

ENDING JUDICIAL ACTIVISM

THE REAL 'CONSTITUTIONAL OPTION'

KARL MAHER
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SUMMARY

The following proposes a state-by-state campaign to force a change in Article III, Section 1 of the U.S. Constitution, which gives federal judges lifetime tenure. It argues that a change is needed for these reasons:

- A half-century of judicial activism has made the nominating process increasingly bitter, as conservatives seek to appoint judges who'll follow the law and liberals seek to preserve as valid the philosophy of a "living constitution."
- Conservatives may be successful, over a period of many years, of reversing the flow of power away from Congress and the President and to the courts. Even when conservatives control the executive and legislative branches of government, however, this is not a certain outcome, as judges' views may change over a lifetime.
- Further, because the judicial mindset is now result-oriented, there may be no turning back, under the existing structure, to a tradition of a more literal reading of the Constitution.
- Advocates of judicial restraint in Congress have been unsuccessful in their efforts to rein in the judiciary, which began in earnest with House and Senate hearings on judicial activism in 1996.
- Lifetime tenure is an anachronism. Only three of the 50 states provide lifetime tenure for judges. The rest provide for some measure of accountability, mostly through elections. Elections have tempered activism at the state level, most famously in California.
- A state-level campaign to endorse a petition for a constitutional convention may force Congress to act, or may result in a convention to write an amendment. Research is required to measure such a campaign's chance of success.
- A state-by-state campaign would be expensive. However, political contributors for whom judges are the No. 1 issue may find the issue appealing, as it provides a means for more direct action on judicial activism than the process of electing conservative presidents to appoint conservative judges to be confirmed by conservative senators, and hoping things turn out for the best. And as was demonstrated in November 2006, conservatives won't always be in power. Electing judges provides a check to make sure that process works.

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This proposal argues that the U.S. Constitution should be amended to restore the balance of power between the Supreme Court and the other branches of government. Further, it argues that conservative contributors for whom judges are the No. 1 priority would find it more worthwhile to contribute directly to a campaign to end judicial activism than to work indirectly toward that end through party politics.

I. Background

From 2003 to 2007, Republicans controlled the Presidency and the Senate. During that period they made headway in filling Appeals and Supreme Court vacancies with conservatives. A filibuster cease-fire allowed a few outstanding jurists to get through the Senate. But that regime ends in January 2007: Democrats take the Senate, the cease-fire expires, and Sen. Patrick Leahy will chair the Judiciary Committee. President Bush has said he'll continue to nominate conservatives, but his chances of having conservatives like Justice Samuel Alito confirmed aren't good.

While political power has shifted in Congress, the reason for the bitterness over judicial nominations hasn't changed. Republicans want to stop judicial activism with nominees who'll heed the written Constitution. Democrats want to protect it by defeating these nominees in favor of others who, as Justice Anthony Kennedy put it¹, will exercise their "independent judgment" to recognize "evolving standards" in constitutional law.

Liberals in politics, opinion media and the academy have tried to define activism down recently, so that they can claim "everybody does it." But for the purpose of this document, Kennedy's justification for striking down the death penalty for murders committed by defendants as minors will suffice as a working definition. Also, for the sake of brevity, judges who take the opposite approach will be called "conservative" here – whether they technically adhere to textualism, originalism, constructionism or some other five-syllable flavor of judicial philosophy.

The acrimony affecting the Senate's judicial confirmation proceedings also has found its way into relations between the three branches of government, and between the states and the federal courts. Nowhere is this more apparent than in Judge Stanley Birch's gratuitous opinion² denying relief to Terri Schiavo's parents, after Congress had granted jurisdiction to federal courts to review the case.

¹ *Roper v. Simmons*, 112 S.W. 3d 397, 2005.

² *Schiavo v. Schiavo*, emergency petition for rehearing, 11th Cir., 2005, Birch, Circuit Judge, specially concurring: "A popular epithet directed by some members of society, including some members of Congress, toward the judiciary is the denunciation of 'activist judges.' ... In resolving the Schiavo controversy it is my judgment that, despite sincere and altruistic motivation, the legislative and executive

And while it might be charitably said that the general public's knowledge of courts, decisions and judicial philosophies is slight – and while public opinion surveys generally find that Americans trust the courts – that situation may be changing. Majorities of 70 percent and more continue to believe – 40 years after the Supreme Court outlawed it – that prayer should be allowed in schools. The Court's *Roe v. Wade* decision, far from settling the legality of abortion, set off a 30-year-and-counting crusade. Certain communities and states that have found themselves under a judicial boot – from the Yonkers, NY, city council³ to the Kansas City, Mo., school district⁴ to referendum voters in Colorado⁵ and California⁶ – may have stronger opinions of the judiciary than the public at large.

