WHY SHOULD I HAVE TO TELL THEM? THE NECESSARY ROLE OF THE JUDICIARY IN ACHIEVING REFORM*

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I. INTRODUCTION

I am a litigator, and therefore, I am going to talk about litigation and reform phrased in the context of what I believe is the necessary role of the judiciary in achieving various kinds of reform. I’m going to discuss examples in different areas. It’s not going to be entirely comprehensive. For example, I’m not going to discuss educational funding reform, which has been the subject of major litigation in this state, as in many other states, but I will discuss governmental process reform and the role of the judiciary.

The title of my talk, “Why Should I Have to Tell Them?” will become apparent in the course of the talk, so I will return to that a little later. Basically, my thesis is that enforcement of existing law is an important source of reform. That’s a fairly conservative proposition, but I believe it is very true. I think it happens not infrequently that the blueprint set forth either in a constitution or in a statute, over time, gets departed from to a very significant extent. The blueprint, when it was framed at a constitutional convention, in the case of a constitution, or in the legislature, in the case of a statute, is better by far than the practices that have grown up that depart from that blueprint. Of course, the branch whose ultimate job it is to enforce the blueprint, to say what the law is, is the judiciary. My thesis will be that the judiciary is the institution of government best-suited to make sure that the blueprint is

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sufficiently followed, so that government remains credible. Judicial activism to this extent is necessary to insure that we don’t depart too far from the original plan due to the influence of political interests that are in conflict with the public interest in adhering to the plan. I will start out with examples drawn from the world of budget reform, because this is an area where the court has been active over a fairly long period of time, and active recently as well.¹

By the court, I mean the New York Court of Appeals.

II. BUDGET PROCESS

Not everyone is going to agree with my first example. You have to remember I was counsel to the governor. I believe that the legal blueprint in New York State for the budget process is a strong executive approach to budgeting. You can have various approaches, but in New York, the governor proposes the budget, the governor makes a revenue estimate, and the governor has a line-item veto.²

It’s a strong executive role. Not everyone will agree, but I think the court, in fact, did in a recent case; they enforced what they saw as the strong executive role in the budget process.³ They used the strong executive blueprint to resolve disputes between the two houses of the legislature and the governor about how that process should work.

Those cases are landmark cases. I don’t agree with them in every detail. I think, maybe, you could argue that in certain respects, the court went too far. Notwithstanding, what they thought they were doing was keeping the process true to the blueprint in the constitution, the strong executive blueprint. I think it’s significant that, in response to what the court did, the legislature sought to have the constitution amended, and the people said no. This story, however, is not over. I think one aspect of judicial activism is that it often is the platform for further action that comes to a different remedy or solution than that the judiciary first proposed; judicial activism is a force for further action.

Sometimes—and this is another example drawn from budget reform—the blueprint in the constitution has ambiguities; it is not

² See N.Y. CONST. art. VII, §§ 2–3.
entirely clear. One of the best examples is this: everyone thinks that the Constitution of the State of New York has in it a balanced budget requirement, but it doesn’t. There is no express balanced budget requirement. So, in 1974, ’75, and ’76, in a series of cases, the New York Court of Appeals implied into the constitution a balanced budget requirement. The court did this in the context of cases about the State’s power to issue revenue anticipation notes. They said that the power to issue revenue anticipation notes is limited by the fact that the notes must be repaid within a year, within a balanced budget. They added those words to the constitution—“balanced budget.” That was the decision in the Wein case, and it led to what, in Albany, was known for many years as a Wein Certificate, where the various powers that be would all sign a certificate—sort of like Sarbanes-Oxley—saying the budget was balanced.

Reform often has the problem of unintended consequences, and one of them occurred in this case. Because the validity of the state debt now turns on whether the budget is really balanced, uncertainty arose whether the debt was really valid. How is a purchaser going to be sure that the debt is valid and that some court will not decide, later, that the budget really wasn’t balanced? To solve this problem, the State, and the people who sell state debt, went back to the court and asked it to clarify its new balanced budget requirement in the context of its effect on the validity of the notes—to say that it would be enough that the budget was, from all that appears, honestly balanced. That’s what the court said—“honestly balanced.” Honest estimates. I’m not sure that entirely solves the problem because sometimes people don’t think the estimates are entirely honest, but it was an attempt to deal with what was an unintended consequence. The lesson is that tinkering may be necessary to address unintended consequences. Tinkering is, after all, the essence of the common law.

