

Judges as Politicians: The Enduring Tension of Judicial Elections in the Twenty-first Century

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Abstract:

Elections transform the basis of judicial legitimacy. Whereas a permanently appointed judiciary finds support in its supposed neutrality, the democratic judiciary demands responsiveness. Yet while this is obvious to scholars, the electorate, and most judges – and is in fact confirmed by much statistical data – the Supreme Court and others continue to insist that judicial campaigns can be sculpted to ensure robust democratic debate without compromising the bench’s impartiality. This Essay rejects the notion that the court can be both democratic and disinterested. It reviews the volatile history of judicial elections as well as the modern web of distinctions between protected and proscribable campaign speech. It concludes that elections are incompatible with judicial impartiality, that the elected judiciary of the twenty-first century is a third political branch charged with delivering democratic goods, and that it delivers regularly.



Rezumat:

Alegerile transformă baza legitimității judiciarului. În timp ce o justiție permanentă își găsește sprijinul în presupusa sa neutralitate, sistemul judiciar democratic cere o reacție. Cu toate acestea, în timp ce acest lucru este evident pentru oamenii de știință, electoratul și majoritatea judecătorilor - fapt confirmat de date statistice - Curtea Supremă și alții continuă să insiste în sensul că pot fi dezvoltate campaniile judiciare pentru a asigura o dezbateră democratică robustă, fără a compromite imparțialitatea sistemului judiciar. Acest eseu respinge ideea că instanța poate fi atât democratică cât și dezinteresată. Autorul analizează istoria volatilă a alegerilor judiciare, precum și web-ul modern al distincțiilor dintre discursul de campanie protejat și cel interzis.

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Eseul conchide că alegerile sunt incompatibile cu imparțialitatea judiciară, iar sistemul judiciar ales al secolului al XXI-lea este o a treia ramură politică însărcinată cu oferirea de servicii democratice în mod regulat.

Keywords: *judicial elections, democratic judiciaries, judicial campaigns, political machines, relationship between the judiciary and the public*

Introduction

It's an election year. Politicians all over America are meeting constituents, making promises, and raising money – and so are judges. This last point might surprise those hailing from abroad. “To the rest of world,” as one judge quipped, “the American adherence to judicial elections is as incomprehensible as our rejection of the metric system.”³²²

Indeed, only two other nations use elections for selecting or retaining judges,³²³ compared to thirty-nine American states. This means that ninety percent of all state judges in the United States face democratic scrutiny at some point.³²⁴

This is not a new development: judicial elections date back to the early nineteenth century. But while past judicial elections were rather tame affairs, the twenty-first century has seen these contests grow increasingly politicized.³²⁵ For instance, in the 2012 Michigan Supreme Court

campaign, Republican opponents of Democrat-backed candidate Bridget McCormack critiqued her pro bono experience by airing attack ads claiming that McCormack had “volunteered to help free a terrorist.”³²⁶ Elections have grown increasingly expensive, too. In 2000, 2002, and 2004, all judicial candidates combined raised \$123 million in campaign funds, which was nearly double the amount spent in the three previous cycles.³²⁷ And from 2003 to 2004, state supreme court candidates alone raised a combined \$46.8 million.³²⁸ Consequently, judicial elections – which were once colorfully described as being just as exciting as “playing a game of checkers by mail” – have become fully politicized sports not unlike those seen for traditional public office.³²⁹

These intense judicial contests largely resulted from court decisions holding restrictions on judicial candidates' campaign speech unconstitutional. The watershed case is *Republican Party of Minnesota v. White*, in which the Supreme

³²² Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 1996 (1988).

³²³ Switzerland elects some lay judges of canton courts, and Japan's Supreme Court judges face infrequent retention elections. See Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1351 n.3 (2010) (citing Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 691 n.3 (1995)).

³²⁴ Matthew J. Streb, *The Study of Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 1, 7 (Matthew J. Streb ed., 2007) [hereinafter *RUNNING FOR JUDGE*].