The Schiavo case also opened eyes: During the heightened attention paid the case after Schiavo's feeding tube was removed, an obscure judicial-affairs website was hit by hundreds of search-engine inquiries asking how to impeach judges.⁷

And so all of this contentiousness is wrapped up in a conservative president's nomination of conservatives to the judiciary: A conservative president tries to implement a vague mandate, Senate liberals try to preserve a field of influence on which they have achieved one policy success after another.

Unfortunately, nominations aren't a sure-fire cure for judicial activism. A President can go only so far in implementing that mandate through the judiciary. He can select nominees carefully, but he has little more to go on than the written record. Once the nominee is on the

branches of our government have acted in a manner demonstrably at odds with our Founding Fathers' blueprint for the governance of a free people – our Constitution.”

³ *U.S. v. Yonkers*, 635 F. Sup 1577 (S.D.N.Y. 1986). The federal district judge ordered Yonkers City Council members to vote in favor of building subsidized housing in predominantly white neighborhoods, and fined them for not voting in favor.

⁴ *Missouri v. Jenkins*, 495 U.S. 33 (1990). This case made several trips to the Supreme Court, but the crux of it is that the judge presiding over this school desegregation case ordered an increase in local property taxes for the Kansas City, Mo., school district. The 8th Circuit affirmed, and additionally ruled that courts should enjoin state tax laws that capped property taxes. A Supreme Court majority found that court orders directing local governments to levy their own taxes were “plainly” judicial acts within the powers of federal courts.

⁵ *Romer v. Evans*, 517 U.S. 620 (1996). Colorado voters passed an amendment to the state constitution prohibiting the use of sexual orientation as a basis for a claim of discrimination. The Supreme Court found this “peculiar.”

⁶ *Coalition v. Wilson*, 9th Cir., Appeal from D.C.N.C., 1997. California voters passed an amendment to the state constitution prohibiting race-based hiring by government entities. Enforcement of the amendment was enjoined by a federal district court judge. The 9th Circuit vacated the injunction. The Supreme Court denied cert.

⁷ Vote for Judges, a web log at <http://voteforjudges.blogspot.com>, routinely received 15 to 20 visits per day. On the day Terri Schiavo died, it received 350 hits from search engines regarding the state judge in the case, George Greer. On Google, the article found at Vote for Judges was the 75th article in the list.

bench, as things stand now, he's there for life. Over a life term, a judge's philosophy can change. It isn't unusual for people in their 70s to see things differently than they did in their 30s.

The Constitution provides other remedies to activism: restriction of jurisdiction and impeachment. The founders seemed to consider both as congressional checks on the courts. President Jefferson, for example, tried (and failed) to have a Supreme Court justice impeached over his conduct of trials as a circuit judge.⁸

That was in 1805, and it was the last time a judge's judging was considered grounds for impeachment. The power has since been used only to punish corruption. Congress has also made rare use of its jurisdiction-exception powers, despite plentiful opportunities to do so over the last 50 years.

There are two more remedies the Constitution provides, one also rarely invoked, the other never used.

The first is the amendment process. These constitutional amendments have been proposed to specifically address complaints about the judiciary (and there may be others):

- Limit the terms of judges to 15 or 18 years.⁹
- Subject judges to periodic retention elections by voters or legislatures.¹⁰
- Allow Congress to override court decisions, as they do presidential vetoes.¹¹
- Require that the Constitution be amended only through the amendment process.¹²

The final remedy, a constitutional convention called by the states, has been used in the past as leverage, and may be the key in prodding Congress to report out one or more of the above solutions to the states for ratification.¹³

⁸ This article http://www.constitutionproject.org/ci/newsroom_guide/29.htm at The Constitution Project's web site has an even-handed summary of the impeachment.