III. REAPPORTIONMENT

Another important example of judicial activism in the cause of

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5 Id. at 591.
6 Id. at 587–88.
8 Id. at 591.
political process reform is reapportionment. The blueprints, for the federal government and for every state, call for legislative supremacy. Legislative supremacy means that it is the legislature that makes policy for the federal government and for the state government by enacting laws and by adopting final budgets, subject to executive veto.

There was a problem that rural areas were overrepresented in many states. It wasn’t such a problem in New York because New York had addressed this problem on its own, earlier, in a constitutional convention—not in the legislature, but in convention. But in many states, rural areas were overrepresented because rural areas covered a lot of acreage and people drew district lines based on acreage. The rural voice in the legislature was therefore much stronger than the urban voice. A lot of reform groups spent a lot of time and effort trying to get legislatures to change that, but since the rural people were the majority, they thought it was totally appropriate that geography and acreage should be taken into account. They had a big political stake in keeping it that way. If you’re going to reduce their number, who is it that wouldn’t show up at the next session? As a result, there was no ability to achieve reform.

Starting in Baker v. Carr, and ultimately in Reynolds v. Sims, the Supreme Court of the United States intervened and held that trees don’t vote, people vote—one person, one vote. It was an activist decision, no doubt about it. It was judicial activism, but the Court felt, and said so in its opinion, that it was justified judicial activism because there was no other way that change was going to occur.

This illustrates the concept of there being times when you can’t defer to the legislature because they have a fundamental conflict of interest on the question at issue. Here, the rural people had the conflict of interest of keeping their jobs. Because of that, you can’t defer to the legislature and the court has to be more activist. This is actually a theory of constitutional interpretation that I, personally, find congenial. The idea is to look intelligently at the question of when can you rely on the legislature and defer to them, and when

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11 See id. at 567–68.
12 See id. at 578, 586.
Footnote 4 of the *Carolene Products* case is a footnote to a famous U.S. Supreme Court case that sketches out this theory.\(^\text{13}\)

The *Carolene Products* case is one of the cases that mark the divide between the Supreme Court’s effort to strike down everything the New Deal did, and after this case and *West Coast Hotel v. Parrish*,\(^\text{14}\) to support the right of the legislature to pass economic legislation. Interference with the liberty of contract died as a viable constitutional theory. It may be coming back, but it died at that time because you could defer to the legislature on questions of economics and striking the balance between regulation and liberty.

Footnote 4 says there remain areas where the Court will not defer to the legislature.\(^\text{15}\) One of them is the treatment of minorities.\(^\text{16}\) The footnote uses the phrase “discrete and insular”\(^\text{17}\) groups. The constitutional theory is that prejudice creates an inability to have empathy that disables the legislature from adequately addressing the grievances of such groups. As a result, the Court has to stand as a more activist guardian of the rights of discrete and insular groups.

And another area, it says in Footnote 4, where you can’t defer to the legislature is in the area of the First Amendment, particularly in the openness of the legislative process to people being able to come to that process and have their grievances resolved.\(^\text{18}\) If the legislature is going to be supreme, it has to be connected to the people, and the legislature can’t insulate itself. The Court will not defer to the legislature when it tries to cut itself off from public accountability. That’s in Footnote 4, written in 1938.\(^\text{19}\) I believe that the same considerations about when it’s appropriate to defer to the legislature, and when it’s not, are still very true today.

A development that’s underway in the reapportionment area is a sense that the Supreme Court is rethinking its attitude toward gerrymandering. Up until now, and perhaps even now, they have not been receptive to claims contesting gerrymandering on a political basis—the drawing of lines to favor one political party or

\(^\text{14}\) 300 U.S. 379, 399–400 (1937).
\(^\text{15}\) *Carolene Prods. Co.*, 304 U.S. at 152 n.4.
\(^\text{16}\) Id.
\(^\text{17}\) Id.
\(^\text{18}\) See id.
\(^\text{19}\) Id. at 144.
the other. But if you read the opinions, there are suggestions and words, some of them by Sandra Day O'Connor, who won’t be there to follow up on them, that the Court is interested in taking a harder look at the political gerrymandering question. Such gerrymandering is a way for a legislature to cut itself off from accountability to the people, to guarantee their reelection. So in a sense, political gerrymandering falls within the constitutional theory that I was describing before. Indeed the words “gerrymandering” and “conflict of interest” go hand-in-hand because, obviously, the lines are drawn for partisan political interests and not for the public interest.

