

1992

## Balancing the Federal Judiciary

Anne Bryant

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Courts Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Anne Bryant, *Balancing the Federal Judiciary*, 26 U. Rich. L. Rev. 485 (1992).

Available at: <http://scholarship.richmond.edu/lawreview/vol26/iss3/12>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

## BALANCING THE FEDERAL JUDICIARY

Anne Bryant\*

*Since the American Association of University Women first published the associational brief "Balancing the Federal Judiciary" in 1988, two new Associate Justices (David Souter and Clarence Thomas) have joined the Supreme Court. The Court has continued to chip away at the rights of women and minorities, with damaging decisions in areas such as reproductive rights (e.g., Webster v. Reproductive Health Services<sup>1</sup>) and employment discrimination (e.g., Wards Cove Packing Company v. Atonio<sup>2</sup>). With a conservative majority in place on the Supreme Court until well into the next century and Reagan and Bush appointees comprising more than half of the nation's federal judges, the courts can no longer be counted upon to act as the guardians of individual liberties.*

Anne Bryant

### *Only White Males Need Apply*

Between 1981 and early 1988, President Ronald Reagan made 334 appointments to the federal bench. Those appointees were overwhelmingly white, male, and determined to interpret very narrowly the Constitution's guarantees of individual liberties.<sup>3</sup> The Reagan administration's impact on the courts was particularly great because of the extraordinary number of vacancies it filled. Reagan appointed more federal judges than any other president and his appointees make up forty-five percent of the total currently serving.<sup>4</sup> According to James McClellan, Director of the Center for Judicial Studies, "There is no question that this is the most lasting and significant achievement of the Reagan adminis-

---

\* Executive Director, American Association of University Women.

1. 492 U.S. 490 (1989).

2. 490 U.S. 642 (1989).

3. Stephen Wermiel, *Tilting Bench: Reagan Choices Alter the Makeup and Views of the Federal Courts*, WALL ST. J., Feb. 1, 1988, at 1.

4. Assessment as of June, 1988, when this article was distributed by the AAUW.

tration. The impact of these appointments will spill over to the next century."<sup>5</sup>

Throughout the past decade, the American Association of University Women (AAUW) members have worked to preserve the integrity of the courts by calling for an ideologically balanced United States Supreme Court and by urging the appointment of more women and minorities to the federal judiciary. AAUW joins legal analysts and civil rights activists in focusing attention on the damaging effects of the Reagan administration's judicial appointments, and in educating the public about the need for action to restore a balanced federal judiciary.

### *Unequal Protection*

The importance of the federal courts in preserving individual rights and effecting social change has been recognized since 1954, when the United States Supreme Court's ruling in *Brown v. Board of Education*<sup>6</sup> outlawed segregated public schools. For twenty-five years after *Brown*, the federal courts were a major force in the achievement of legal rights and expanded opportunities for women and minorities.

In the absence of an Equal Rights Amendment (ERA) to the United States Constitution, the individual liberties of American women in particular are protected — or denied — through Congressional action and judicial interpretation of the law. During the past two decades, a number of federal court decisions have established or strengthened legal protections of women's rights. Those landmark rulings include:<sup>7</sup>

*Phillips v. Martin Marietta Corp.*<sup>8</sup> The practice of refusing to hire women, but not men, who have preschool-age children is unconstitutional.

---

5. Wermiel, *supra* note 3, at 1.

6. 347 U.S. 483 (1954).

7. Further information about cases cited in this section can be found in LESLIE FRIEDMAN GOLDSTEIN, *THE CONSTITUTIONAL RIGHTS OF WOMEN: CASES IN LAW AND SOCIAL CHANGE* 601-12.

8. 400 U.S. 542 (1971).

*Reed v. Reed*.<sup>9</sup> Giving preference to men over women who are equally close relatives of the deceased as executors of wills is unconstitutional.

*Roe v. Wade*.<sup>10</sup> Abortion is legal during the first two trimesters of pregnancy, states may regulate second trimester abortions only to protect the woman's health, and third trimester abortions are legal only when the woman's life is in danger.

*Frontiero v. Richardson*.<sup>11</sup> It is unconstitutional for the U.S. Armed Forces to require husbands, but not wives, of officers to prove "actual dependency" to qualify for spousal benefits.

*Cleveland Board of Education v. LaFleur*.<sup>12</sup> A board of education cannot require teachers to leave their jobs when they become pregnant.

*Nashville Gas Co. v. Satty*.<sup>13</sup> An employer cannot deprive women returning from maternity leave of previously accumulated pension benefits when employees returning from other types of disability leave do not lose seniority benefits.