⁹ James Lindgren, "Supreme Gerontocracy," Wall Street Journal, April 8, 2005, for example. Lindgren is a co-blogger at volokh.com.

¹⁰ Extensive discussion of retention by voters can be found at voteforjudges.blogspot.com. Retention of federal district judges by state legislatures was introduced in the House in 2004 by U.S. Rep. John Culberson, R-Texas.

¹¹ Introduced in the House in 2004 by Rep. Ron Lewis, R-Ky.

¹² Charles Pickering Sr., "Nuclear Isn't the Only Option," Wall Street Journal, May 9, 2005.

¹³ A convention call is referred to throughout. A better solution might be to campaign for a specific amendment: for example, "State X resolves that Article III should be amended to say X." While this would add weight to a specific remedy, it would also be open to amendment by every state legislature, and Congress could use that lack of unanimity as an excuse not to act.

This proposal focuses on the convention option: passage by 34 states of a convention call to consider amendments to Article III of the Constitution. Toward that end, the proposal outlines a strategy for research which, if the results warrant, would be followed by organization, lobbying and referendum campaigns.

These activities require money. More than \$1 billion was spent in the 2004 elections. A lot of that money was spent to tangentially influence the courts in the only way now possible: the election of a president who nominates the judges, and senators who confirm them.

Donors for whom judging is the No. 1 concern may want to be able to have a more direct impact. The campaign proposed here gives them that opportunity.

II. How We Got Here

Federal officials take an oath to protect and defend the Constitution. In deciding whether to act against judicial activism, then, it's important to know the answer to this question: Is the delegation of powers as we find it in 2007 what the framers intended in the 1787 Constitution and in later amendments?

The Supreme Court is the most powerful branch of government today. It can vacate acts of Congress (e.g., the Violence Against Women Act¹⁴) and state legislatures (*Roper v. Simmons*¹⁵). It can make (*Bush v. Gore*¹⁶) or break (*U.S. v. Nixon*¹⁷) a president. It can order that taxes be raised (*Missouri v. Jenkins*¹⁸) or micromanage neighborhoods (*U.S. v. City of Yonkers*¹⁹). It can abolish cultural institutions (school prayer²⁰) and override millennia-old consensus (*Roe v. Wade*²¹).

It can't write or pass a federal budget, or raise an army. Not yet, anyway. But a recent series of cases (*Rasul and Hamdi*, for example²²) have seen the courts insinuate themselves into the

¹⁴ *U.S. v. Morrison*, 169 F. 3d 820.

¹⁵ *Op. cit.*

¹⁶ *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁷ *U.S. v. Nixon*, 418 U.S. 683 (1974)

¹⁸ *Op. cit.*

¹⁹ *Op. cit.*

²⁰ *Engel v. Vitale*, 370 U.S. 421 (1962).

²¹ *Roe v. Wade*, 410 U.S. 113 (1973).

²² See, for example, *Rasul v. Bush*, 321 F.3d 1134, in which the Supreme Court ruled that U.S. courts have jurisdiction over the detention of enemy combatants at the U.S. Navy's base at Guantanamo Bay, Cuba.

conduct of war-fighting. And how long will it be before the courts, now citing European precedents and public opinion on a regular basis, require that Congress adopt a single-payer health system and raise the taxes to pay for it?

Would Alexander Hamilton recognize these courts? Hamilton was perhaps the strongest supporter of judicial independence, writing in Federalist 78 that it would be the weakest branch: no purse, no sword. To protect judicial independence, he insisted that judges receive lifetime appointments. When Jefferson and his majorities in Congress tried to neuter the courts, Hamilton railed against Jefferson's Republicans. But Hamilton also wrote²³:

- “The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.”
- The judiciary “can never attack with success either of the other two” branches.
- “Though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter.”

The people of Yonkers and Kansas City might beg to differ.

By the way, Hamilton considered another issue important to granting lifetime tenure: A paucity of qualified people to fill the bench. There's certainly no shortage of lawyers today.