Our state constitution has words about political gerrymandering that are stronger than those found in the Federal Constitution. Article 3, section 4 of the New York Constitution uses these words: “[The] districts shall . . . be in as compact form as practicable.” In older decisions, the court has been a little skeptical of the justiciability of the word “practical” and whether they wanted to get themselves into that role. But if we’re going to rethink gerrymandering at a federal level, perhaps we could also rethink it at a state level. It is, to my judgment, not difficult to develop a rule of thumb for compactness. Mathematicians could easily create models for what is presumptively compact, much as they create mathematical models for mergers that are presumptively okay under federal antitrust laws. These mathematical models are used by courts day in and day out; it would not be hard. And as we know, the way the districts are drawn in New York today, it’s very hard to imagine a conclusion that they are compact. This is an area where you cannot defer to the legislature to fix it because they’re not going to fix it. The majority in each house has an interest in drawing lines to perpetuate its majority, and there’s no doubt that that’s what they do. So, unless the court is willing to be activist and develop these models of what is compactness and what is not compactness, nothing will change in my judgment.

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20 See, e.g., Georgia v. Ashcroft, 539 U.S. 461, 479 (2003) (defining in the first instance “effective exercise of electoral franchise” in determining whether a redistricting plan has a retrogressive effect on the position of minorities and their political participation).
IV. CAMPAIGN FINANCE

The next area, campaign finance reform, is one where reform groups sometimes think the Court is an obstacle because the Court is not hesitant to enforce First Amendment rules that have a major impact on the substance of campaign finance reform. Because the spending of money is a form of political expression, the Supreme Court has insisted, again and again and again, that you have to show a compelling interest in order to justify restrictions.\textsuperscript{23} The compelling interest that the Court has accepted is the interest of avoiding the appearance of corruption.\textsuperscript{24} You don’t have to prove a bribe. It’s enough to show the appearance of corruption, for example, big amounts of money being exchanged. Expenditure limits have, however, in general, not been successfully tied to the appearance of corruption.\textsuperscript{25} So, absent a public financing scheme, where the giving of the money is conditioned on agreement to an expenditure limit,\textsuperscript{26} the Court has not been willing to uphold expenditure limits under the First Amendment. This is frustrating to some reform groups that would like to see expenditure limits imposed. Also, since a person cannot corrupt themselves, spending of money by a very wealthy individual cannot be tied to an appearance of corruption rationale, and so the Court has said you can’t prohibit personal expenditure.\textsuperscript{27} That in turn makes it much harder to devise a campaign finance legislation that won’t tip the balance in favor of rich candidates.

So, here is an instance where judicial activism on behalf of the First Amendment—and I totally agree with being activist on behalf of the First Amendment—inhibits reform. I personally believe that there’s another side of this story, where we would take account of the fact that, in the campaign finance reform area, the legislature is disabled, to a degree, by a conflict of interest. If you present to the legislature a campaign finance proposal that guarantees the challengers will get to spend no money and that incumbents can raise as much as they want, the legislature would be very much for


\textsuperscript{24} See, e.g., McConnell, 540 U.S. at 138 n.40; Beaumont, 539 U.S. at 159 n.5; Colo. Republican Fed. Campaign Comm., 533 U.S. at 456.

\textsuperscript{25} See, e.g., Buckley v. Valeo, 424 U.S. 1, 99 (1976).

\textsuperscript{26} Id. at 57 n.65.

\textsuperscript{27} See id. at 45, 47–48, 53.
that. But if one makes a proposal that actually improves the ability of challengers to come in and tries to redress the problem that givers of money are much more willing to give to people in power than they are to give to someone who is not in power, then that becomes a much more difficult proposition for legislators. Just as in the case of reapportionment, the legislators have a conflict of interest to protect their advantage in keeping their job.

I think, in light of this conflict, there is more of a role for the judiciary to weigh in not only on the restrictive side of campaign finance, but on the positive side. Just to give a New York State example, the New York State Ethics Commission takes the position that—at least it did, they may have changed—issues relating to campaign receipts and expenditures are outside their purview because they’re governed by the Campaign Finance Law. They say that law is the exclusive standard and anything that’s permitted under the law is by definition, ethical. I don’t agree with that.

I think that there are things that are permitted by the law that create an ethical violation because they create an appearance of impropriety. For example, obviously, it’s a crime to bribe somebody for his or her official action. But if a major contribution follows immediately after favorable action has been taken, you may not be able to prove a quid pro quo. You can’t prove a meeting in the dark of night and the exchange of a white envelope with money in it, but you can say this looks absolutely terrible. I think that is an ethical issue, an appearance of impropriety, and therefore the State Ethics Commission could say that you can’t do that. I think that is what they should do and the judiciary should uphold them in doing it.