*City of Los Angeles Department of Water and Power v. Manhart*.<sup>14</sup> It is illegal to deduct more money for a pension fund from female employees' wages than from male employees' wages.

*Kirchberg v. Feenstra*.<sup>15</sup> A state law giving husbands unilateral control over marital property is unconstitutional.

*County of Washington, Oregon v. Gunther*.<sup>16</sup> A state cannot pay female jail guards less than it believes men holding similar jobs would have to be paid.

*Meritor Savings Bank v. Vinson*.<sup>17</sup> Sexual harassment of employees by their employers or supervisors violates federal law.

---

9. 404 U.S. 71 (1971).

10. 410 U.S. 113 (1973).

11. 411 U.S. 677 (1973).

12. 414 U.S. 632 (1974).

13. 434 U.S. 136 (1977).

14. 435 U.S. 702 (1978).

15. 450 U.S. 455 (1981).

16. 452 U.S. 161 (1981).

17. 477 U.S. 57 (1986).

*Johnson v. Transportation Agency, Santa Clara County*.<sup>18</sup> Affirmative action programs aimed at hiring women for jobs from which they have traditionally been excluded are constitutional, even if there is no proof of past discrimination by the employer.

Since 1980, however, the federal courts' role in ensuring women's rights has greatly diminished. In one of the most prominent cases of the decade, *Grove City College v. Bell*,<sup>19</sup> the Court held that Title IX's prohibition of sex discrimination in federally funded educational institutions applied only to programs directly receiving federal funds. Passage of the Civil Rights Restoration Act of 1987 in early 1988 invalidated *Grove City*.<sup>20</sup> In the intervening four years, however, federal officials took advantage of *Grove City* to halt the investigation of sex discrimination complaints filed under Title IX, as did many educational institutions in order to discriminate against women in various programs and facilities.

A potential advance for women was stymied when the Ninth Circuit Court of Appeals overturned a district court decision in *AFSCME v. State of Washington*.<sup>21</sup> The lower court had ruled that the state's wage-setting practice discriminated against women because it continued to pay higher wages for male-dominated jobs than female-dominated jobs, even though the state itself had determined that the jobs in question involved comparable responsibilities and requirements.

Recent decisions in cases involving affirmative action plans provide another example of the effect of the Reagan administration's judicial appointees. During one eight-month period in 1987, federal appeals court judges appointed by Reagan struck down city and state affirmative action programs in San Francisco, California; Richmond, Virginia; and the state of Michigan.<sup>22</sup>

---

18. 480 U.S. 616 (1987).

19. 465 U.S. 555 (1984).

20. Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C. 1681 (1988)).

21. 770 F.2d 1401, 1403 (9th Cir. 1985).

22. See *Associated Gen. Contractors of Ca., Inc. v. City of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987); *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987).

In *Patterson v. McLean Credit Union*,<sup>23</sup> the Court decided to reconsider *Runyon v. McCrary*,<sup>24</sup> a ruling prohibiting discrimination against racial minorities by private schools, employers, and other non-public parties which had long been a fundamental principle of civil rights enforcement. Because neither Congress nor the parties in *Patterson* asked the Court to review *Runyon*, which had been cited both by the High Court and in more than 100 lower court rulings, this action was highly unusual. The Court's reopening of *Runyon* also may be highly significant if it triggers a series of decisions to review major precedents in various areas of the law, including women's rights.

Legal experts suggest that other effects of the Reagan administration's judicial appointments include increased procedural hurdles that may discourage individuals from pursuing lawsuits, and greater difficulty in proving sex, race, and age discrimination claims.<sup>25</sup> Indeed, the most damaging effect of the Reagan presidency on the federal judiciary may be potential plaintiffs' increasing reluctance to file lawsuits involving charges of discrimination, for fear of setting unfavorable legal precedents.

#### *Agendas on the Docket*

The Constitution mandates coequal roles for the executive and legislative branches in the federal judicial appointments process. The President nominates judges to fill Supreme Court, circuit court of appeals, and district court vacancies. Nominees are then reviewed by the United States Senate, which votes to confirm or reject them.

Discussions about the qualifications of federal court nominees frequently center on whether the nominee has a "conservative" or "liberal" record. Most often, judges characterized as conservatives or "strict constructionists" rely heavily on a very narrow interpretation of the "original intent" of the Constitution or of Congressional statutes. Jurists who appear to view the Constitution as a legal framework and who place a high priority on current societal needs and realities in crafting their decisions are usually labeled "liberals" or "judicial activists."