Further buttressing the case that the modern court (1960 on, say) is a different animal is that intense criticism of the courts was sporadic, if intense, before then. *Marbury v. Madison* caused a lot of grumbling in Jefferson's camp (more than grumbling, actually; had Jefferson succeeded in impeaching Associate Justice Samuel Chase, rumor had it that Chief Justice Marshall was next²⁴), but in hindsight the court's flexing of its muscles at that critical point seems almost necessary. *Dred Scott*, one of several slow-burning fuses that set off the Civil War, was even at the time seen as a departure from the Constitution.²⁵ The courts effected a slow-motion revolution in society with the “incorporation” of the Bill of Rights into the 14th Amendment in the 75 or so years after the Civil War, but the gradualism lessened the impact and the criticism.²⁶

It may have been the most famous attack on the judiciary, ironically, that finally set the judges free: President Franklin Roosevelt's court-packing scheme. Roosevelt lost his battle to expand the Supreme Court with judges more friendly to statist economics, but he succeeded

²³ Alexander Hamilton, “The Judiciary Department,” *Independent Journal*, June 14, 1788 (Federalist 78).

²⁴ See, for example, this article at pbs.org about Chase: www.pbs.org/wgbh/amex/duel/peopleevents/pande02.html.

²⁵ The *New York Times* said of Chief Justice Taney that he would “go through history as the judge who dragged his official robes in the pollutions of treason.”

²⁶ See, for example, the chart at <http://1stam.umn.edu/archive/historic/pdf/Incorporation%20Chart.pdf>, which chronicles incorporation of 1st Amendment clauses.

in intimidating the Supreme Court into blessing his economic recovery programs. Once the restraints were off Congress, they came off the courts as well. The loosening of economic restrictions in the 1930s was followed in the 40s by ground-laying decisions about religion, including erection of the “wall of separation.” The 1950s were probably less important for the stature of the cases heard (in particular *Brown*) than for who was appointed Chief Justice: California Gov. Earl Warren.

President Eisenhower, when asked if he’d made any mistakes in office, is reputed to have answered “Two, and they’re both on the Supreme Court.” Warren was one. William Brennan was the other. The two cemented a liberal majority from the years of Democratic dominance that in the 1960s outlawed school prayer; discovered a right to privacy (which led in the ‘70s to discovery of the right to abortion); expanded the rights of criminal defendants; overturned the power of states to draw political districts; and much more.

Justice Antonin Scalia recently suggested²⁷ that it was the elevation of Warren – a politician, not a judge, who was more interested in outcomes than constitutional law and precedent – that made bench amendments the rule rather than the exception; and that once outcomes became the primary concern, there was no turning back. It made little difference thereafter who was president: Supreme Court judges nominated by Nixon (Harry Blackmun), Ford (John Paul Stevens), Reagan (Anthony Kennedy and Sandra Day O’Connor), and George H.W. Bush (Souter) have regularly built majorities with those appointed by Democrats. To be sure, those presidents also placed consistent conservatives on the court (Rehnquist, Thomas and Scalia). But, to put it bluntly, they’re badly outnumbered.

Getting back to the question of whether this is a judiciary Hamilton would recognize, it’s likely he wouldn’t. He wanted a court insulated from politics and the passions of the day. But what we have today are courts that are intensely political: that abhor the death penalty and are willing to abuse their power to ban it; impatient with the pace of legislative accommodation of what they consider cultural progress; an inability, in a literal sense regarding the Guantanamo cases, to understand Justice Jackson’s admonition that the Constitution is not a suicide pact.

III. The ‘Right’ Nominees

It should be said that recent Republican presidents, having recognized that the Supreme Court has become a political, rather than an adjudicating, institution, have responded by paying closer attention to nominees’ views. President Reagan elevated William Rehnquist to Chief Justice and replaced him with Antonin Scalia. His next nominee was Robert Bork. With Bork’s nomination, Democrats woke up to the fact that Reagan was serious about changing the Court’s direction.

Bork’s treatment in the Senate Judiciary Committee was abominable, and his name became an eponym for the tactic of defeating a nominee by character assassination. The tactic was used again a few years later against Clarence Thomas. It’s now employed, along with the

²⁷ Speech at the Woodrow Wilson Center, Washington, D.C., March 14, 2005.

filibuster, against any judges whom Democrats even suspect might be in the mold of Thomas or Scalia.

But a “right nominee” strategy for fixing the courts only works (from a conservative’s point of view) when there’s a conservative president and enough conservative senators to confirm his nominees. America’s claim to be a “society of laws, not of men” rings hollow when all parties generally agree that the law is whatever five men or women say it is.

