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Don Willett's Lone Star Legal Show

The Texas Supreme Court justice is witty and approachable, and he's huge on Twitter. He's also one of the most influential conservative jurists in the country right now.

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In the past few decades, the number of American jobs requiring a state license has exploded. Roughly one out of every four workers must seek a license to work. Now some institutions are starting to push back. Perhaps the most prominent -- or at least most fervent -- of these is the Texas Supreme Court. In 2015, the court struck down the state's licensing requirement for eyebrow threaders (cosmetologists who remove unwanted facial hair using a thread), finding it unreasonable.

One of the justices, Don Willett, who has served on the court since 2005, went much further. The state's regulatory requirements were not just extreme, he concluded, but "preposterous." To pursue the low-paying job, prospective eyebrow threaders had to pay thousands of dollars in fees and were required to complete more than five times as many hours of initial training as emergency medical technicians. "If these rules are not arbitrary," Willett wrote in a concurring opinion, "then the definition of 'arbitrary' is itself arbitrary."

Willett's concurrence in the case, Patel v. Texas Department of Licensing and Regulation, has been hailed as one of the most important conservative opinions of recent years. It was expansive enough to trigger talk about reviving a judicial approach to regulation that has lain dormant for decades. It's one of the main reasons Willett's name appeared on President Trump's short list for the U.S. Supreme Court.

Willett is pretty blunt about his overall intent. He's a champion of individual rights, claiming a central role for the judiciary in protecting those rights against state encroachment. "Liberty is not provided by government," he wrote in Patel. "Liberty pre-exists government." In that context, Willett wasn't talking about speech or privacy rights. He was referring to economic liberty: the right to earn a living by unfettered free choice in a capitalist economy.

For someone in the important but relatively obscure position of state supreme court justice, the 51-year-old Willett has engendered an unlikely cult of personality. He's hailed by conservative columnists and think tanks and has been profiled in *The Wall Street Journal* as one of the right's leading legal thinkers. It's hard to find anyone, even among his liberal critics, who won't acknowledge Willett's combination of legal acumen and down-home style.

During his 12 years on the Texas bench, Willett has pushed libertarian ideas in language that is readily accessible to people who lack legal training. He appears frequently at law schools and other public venues. He's all over social media, telling jokes and doing everything he can to demystify the work of his court. "Among law students, at least those who follow judicial politics, he's a rock star," says Ilya Shapiro, a senior fellow at the libertarian-leaning Cato Institute. "It's in part because of Twitter and in part because of his personality."

Willett's Twitter feed is often patriotic and Texas proud, but it's primarily nonpartisan, filled with puns, encomiums to bacon and pictures of his kids slopping in the mud. He has roughly 90,000 followers. By comparison, Nathan Hecht, the chief justice of the Texas Supreme Court, has just over 2,000. "There's not a very saturated market for judges who enjoy interacting with people and are good at it," says Chris Bonneau, a political scientist who studies courts at the University of Pittsburgh. "Willett rejects these old-school norms about how judges should only speak from the bench, and I think rightly so."

Willett may be an amiable self-promoter, but there are substantive reasons why his Patel opinion made such a big splash. He went out of his way to question one of the most time-honored ideas in American jurisprudence: judicial restraint. Conservative judges have at least paid lip service in recent years to the notion of restraint, for fear of being accused of legislating from the bench. Willett doesn't do that. In his Patel opinion, he wrote that he opposes judicial activism, but argued that "judicial passivism" is also "corrosive."

"We see a guy who's willing to say that just as courts shouldn't exceed the rule of law, neither should anyone else," says Michael Quinn Sullivan, president of Empower Texans, a conservative nonprofit that's influential in state politics. "We've seen a lot of judges, all the way up the judicial food chain, give a lot of deference to agencies and to legislative bodies for taking actions that are just as unconstitutional as an activist judge creating law out of thin air."

Willett devotes a fair amount of space in his Patel opinion to describing how courts have been far more timid about calling out lawmakers when it comes to overreaching on economic issues than in other areas such as privacy or political speech. In his view, judges must intervene whenever the government tramples on an individual's right to pursue an economic path of his or her choice. "I believe that judicial passivity is incompatible with individual liberty and limited government," he wrote in Patel.