---

23. 491 U.S. 164 (1988) (a case involving a black bank employee's charges of racial harassment).

24. 427 U.S. 160 (1976).

25. Wermiel, *supra* note 3, at 48.

Such labels oversimplify legal reasoning. They are also misleading in that judges — liberal or conservative, Democrat or Republican — can further an agenda either by issuing far-reaching decisions or by deciding not to enforce or extend the impact of a law. Nevertheless, the labeling of judicial candidates does denote the inherently political nature of the appointments process. Because of the politics involved, the most equitable court system possible is one that achieves a balance between what legal analyst Dean Alfange calls “politically minded” and “judicially minded” judges.<sup>26</sup>

Partisan politics has always been an ingredient of the judicial appointments process. Every president has nominated to the federal bench more members of his own party than of the opposition. The most famous attempt at “court packing” occurred in the late 1930’s when President Franklin D. Roosevelt, frustrated by Supreme Court decisions that had halted some of his New Deal programs, sought to increase the number of justices from nine to fifteen so that he could make appointments to tip the Court in his favor.

Roosevelt’s “court packing” scheme failed, but efforts to mold a judiciary that will support a particular political agenda persist. For example, the 1984 Republican Party platform included the statement, “We affirm our support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”<sup>27</sup> In this instance, “traditional family values” and “sanctity of innocent human life” are code words for very conservative positions on issues such as employment rights for women, family life education in the public schools, and reproductive rights.

The Reagan administration was exceptionally successful in furthering its conservative political agenda through the courts. A 1984 study by the Center for Judicial Studies indicated that half of President’s Reagan’s federal court appointees had rendered their most important decisions in line with the 1980 Republican Party platform, and more than a quarter of these judges had furthered the party’s agenda in almost all the cases they decided.<sup>28</sup>

---

26. Dean Alfange, *Judges Are More Than Liberal or Conservative*, N.Y. TIMES, Dec. 17, 1987, at A34.

27. William Schneider, *Americans Satisfied with the Judicial Status Quo*, 19 NAT’L J. 2612 (1987).

28. William Saletan, *It’s the Only Argument That Could Stop Robert Bork. And It’s a Long Shot*, 2 AM. POL. 18 (1987).

*Courting Disaster*

Ronald Reagan will go down in history as the first president to appoint a woman — Associate Justice Sandra Day O'Connor — to the United States Supreme Court. However, most of President Reagan's appointments to the federal judiciary have preserved and reinforced it as a white, male, affluent stronghold. In a 1984 survey of federal judges, eighty-nine percent of the respondents were men and ninety-five percent were white. Their median age was sixty, and a quarter of them indicated that they earned more than \$100,000 a year.<sup>29</sup> The appointments made by President Reagan have added to this imbalance. While forty percent of President Jimmy Carter's 264 judicial appointees were women or minorities, only fourteen percent of the 334 judges named by Reagan have been female or members of minority groups.<sup>30</sup>

Administration officials defended President Reagan's appointment record by saying that they have had trouble finding qualified female and minority jurists. According to some in the Administration, female and black lawyers tend to be younger, and therefore less experienced, than white male lawyers.<sup>31</sup>

In fact, Reagan's judicial appointees have on average been younger than judges named in previous administrations. In 1985, then White House counsel Fred Fielding said that the Administration deliberately sought to appoint relatively young judges who could be expected to be on the bench for many years. A 1987 American Judicature Society study revealed that the proportion of judicial appointees under forty increased from seven to fifteen percent in Reagan's second term.<sup>32</sup>

Reagan was also much less likely than his predecessors to nominate individuals from the opposing party. In his first six years in office, Reagan named sixty-two Republicans and the chair of New York's Conservative Party to seats on circuit courts of appeals. No Democrats were nominated. Presidents Carter, Ford, Nixon, and

---

29. Althea K. Nagai, Stanley Rotherman, & S. Robert Lichter, *The Verdict on Federal Judges*, PUBLIC OPINION, Nov.-Dec. 1987, at 52 (survey sponsored by the Center for the Study of Social and Political Change at Smith College).

30. Wermiel, *supra* note 3, at 48.

31. Al Kamen, *Kennedy Lashes Administration on Appointments*, WASH. POST, Feb. 3, 1988, at A17 (interview with Stephen J. Markham, assistant attorney general in the Office of Legal Policy).