IV. Changing the Balance of Power

Power in America’s constitutional order is a zero-sum game: If the Court wants a political role for itself, the political players’ power is necessarily reduced. Those players include not just Congress and the Executive, but the states and electorates too.

The Court, over the last 50 years, has changed the balance of power. Some who hold the Court in high reverence (Chief Justice Rehnquist²⁸ and Justices Kennedy and Thomas²⁹, for example, along with Ted Olson writing recently in the *Wall Street Journal*³⁰), tell us that it’s OK to criticize the courts, as long as the criticism doesn’t get out of hand. Court critics are admonished to not even think about using impeachment and jurisdiction exception powers, lest the Court’s independence be infringed. Constitutional amendments to pre-empt or change court rulings, one assumes, are permissible.

The balance of constitutional power may come back into balance over the course of many years, as the Warren legacy fades with each new appointment, and presuming that the new appointees wish to return to a warmer relationship with the written Constitution. That’s unlikely, however, and the Court could do a lot more damage in the meantime. No damage from the last 50 years has been undone. *Roe v. Wade* seems always on the bubble, but once an issue is settled law, it tends to stay that way.

Advocates of judicial independence-at-all-costs like Olson, who called the judiciary the “most respected branch of our government,” may be mistaking ignorance for respect. A Quinnipiac poll³¹ from December 2004 found the Court’s approval rating at 50 percent – not all that great to begin with. Coupled with a Fox/Opinion Dynamics poll from the month before, you have to wonder about the validity of even that number: Fox found that 58 percent of respondents couldn’t name a single Supreme Court justice – despite Rehnquist’s having been on the court for more than 30 years, and the most recently named justice having served for more than a decade.

²⁸ William Rehnquist, “2004 Year-End Report on the Federal Judiciary,” January 1, 2005.

²⁹ See, for example, this report on Kennedy’s and Thomas’s appearance before the House Appropriations Committee in April 2005, in which Kennedy said criticism of the courts was “very healthy.” <http://cf.us.biz.yahoo.com/law/050413/fc20aedcbb19b6ac79e1cc710e0d5b44.html?.v=1>

³⁰ Theodore B. Olson, “Lay Off Our Judiciary,” *Wall Street Journal*, April 21, 2005.

³¹ All polls referenced here and below can be found at www.pollingreport.com.

Yet other polls reveal some measure of what might be called innate sophistication on the public's part:

- ABC News/Washington, December 2004: 60% believe nominees' views on issues are fair game for Senate consideration.
- Los Angeles Times, January 2005: 46% believe nominees should publicly state their views on abortion. (That would end a lot of beating around the bush.)
- CBS News/New York Times, January 2005: 71% believe Bush will appoint judges who will vote to make abortion illegal.
- CBS/NYT, November 2004: How much confidence do you have in the Supreme Court? A great deal: 20%. Quite a lot: 22%. Some: 39%. Very little: 17%. Those are not the numbers you'd associate with America's "most respected branch of government." Either that, or the other branches are really in trouble.

There is, moreover, empirical evidence that the public is fed up with judges taking liberties with the law. California voters in 1986 voted "no" on the question, "Should State Supreme Court Chief Justice Rose Bird be retained?" Two of her associate justices also lost their retention elections that year. On their way to judicial ignominy, and in the face of a voter-approved referendum reinstating capital punishment, Bird voted to set aside every death sentence that arrived in her court, 61 in all.

Ten years later, something similar happened in Tennessee. Juries had been handing out death penalties since the U.S. Supreme Court reinstated capital punishment in 1976. Yet no executions had taken place. State Supreme Court Justice Penny White, fairly new to the court, concurred in an opinion setting aside a death penalty for a man who committed a murder in Memphis, having escaped from a Mississippi prison where he was interned for committing another murder. White had the misfortune of being the first of the concurring justices to face retention. The voters deposed her.

The California and Tennessee cases demonstrate that there are solutions to judicial activism. These solutions were intentionally applied and have an effect (in the cases noted above, California got itself a more conservative court after the retention losses; in Tennessee, executions resumed). California changed its constitution in 1934 to allow for retention elections, and was the first state to do so. In 1937 the American Bar Association endorsed the system.³² There's no reason to believe a retention system for federal judges would work any differently than the system does in California.