V. JUDICIAL SELECTION

A very recent example of litigation and reform relates to the topic of judicial selection reform. It’s the Lopez Torres case decided by Judge Gleeson in the Eastern District of New York. Judge Gleeson held that the current judicial nominating convention system—not the way it’s written in the law (the blueprint), but the way it operates in practice—violates the Federal Constitution. The crux of the holding is that the New York system works to create nearly insurmountable obstacles to getting access to the ballot without the

support of a party leader. Judge Gleeson relied on U.S. Supreme Court precedent that says if you make the decision to elect judges, you have to follow through on all the rules of the constitution that go with the election process. The particular case on which he relied is a case that says judges have the same right of free speech in running for office as do other kinds of candidates; it severely limited the ethical concept that you could tell a judge it was undignified to make certain kinds of campaign speeches. The Court did not accept that and said that that was too restrictive of the First Amendment, which has to be given play in an election. Judge Gleeson relied on that case to say if you’re going to have an election, you can’t really have an appointment by party leaders. And he goes through the nominating system in great detail—a 125 page opinion showing exactly why it is a sham from the point of view of being an election.

Interestingly, the case could equally have been decided, although it wasn’t decided and wasn’t pled that way, under the state constitution which says that judges shall be elected. This is because Judge Gleeson’s point is that there’s no election when party leaders effectively appoint. It’s always interesting, when you’re bringing these kinds of cases, whether you’re going to go into federal court or state court. I am personally a big fan of state court, but a lot of people are nervous about state court on a topic like this because they think there may be a little bit of a conflict of interest that will inhibit the decision. But the Torres plaintiffs went to federal court, it was decided on federal grounds, and it is being appealed.

In the end, it is quite likely that the final effect—the historical effect of this decision—assuming it is upheld on appeal as I believe it should be, will not be the remedy ordered by the judge, which is to hold primaries. The historical effect will be some other solution, which will be crafted by the legislature, and perhaps by the people, if the constitution is amended. It may be a reform of the convention

29 Id. at 254–55.
30 Id. at 246.
31 Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding that “[t]he Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment”).
32 See id.
33 N.Y. CONST. art. VI, § 6(c).
system to make it a more real nominating process where people who want to run have access to delegates who were elected for a term of years and the like. This is what the Feerick Commission, of which Dean Salkin is Vice Chair and I’m a member, recently proposed. It could also be public financing of primaries or, much less likely, it could be appointment by the governor.

Interestingly, Judge Gleeson has ordered the interim remedy of primaries when he could also have said that if an election couldn’t be held because it’s unconstitutional, the default provision under the state constitution is that the governor appoints.\(^{35}\) I think Judge Gleeson was very smart not to make that default position the interim remedy. Otherwise, a bill would never be signed by the governor creating reform of the convention process. The governor, like those rural legislatures in the pre one person-one vote days, would not give up the power to make all those appointments. I think Judge Gleeson was wise in his interim remedy, even though I don’t think it is the right remedy and that it ultimately will not be the long-term remedy.

VI. LEGISLATIVE REFORM

The final area I want to discuss is an area that I am involved in, and that is reform in the area of how a bill becomes a law. This is an area where, I believe, there has become quite a discrepancy between the blueprints of how a bill becomes a law—between what is taught in schools about how a bill becomes a law and the reality of how a bill becomes a law. The reality, in my judgment, is that a majority of the majority decides in secret meetings what bills will become laws. In the New York Senate, a majority of the majority in conference secretly decides what is going to become a law. In the New York Assembly, the same thing happens. That is the reality. That is not the blueprint.

I am representing a Republican in the Assembly and a Democrat in the Senate in challenging this closed system for how a bill becomes a law. This system leaves both minority parties out of the picture and that departs significantly, we contend, from the blueprint in the constitution.