³²⁵ Janet Stidman Eveleth, *Restoring Civility to Judicial Elections*, 41 MD. B.J. 48, 48 (2008).

³²⁶ See Andrew Rosenthal, Opinion, *Everyone Deserves Legal Representation*, N.Y. TIMES: TAKING NOTE (Nov. 1, 2012, 3:35 PM), <http://takingnote.blogs.nytimes.com/2012/11/01/everyone-deserves-legal-representation/>.

³²⁷ See Streb, *supra* note 3, at 1 (citing DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A 'TIPPING POINT'—AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL* 13 (2005), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_10569.pdf).

³²⁸ *Id.*

³²⁹ *Id.* at 2.

Court ruled that Minnesota's Announce Clause – which forbade candidates for judicial office from declaring their views on disputed legal and political issues – violated the First Amendment.³³⁰ Writing for the majority, Justice Scalia acknowledged the tension in Minnesota's attempt to secure an open-minded yet elected judiciary,³³¹ but reasoned that “the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about.”³³² Over the next decade and a half, courts addressing campaign restrictions have struggled to reconcile the tension between ensuring a robust democratic election and recognizing the compelling state interest in securing an actual and perceived unbiased judiciary.

This Essay rejects the notion that the bench can be at once both democratic and impartial. The tension between these two concepts is irreconcilable because informed elections make judges responsible for delivering democratic goods and transform the judiciary into a political branch. The argument proceeds in three parts. First, Part I reviews the history of judicial elections, emphasizing their uneasy beginnings and cataloguing the various electoral systems practiced today. Next, Part II assesses the twenty-first-century court's struggle to balance the tension between democracy

and judicial legitimacy, analyzing the illogical web delineating protected and unprotected judicial-campaign speech. Finally, Part III evaluates the current state of judicial elections, drawing upon scholarship, judicial experiences, and recent statistical data to show that the tension persists and cannot be resolved.

I. A Brief Overview of Judicial Elections

States did not always elect their judges. To the contrary, all thirteen original states appointed judges in some fashion. Eight vested appointment in one or both of the houses, two utilized gubernatorial appointments with legislative confirmation, and three utilized gubernatorial appointment with the consent of an executive council.³³³ In most ways, this system mirrored the federal approach of executive appointment with the advice and consent of the Senate, which itself migrated from the English tradition of king-selected judges.³³⁴ During the eighteenth century, then, the American judiciary was insulated from direct democratic scrutiny.

This consensus on judicial appointments slackened with the rise of Jacksonian democracy. Around the early and mid-nineteenth century, citizens began emphasizing political accountability and direct participation in government decisionmaking.³³⁵ The unelected and unaccountable judiciary

³³⁰ 536 U.S. 765, 788 (2002).

³³¹ *Id.* at 779.

³³² *Id.* at 788.

³³³ Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 *ARK. L. REV.* 249, 252 (2011) (citing LARRY C. BERKSON ET AL., *JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT* (2010)

http://judicialselection.us/uploads/documents/Berkson_1196091951709.pdf).

³³⁴ *See id.*

³³⁵ *See* Rachel Paine Caufield, *How the Pickers*

Pick: Finding a Set of Best Practices for Judicial Nominating Commissions, 34 *FORDHAM URB. L.J.* 163, 167 (2007) (first citing ALLAN ASHMAN ET AL., *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 9–10 (1974); then citing CHARLES H. SHELDON & LINDA S. MAULE, *CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES* 4 (1997); and then citing Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, in *JUDICIAL POLITICS: READINGS FROM JUDICATURE* 50, 50 (Elliot E. Slotnick ed., 2005)).

proved an obvious target. Compared to their appointed counterparts, voters considered elected judges more independent from political elites and therefore worthy of greater public trust and confidence.³³⁶ Georgia was the first state to employ elections, passing a constitutional amendment to elect lower court judges in 1812.³³⁷ Mississippi moved to elect the entirety of their judiciary in 1832.³³⁸ And most noteworthy, every state entering the Union after 1845 opted for judicial elections over appointments.³³⁹