(To those who say this would have a "chilling effect" on judges, well, that's the point. But in the end, any judge who would let a referendum on his performance once every 10 years prevent him from doing what he believes is right shouldn't be on the bench to begin with.)

³² "Judicial Retention Elections," Honorable B. Michael Dann & Randall M. Hansen, *Loyola of Los Angeles Law Review*, Volume 34, Issue 4. <http://lr.lls.edu/volumes/v34-issue4/dann.pdf>

To impose such a system as retention would require amending the Constitution. To expand a bit on other proposals mentioned earlier:

- Allow Congress to override Supreme Court decisions, just as Congress overrides presidential vetoes. This would seem a desirable constitutional feature. It's easy to see the states ratifying it. In a rational world, one would think Congress would like to have the power. Given the poisonous atmosphere in both houses of Congress at this time, however, it's unlikely that it could clear Congress. This and a retention provision also would make a nice Section 1/Section 2 combination in an amendment.
- Limit judicial terms. Term limits of 15 or 18 years have been heavily debated at the web sites of law school professors, such as volokh.com. Federal Judge Richard Posner has endorsed term limits for the express reason that judges have become political creatures and that for them to have lifetime tenure is undemocratic.

It's hard to see how this would de-activate judges, however. It's just as easy to argue that it would make the problem worse, with judges rushing to polish off their legacies as their terms draw to an end. It would definitely increase judicial turnover, but it's hard to predict whether that would have a good effect, a bad one, or none at all.

- Impose mandatory retirement age. This might be a good idea in itself, but doesn't really do much to stop activism. Might make a good Section 3 on another amendment.

These examples demonstrate that there are ways to police the judiciary without undue interference in its independence. What they don't demonstrate is how to get over the hurdle of two-thirds majorities in Congress.

V. Passing an Amendment

Amendment advocates can take one of two approaches: top-down and bottom-up. The top-down approach has Congress passing a proposed amendment by two-thirds majorities, and sending it off for ratification by three-fourths of the states.

If Congress hasn't taken this action yet on judicial activism, it's unlikely to at any point in the near future. The past 10 years have been a period of intense judicial scrutiny, with former Rep. Tom DeLay the most prominent critic in Congress and widespread comment on activism in the press.³³ Democrats now control Congress, and, in any event, many Republicans believe a hands-off approach to the courts is the appropriate one.

A more promising strategy is that deployed by advocates of a balanced budget amendment during the 1970s and 80s. BBA backers couldn't get an amendment through Congress,

³³ As if written to support the case here, Ramesh Ponnuru and Robert P. George, in "Independence Day," discuss Congress's Article III powers in the May 23, 2005, *National Review*.

despite the huge deficits racked up during the Reagan administration. So they went state to state, winning passage of resolutions to hold a convention to do so (or voting to approve the amendment itself).³⁴ Thirty-two of the required 34 states passed resolutions. The movement stalled there, but it did provide support for those in Congress who wanted to pass an amendment. It passed overwhelmingly in the House in 1995 and fell one vote short in the Senate in 1997. The movement ran out of steam as the federal budget turned from deficit to surplus, at least temporarily.

At least in the states, an Article III amendment campaign might yield better results, for these reasons:

- Only three of the 50 states grant their judges lifetime tenure, and two of those retire their judges at age 70. Most states have elections of some sort: retention, partisan or non-partisan. They know there's a better way to fashion a judiciary than to have judges serve "during good behavior."
- In considering the BBA, the states acted despite the nebulous effect on them of federal deficit spending. Many states, on the other hand, have been directly impacted by activist court decisions (except as noted, these have been previously cited). For example:
 - In California, federal judges have stayed enforcement of referenda limiting benefits to illegal aliens and eliminating race-based hiring in government.
 - In Colorado, a referendum banning affirmative action for gays was struck down by the courts.
 - In Missouri, a federal judge ordered local and state tax increases exceeding \$1 billion to fund school improvements in Kansas City in a fruitless effort to stop white flight.
 - In the University of Michigan affirmative action cases, a scandal erupted over whether the 6th Circuit Court of Appeals delayed hearings until two Republican-appointed judges retired, hence affecting the outcome.³⁵
 - Every state seems to have a 10 Commandments monument left over from promotion of the Cecil B. DeMille epic and an ACLU lawsuit to go with it.³⁶

³⁴ The Constitutional Rights Foundation has an article at its web site (http://www.crf-usa.org/terror/const_conven.htm) discussing the convention method and the Balanced Budget Amendment. There was some controversy with the BBA resolutions, which Phyllis Schlafly writes about here: <http://www.eagleforum.org/psr/1987/sept87/psrsept87.html>. The argument is that some legislators believed they were voting on an amendment, not on holding a convention to consider one.