The case has been in supreme court before Justice Jane Solomon

\(^{35}\) N.Y. CONST. art. VI, § 27.
at the motion to dismiss stage and we had a partial victory.\textsuperscript{36} We are now on appeal in the Appellate Division, First Department. I’m not going to argue the case here. If you want to come hear the argument in the Appellate Division, you are all invited. I’ll just review briefly what the claims are. One is in the resources available to serve constituents—the ability to hire people who handle constituent grievances and the like. There’s a vast difference between what you have available if you’re a member of the majority and what you have available for constituent service work if you’re a member of the minority, but you have the same number of constituents and they have the same kinds of grievances. Justice Solomon said that was a potential violation of the Equal Protection Clause, so that is one that we won.\textsuperscript{37}

With regard to member items, it’s not like they go through a process that decides how important one little league field is vis-à-vis another little league field. There are two pots. There’s a big pot for the majority, the Speaker and the Majority Leader to pass out. There’s a smaller pot for the two minority leaders to pass out. The size of the pots is just based on who’s the majority and who’s the minority. In their briefs, the majorities argue “to the victor go the spoils.” Well, Justice Solomon did not buy that, and she held that was also a potential violation of the Equal Protection Clause.

The other one we won was the message of necessity.\textsuperscript{38} The Court of Appeals recently said you couldn’t make the governor really give good facts about why a message of necessity is appropriate.\textsuperscript{39} I’m speaking in Albany and I assume you all know what a message of necessity is.\textsuperscript{40} And you know that the words are often the same: It’s necessary because it’s necessary to pass this bill, period. That’s the specification of facts. And that was challenged and the court was not willing to require more specificity. The challenge that Justice Solomon upheld involves a less well-known aspect of the message of necessity process, which is that typically the governor has no clue whether or not a message is being given. The counsel to the governor puts the governor’s pen signature on a message and off it goes to the legislature. The governor might be home sleeping. The constitution, though, says the message shall be signed under his or

\textsuperscript{36} See Urban Justice Ctr. v. Pataki, 10 Misc. 3d 939, 953 (N.Y. Sup. Ct. 2005).
\textsuperscript{37} Id. at 952.
\textsuperscript{38} Id. at 953.
\textsuperscript{39} See Maybee v. State, 828 N.E.2d 975, 977–78 (N.Y. 2005).
\textsuperscript{40} See N.Y. CONST. art. III, § 14 (providing for the message of necessity for immediate vote).
her hand,\textsuperscript{41} and the last time I looked, a machine is not a hand. Justice Solomon said that was a violation of the provision of the state constitution that requires the message to be signed under his or her hand.\textsuperscript{42}

In the ones we lost in the supreme court, we have a claim under a provision of the state constitution that has never before been the subject of litigation. The constitution says “the doors of the Legislature shall remain open.”\textsuperscript{43} And we have cases that say that when in a caucus the actual decision is made, that that is, in effect, the meaning of the legislature. So, we are advancing this argument that the doors of the legislature shall remain open, and there shall be a journal; those constitutional requirements apply when a majority of the majority decides whether a bill is going to become a law in a secret caucus.

We have a couple of other claims as well, but apart from this new case, there are prior cases where the court has gotten into the question of how a bill becomes law.\textsuperscript{44} The Court of Appeals has not treated this as a nonjusticiable political question. A recent example is that it used to be the practice not to send certain passed bills to the governor for signature or veto. This occurred when both houses passed a bill, and it’s now ready to be signed or vetoed by the governor. So, it’s getting a lot more attention than it did when it passed at one in the morning, and lo and behold, it really is a foolish bill, and the sponsor is a little bit embarrassed that this bill is going to be sent down to the governor and will be vetoed. We used to have this nice system where the bill would be held, we’d never see it, or we would get it, but then it would be recalled by the House, and then we’d never see it again. And the Court of Appeals says that that is unconstitutional, even though it relates to the way the legislature works and the Governor’s Office works, and the legislative process—that was unconstitutional.\textsuperscript{45} They have to send the bills down if they’re passed, and they have to be presented to the governor for action. That was an opinion, written by Judge Bellacosa.\textsuperscript{46} I was a little surprised that they took such a strong position because there was a real practical benefit to the holding or

\textsuperscript{41} Id.
\textsuperscript{42} Urban Justice Ctr., 10 Misc. 3d at 953.
\textsuperscript{43} N.Y. Const. art. III, § 10.
\textsuperscript{44} See, e.g., King v. Cuomo, 613 N.E.2d 950, 951 (N.Y. 1993).
\textsuperscript{45} Id. at 955.
\textsuperscript{46} Id. at 951.
recalling of bills, but it wasn’t the blueprint of the constitution and they enforced the blueprint of the constitution.

I’ll just end with referring back to the title of this talk, which you will recall is, “Why Should I Have to Tell Them?” That has been what I’ve been talking about. That’s what Judge Solomon said during oral argument in the case: “Why do I have to tell them?” And I have given a presentation here that shows that courts often conclude that they are the ones who really do have to tell them, and that they are right to reach that conclusion.