republican* documents, not only were all seven members of the Iowa Supreme Court, save Ternus, nominated by Democratic governors, from lists presented by the commission, but all were or had been Democrats or had made significant contributions to the party or its candidates. All seven, in short, came from one party.

Ternus does not see *this* process as politicizing the court, even though the 2010 report documents how the "nonpartisan" screening commission itself grew so one-sided. Instead, she contrasts "politicized courts"—where judges, influenced from outside, "approach decisions along philosophical or ideological lines"—with "impartial courts"—where "judges holding diverse perspectives pursue a collegial approach to decision-making," effectively holding each other "accountable to the rule of law." In these, "a collective wisdom is brought to bear when judges listen to, and find value in, their colleagues' different perspectives."

A worthy aspiration, perhaps, and doubtless more likely when all your colleagues are of the same party. But judges often disagree, often simply on what the law is, especially when they hold different philosophical or ideological views. And those differences can easily preclude any "collective wisdom," much less "finding value in a colleague's different perspective." None of that, however, makes judges "politicians in robes."

In fact, the judicial "consensus" Ternus is advocating is hardly possible today because we're deeply divided along philosophical or ideological lines. Yet for the better part of our history we largely *did* agree, at least at a basic level. Our "philosophical view," rooted in the Declaration of Independence and the Constitution, was one of individual liberty through limited government. Most of life was meant to be, and was, lived apart from government.

Progressivism and Our Politicized Courts

That all changed with Progressivism, of course, with the idea that law is a vehicle not mainly for adjudicating private disputes but for pursuing grand public visions. After the slow expansion of state police power during the early decades of the twentieth century, the U.S. Supreme Court paved the way for this view following President Franklin Roosevelt's infamous court-packing threat. The demise of the doctrine of enumerated powers in 1937, which unleashed the modern redistributive and regulatory state; the bifurcation of the Bill of Rights and of judicial review a year later in *Carolene Products*' (in)famous footnote four, which enabled judges to label some rights "fundamental" and others of lesser value; and the rise thereafter of the vast administrative state all amounted to an explosion of "political law"—the law of "policy," not principle, and hence of deep political disagreement. Thus, courts today are asked to decide matters that once were left to private determination—under private law, if necessary—and often to make essentially value-laden political decisions that parade then as "law."

Take a simple current example. When the Commerce Clause was read as a power aimed mainly at ensuring unimpeded interstate commerce, as in *Gibbons v. Ogden*, not remotely was it thought to authorize anything like the massive redistributive scheme called Obamacare. Thus, if an organization wanted to offer its staff health insurance excluding contraceptive coverage it would simply transact for that in the marketplace. Today, however, the Court is asked to decide whether the administration, pursuant to a statute, can dictate that choice—a value-laden matter that would never be before the Court had it not so expanded Congress's commerce power.

The case at hand is somewhat different, of course, since it turns not only on the Iowa Constitution but, ultimately, on the Fourteenth Amendment and hence pre-dates Progressivism. But even here, had we done a better job explaining and enforcing that amendment's principles—their roots in the Declaration, as Lincoln saw—we might have been in a better position today to explain how they apply not only to New Orleans butchers, who in the *Slaughterhouse Cases* sought simply to be treated like other butchers; or to the black passengers in *Plessy* who sought an end to segregated railway cars; or to the bakers in *Lochner* who wanted only to negotiate their own terms of employment; and even to interracial and same-sex couples seeking simply to be left alone to marry, as in *Loving* and *Perry*—all of which would have meant far less government intrusion in our lives. And at bottom, isn't that what many of those who unseated Justice Ternus want?

But locked into a program for ubiquitous government, Progressives like Ternus are hard pressed to explain why government should not, through the democratic process, be setting the terms of marriage as well. They'd have been better served by the broad leave-us-alone agenda that resonates with so many of their critics.