³⁵ Kay Daly, "Sixth-Circuit Shenanigans," National Review, March 2, 2005.

³⁶ See, for example, this column by Al Tompkins, "10 Commandments Monuments": <http://www.poynter.org/column.asp?id=2&aid=79190>.

- The BBA campaign had popular support, but not a lot of popular enthusiasm. A campaign to re-balance constitutional powers might be actually be adopted as a cause by groups like the National Rifle Association, right-to-life forces, and victims' rights advocates, to name a few.

Further, BBA advocates limited themselves to lobbying. Another option in some states is the initiative. Fourteen I&R states are western; of those 14, 13 are "red," having voted for George Bush in both 2000 and 2004. California is the exception, but it oddly has a history of enacting populist conservative initiatives.

It should be a simple matter to target another 20 or so states for lobbying campaigns, aided by some amount of grass-roots mobilization (See Appendix A).

A campaign like this should be preceded by research to measure the potential for success. If the potential exists, a gradual approach might be taken: Lobbying efforts in small states first, for example, with maybe an initiative or two in states like Wyoming and Utah. But once launched, the campaign should be planned to wind up within four or five years. As the Balanced Budget Amendment campaign demonstrates, energy dissipates over time.

What would happen if 34 states passed the call for a convention? No one really knows, because it's never happened. It's unlikely that Congress would let it go that far. If the magic number approached, Congress would probably pull the plug on the movement by proposing an amendment of its own. If that scenario holds, the organization proposed here should be an influential voice in its drafting.

If it doesn't, then the states would dive into the history books to find out how the last one was arranged, in 1787. Hire a hall, elect some delegates, gavel the thing to order, somebody makes a motion, somebody seconds, the delegates vote. It would be momentous, contentious and strife-ridden, just like the original version. Then the results would be submitted to the states for ratification.

VI. Conclusion

In the 2004 elections, the presidency was important enough to five Democratic billionaires – Peter Lewis, George Soros, John Sperling, and Herb and Marion Sandler – that they tried to buy the election for John Kerry. They couldn't contribute directly to Kerry or the Democratic Party, so they financed 527 groups like Moveon.org, America Coming Together and the Young Voter Alliance. Together they spent more than \$75 million.

It was an almost demented exhibition of Bush hatred: Is there a big enough difference between a Bush and Kerry presidency to be worth anybody's \$20 million? You'd get more liberal judicial nominees, but they'd have to get by a Republican Senate. A less assertive foreign policy, perhaps. Not much else: Democrats had only the slimmest prospect of regaining power in the House or Senate, and so much federal spending is

locked into entitlements that a President Kerry's freedom to spend would've been severely constrained.

Republicans, in much smaller denominations, contributed enough to compete, enough to win a majority of the popular vote along with the electoral. To the hardest core of hard-core Republicans, the ability to keep nominating and confirming judges was the biggest part of the prize.

Political contributors who hold that belief might wonder how efficient their contributions really are, especially given the "maturing" of Republican-appointed judges like Harry Blackmun and Anthony Kennedy. They help elect the man or woman who nominates the judges, and the men and women who confirm them. But after that, the judges are on their own for the next 40 years, restrained only by their own consciences.

Contributions made to change the nature of the judiciary would have a direct impact on the contributors' chief concern. If George Soros were a conservative, ending judicial activism – whether through retention, congressional override or some other device – might be a better \$20 million value.

A final note...

By one account, there have been 400 or so petitions for constitutional conventions circulated over the years. All have failed, in the sense that a convention has not been held. Petitions for the BBA and the popular election of U.S. Senators came close enough to prod Congress to act. The rest may have failed for lack of support or simply bad ideas. But the author knows of no instance in which a convention effort was run as a professional campaign, as is proposed here.