Willett had made similar arguments before. But Patel is where he took up a very old legal dare. Back in 1905, the U.S. Supreme Court ruled in Lochner v. New York that the state could not limit the working hours of people employed by a bakery. That case became the basis for crucial conservative judicial opinions invalidating economic regulation, including workplace protections. During the New Deal period of the 1930s, however, the court changed its approach. Lochner was never formally overturned, but the ideas underpinning the decision became judicial kryptonite. A couple of years back, *The New Republic* ranked Lochner among the court's worst decisions, arguing that a revival of the ideas in Lochner would undermine the government's ability to regulate workplace safety, employment discrimination and minimum-wage rates. That's not an uncommon reading among liberals.

Even Robert Bork, the late conservative judicial icon, called Lochner "the symbol, indeed the quintessence, of judicial usurpation of power." Chief Justice John Roberts has cited Lochner numerous times, describing it as a "discredited decision." Since its repudiation, the courts have only rarely tossed out laws governing economic activity. "There's been this sense in constitutional law, at least for the last 70 to 80 years, that government has full power over regulation of economic matters," says Josh Blackman, a professor at the South Texas College of Law in Houston.

Willett is having none of it. The "Lochner bogeyman," in his view, has for too long stopped judges from doing their jobs, which include questioning the motivations and rationales of lawmakers when they impose new economic rules. In the Patel case, he wrote that some licensure requirements are justified by health and safety concerns, but eyebrow plucking is clearly not one of them. "This case concerns far more than whether Ashish Patel can pluck unwanted hair with a strand of thread," he wrote. "This case is fundamentally about the American dream and the unalienable human right to pursue happiness without curtsying to government on bended knee."

A few conservative legal scholars had previously promoted the idea that it was time to revive Lochner and get judges back in the game of challenging a broader range of economic regulation. The fact that Willett did so in a state Supreme Court opinion, joined by two of his colleagues, had far greater resonance. "Law professors, we can write whatever we want, and it serves no purpose," Blackman says. "When judges do it, it makes a big difference."

Willett's opinion in Patel has yet to make as big a difference as his allies had hoped, or his critics had feared. Courts in Texas are not throwing out economic regulations wholesale. Judges elsewhere haven't adopted Willett's rationale as a means of quashing labor protections or commerce-related laws such as the Affordable Care Act.

But that could still happen, especially if Willett brings his ideas with him to the federal bench. His willingness to wade into one of the most contentious areas of constitutional law has made a big impression, at least among those touting him for a federal post. The fact that recent Supreme Court picks have danced around issues such as abortion and campaign finance on grounds of "restraint" has left some conservatives looking to promote judges whose positions are more clear. Too many recent nominees, they complain, ended up drifting to the left after they reached the bench, in deference to progressive acts of Congress or state legislatures. Willett has offered abundant evidence that that wouldn't happen in his case. "This particular opinion wasn't just a break from the ordinary," says David Bernstein, a pro-Lochner professor at George Mason University law school. "To write a scholarly opinion taking a controversial stand shows that he's not a shrinking violet, that he'll stand up for what he believes."

The current justices on the U.S. Supreme Court all went to Harvard or Yale. They are mainly products of an elite establishment, whether of the left or right. Willett comes from different stock. He was adopted and raised in a double-wide trailer in the small town of Talty, in northeast Texas, by a single mom who scratched together a living waiting tables. His adopted father died when he was 6, leaving no will but providing Willett with a nascent sense of "the law's power to impact lives." Willett started working in his teens as a drummer and a professional bull rider. "I

really wanted to be a calf roper," he says, "but there's no way we could afford a horse with cow-handling know-how."

Willett continued to work through college, graduating from Baylor University with a triple major in economics, finance and public administration. He then went to law school at Duke, where he earned a master's degree on the side. Willett fell into political life almost immediately, working for George W. Bush both as governor and president. In 2003, he returned to Austin to work with Greg Abbott, who was then the state's attorney general and is now governor.