32. Saletan, *supra* note 28, at 14.

Johnson all reserved at least five percent of their circuit court nominations for members of the other political party.<sup>33</sup>

Since questioning a judicial nominee about how she would decide a particular case is prohibited by the Code of Judicial Conduct, predictions about a nominee's future decisions can be wrong. Nevertheless, presidents generally have been able to identify jurists whose views are compatible with their own. For instance, Carter established regional "merit" screening panels to recommend candidates for circuit court seats. The American Judicature Society sent a questionnaire to recommended candidates in 1979 and found that almost one-third had been asked about their personal views on affirmative action and the ERA, while others had been questioned on abortion and capital punishment.<sup>34</sup>

The consistently conservative cast of Reagan appointees' rulings has led to charges that a "litmus test" was applied to them as nominees to ensure decisions supporting administration positions. In 1985, National Public Radio reported that three women being considered for federal judicial appointments said they had been questioned by Department of Justice officials about their positions on abortion. A sitting federal judge told *American Politics* magazine in 1987 that the Department of Justice had asked him, as a potential nominee, how he would vote in cases involving affirmative action, school prayer, privacy rights, and abortion.<sup>35</sup>

But determining the political ideology of a potential judicial nominee does not always require direct questioning about issues. Seventy-eight percent of appellate judges appointed by Reagan during his second term have been active in the Republican Party. In addition, the proportion of Reagan appointees to the circuit courts of appeals who were law professors when nominated is two to three times higher than in previous administrations. This is significant because law professors usually leave a "paper trail" of law review articles and other publications that offer concrete evidence of their judicial philosophies.<sup>36</sup>

---

33. *Id.*

34. *Id.* at 17-18.

35. *Id.* at 17.

36. *Id.* at 18.

*Action for a Balanced Judiciary*

Citizen action for a balanced federal judiciary has never been more imperative. In his annual review of the federal courts, United States Supreme Court Chief Justice William H. Rehnquist reported that every level of the federal system handled a record or near-record number of cases in 1987. The Judicial Conference, the federal judiciary's policy-making body, recommended that fifty-six district court and thirteen circuit court positions be created just to handle the current caseload. In June of 1988 there were more than forty judicial vacancies, the possible creation of new judgeships, and four members of the Supreme Court Justices over seventy years of age.<sup>37</sup> The appointments to these positions will shape the federal courts and their impact on American society for years to come.<sup>38</sup>

The following are some opportunities the AAUW recommend for effective involvement in the judicial selection process.

First, when the President sends a judicial nomination to the United States Senate, contact individual senators, as well as members of the Senate Judiciary Committee, to urge them *not* to make up their minds about the nominee before assessing the evidence presented during the hearings. Ask them to consider how the appointment would affect the overall balance of the federal courts, as well as that of the particular court in question. Urge them to ask if the nominee is an ideologue representing a viewpoint well outside the mainstream of legal thought? Urge them to ask if the nominee has a history of advancing a particular political agenda? Stress the need to bring new perspectives to the federal bench by increasing the number of women and minority judges.

Also, get involved in Senate elections, which are critical to ensuring an open federal judicial appointments process. Question Senate candidates about the courts in surveys and debates. Ask what the candidates see as the respective roles of the executive and legislative branches in making judicial appointments? Ask whether they believe that partisan politics has too great a role in deliberations about judicial nominees? If so, how would they reduce its influence? Include their responses in any voter education materials compiled.

---

37. Reference is made to the status of the judiciary as of June 1988.

38. *Rehnquist Taking Stock of the Federal Judiciary*, N.Y. TIMES Jan. 6, 1988, at A18.

Finally, keep an eye on state courts. Because many fundamental rights are covered by state law, state court decisions greatly affect individual liberties. Not only are cases involving marriage and divorce, children's rights, domestic violence, and property and inheritance usually adjudicated in state courts, but a growing number of discrimination lawsuits are being filed at the state level because of the current climate in the federal courts.<sup>39</sup> Many state court judges are elected, so voters have the opportunity to directly influence the legal decisions in their state. Incorporate information about judicial elections in voter education efforts. Publish information about the candidates' records on individual liberties and civil rights. When state judges are appointed, meet with the governor and her or his advisors to stress the importance of a balanced judiciary. Emphasize the need to name women and minorities to judicial posts. Work with other concerned organizations to develop a "talent bank" of potential nominees who can be recommended to fill vacancies.

The judiciary of the United States must reflect American society. Now is the time to become an active participant in the selection of new members of the bench at all levels of the judicial branch of our government.

---

39. Wermiel, *supra* note 3, at 48.