About the Author

Karl Maher is a Denver, Colo., public affairs consultant. He has managed grass-roots communication campaigns for Fortune 100 companies, and written and produced direct mail for referenda and candidate campaigns. He was with Walt Klein & Associates of Denver from 1989 to 2006, and a newspaper editorial writer from 1976 to 1989.

VII. Budget and Timeline

The following dollar amounts represent informed speculation about the costs of achieving passage of a constitutional convention call in 34 states. The campaign could be aborted after the research phase, if the goal seems unobtainable. If the campaign seems to be succeeding it would likely be stopped at some point by congressional action. Communications, lobbying and campaign expenses are an extension of the lobby/initiative/target matrix in Appendix A.

A. Research

- a. Timing: Winter/Spring 2007
- b. Components
 - i. National public opinion survey, n=1,200
 - ii. Focus groups, 4 locations
- c. Cost
 - i. Survey \$50,000
 - ii. Focus groups 40,000
 - iii. Expenses 25,000

B. 527 (or similar) Organization

- a. Timing: Post-research through 2012
- b. Annual expense
 - i. Executive Director 150,000
 - ii. Administration/Legal/Accounting 100,000
 - iii. Expenses 50,000

C. Communications

- a. Timing: Post-research through 2011

b. Total Expense					
	2007	2008	2009	2010	
i. Direct Mail	\$1.25m	1.56m	2.1m	3.5m	8,410,000
ii. Paid Media	5.1m	7.35m	9m	24m	45,450,000
iii. PR	320k	370k	420k	470k	1,580,000
iv. Lobbyists	235k	235k	285k	320k	1,075,000
v. Web Site	25k	25k	25k	25k	100,000
Annual totals	\$6.95m	9.55m	11.75m	28.4m	

Total Communications 56,650,000

Project total \$58,230,000

Note: To compile this budget, states were broken into 4 population groups. The budget assumes campaigning in some states in each of the four groups each year, with the largest in each group left for the final year. Initiative campaigns are assumed in all I&R states. If the project proceeds past the research stage, the mix of states and campaign types would be fine-tuned, and probably would result in a lower overall budget (for example, the Texas Legislature might pass a resolution without much more than being asked, much less than the \$2.5 million budgeted).

Appendix A: Target Initiative and Lobby States

State	Initiative	Lobby	Households	Target Year	Budget*
Alabama		X	2.03 million	1	\$ 575,000
Alaska	X		268,000	1	415,000
Arizona	X		2.4 million	2	3,210,000
Arkansas	X		1.2 million	2	1,620,000
California	X		12.6 million	4	20,500,000
Colorado	X		2.0 million	1	2,800,000
Florida		X	7.8 million	3	2,000,000
Georgia		X	3.5 million	1	1,000,000
Idaho	X		564,000	3	800,000
Kansas		X	1.2 million	1	340,000
Kentucky		X	1.8 million	3	500,000
Louisiana		X	1.9 million	4	560,000
Michigan		X	4.4 million	2	1,230,000
Minnesota		X	2.2 million	2	660,000
Mississippi		X	1.2 million	2	560,000
Missouri	X		2.5 million	3	3,580,000
Montana	X		420,000	3	435,000
Nebraska	X		750,000	4	1,200,000
Nevada		X	1.0 million	1	270,000
NH		X	570,000	3	190,000
NC		X	3.8 million	1	1,000,000
ND	X		300,000	2	425,000
Ohio		X	4.9 million	2	1,425,000
Oklahoma	X		1.5 million	3	2,020,000
Pennsylvania		X	5.4 million	3	1,500,000
SC		X	1.9 million	4	500,000
SD	X		340,000	2	425,000
Tennessee		X	2.5 million	4	750,000
Texas		X	8.7 million	4	2,500,000
Utah	X		825,000	4	1,200,000
Virginia		X	3.1 million	4	925,000
W. Virginia		X	850,000	4	265,000
Wisconsin		X	2.4 million	3	680,000
Wyoming	X		230,000	1	410,000

* Budget numbers are based on a formula using households and type of campaign. They have been rounded up or down to nearest \$5,000. Use budget in Section VII as reference.