Willett's hardscrabble beginnings may be one of the reasons for his thriftiness. His doctor ordered him to move his wallet from his back pocket because it was so overstuffed with coupons and get-one-free cards that it was throwing out his back. Willett is in the habit of spending a couple of days a week writing and working by himself at his neighborhood Chick-fil-A. But when a new Chick-fil-A opens, he'll show up there, sometimes camping out overnight because the first 100 people in line at a new location receive a year's worth of free food. Willett wears his suits and bow ties until they turn to shiny threads.

All of Willett's former clerks got together this spring to write a letter to Trump urging him to appoint the judge to a spot on the Fifth U.S. Circuit Court of Appeals, which sits in New Orleans but covers Texas. But despite all his connections, Willett may not get one of the two currently empty seats on the court. Abbott, U.S. Sen. John Cornyn and the White House counsel's office all seem to have competing candidates in mind. "He may have a better shot at the Supreme Court than at the lower court, as strange as it sounds," says Blackman.

Willett is taking the possibility of a slight in stride, gearing up to run for another six-year term on the Texas Supreme Court next year. By the time of his most recent run in 2012, he recalls, social media was ubiquitous. He'd tweeted only occasionally up until then, but found it to be an indispensable way to get his name in front of voters. Not many citizens can name the supreme court justices of their state, but in Texas justices still have to go after millions of votes. Willett understands the iron law of political life: "To do my job, I must keep my job."

Given the size of his following and the amount of engagement he receives, other politicians now ask Willett for tips on tweeting. His Twitter persona is that of an easily bemused individual. The jokes aren't hilarious, but in the often-scabrous context of Twitter, they can come across as refreshing. He recently posted a photo of a cluster of red, white and blue pickup trucks, captioning them as the "greatest pick-up line of all time." It's all well and carefully calibrated to appeal to a broad range of people, without putting off partisans. "He's one of a handful of judges who is active on Twitter," says Michael Nelson, a political scientist at Penn State. "It's positive about his work -- how he called the person who got the highest score on the Texas bar exam, things that have happened with his clerks. It's a great image for someone who's trying to project trustworthiness and fairness."

Willett is determined to write in his own voice, whether it is on Twitter or in formal opinions. Like Supreme Court justices John Roberts and Elena Kagan, as well as the late Antonin Scalia, Willett also tries to write so that laymen can follow his ideas. Most state supreme court opinions go unread; Willett's get shared on Twitter and Facebook. Coming up with a punchy phrase -- and not shying away from occasional pop culture shout-outs -- increases his chances to be quoted

directly in news accounts, which gets his name in the papers. “Justice Willett has really typified the rejection of jargon and language that sounds like it came from Mt. Olympus rather than earth,” says Evan Young, a former Scalia clerk who practices in Texas.

His plain-language approach is credited with helping him win the support of his peers. Even though the Texas Supreme Court is made up of nine Republicans, it produces at least as many 5-4 decisions as the U.S. Supreme Court. Willett nonetheless managed last year to convince all his colleagues to sign off on his opinion finding, for the first time in decades, that the state’s school funding system was constitutional.

But Willett still has his critics, who say he puts his thumb on the scale when it comes to religious liberty. Part of his job in the Bush administration was reaching out to religious groups. In a case last year that involved a school district’s ban on cheerleaders including religious messages on banners, Willett wrote a short concurring opinion that seemed to suggest a strategy for the cheerleaders to get the messages approved. He has come down against same-sex marriage rights, notably in a case decided in June that says the same-sex spouses of city workers in Houston have no inherent right to benefits. “Basically, I think Willett hides behind a bow tie and an aw-shucks demeanor,” says Houston attorney Jason Truitt. “His rulings show him to be on the wrong side of history on the few civil rights issues that come before him.”

After Willett emerged as a possible U.S. Supreme Court pick earlier this year, the liberal-leaning Center for American Progress said his “would be a dangerous appointment to the federal bench.” But for conservatives, Willett is a dream come true -- a legal scholar with a modern-day log cabin background who has kept the common touch. He’s willing to press their agenda from the bench, even if it means breaking with decades of precedent to do so. “There’s something distinctive about him,” says Shapiro, the Cato scholar. “His presentation skills make him stand out among perhaps equally qualified legal minds.”