The enthusiasm for democratic judiciaries was short-lived, however. Mid-century industrialization brought with it political machines that came to dominate all facets of the political process – including judicial elections.³⁴⁰ The electorate began to view the elected bench as corrupt, unethical, and unqualified.³⁴¹ For example, in considering a proposal to elect judges in Massachusetts, one delegate argued that other states' judiciaries had already "fallen hopelessly into the great cistern" and had made judges part of the "political mill."³⁴² And after only two decades of holding judicial elections, the New York legislature openly considered a return to appointments.³⁴³ By 1906, Roscoe Pound, then Dean of Harvard Law School, warned:

[W]e must not be deceived by... inevitable discontent with all law into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for the law which exists in the United States to-day (...) Putting courts into politics and compelling judges to become politicians in many jurisdictions has almost destroyed the traditional respect for the bench.³⁴⁴

Despite Pound's warnings, states continued throughout the twentieth century to compel potential judges to campaign for their seat.

A middle way emerged during the twentieth century in the form of merit selection, also known as the "Missouri Plan." Like many progressive-era reforms, merit selection began as an academic attempt to remove power from the electorate and vest it with experts instead.³⁴⁵ The approach combined non-partisan nominating commissions with periodic retention elections, under the belief that appointive systems were better able to identify strong judges while elections guaranteed their accountability.³⁴⁶ The American Bar Association endorsed merit selection in 1937, and soon after Missouri became the first state to adopt the system – hence the namesake Missouri Plan.³⁴⁷

³³⁶ See Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920*, 1984 AM. B. FOUND. RES. J. 345.

³³⁷ EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 108 (Lawbook Exchange, Ltd. 2005) (1944).

³³⁸ Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 854 (2002) (citing MARY L. VOLCANSEK & JACQUELINE L. LAFON, *JUDICIAL SELECTION: THE CROSS-REVOLUTION OF FRENCH AND AMERICAN PRACTICES* 90 (1988)).

³³⁹ *Id.* (citing VOLCANSEK & LAFON, *supra* note 17, at 90).

³⁴⁰ Caufield, *supra* note 14, at 168.

³⁴¹ *Id.*

³⁴² Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176–77 (1980) (quoting Russell D. Niles, *The Popular Election of Judges in Historical Perspective, THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK* 528 (1966)).

³⁴³ *Id.* at 177.

³⁴⁴ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice, Address Before the Annual Convention of the American Bar Association* (Aug. 29, 1906), in 14 AM. LAW. 445, 445, 450 (1996).

³⁴⁵ Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 677 (2009).

³⁴⁶ Caufield, *supra* note 14, at 169–70.

³⁴⁷ *Id.* at 170.

Today, the Missouri Plan – with its commissions of experts – is the most common approach to selecting judges. It is utilized in twenty-four states as well as the District of Columbia.³⁴⁸ A small number of other states employ similar appointment schemes. In California, Maine, and New Jersey, judges are chosen through gubernatorial appointment with the advice and consent of the legislature.³⁴⁹ And in Virginia and South Carolina, legislatures rather than governors appoint judges.³⁵⁰ All of these appointment-based systems employ periodic retention elections. While retention elections in most states are uncontested – meaning that only the incumbent judge is listed on the ballot – a judge’s performance is no less susceptible to electoral scrutiny in these jurisdictions.

Other states use elections both to choose and retain judges. Interstate distinctions are plentiful, with perhaps the most important being whether or not the election is partisan.³⁵¹ A partisan election is one in which the judicial candidate is designated on the ballot as belonging to a particular political party, not unlike a candidate for the legislature or executive. A non-partisan election is one in which the judicial candidate is presented on the ballot without party identification, not unlike a candidate for a municipal position. Partisan elections are only slightly less common than non-partisan

Today, a majority of states have merged the three branches and welcomed in the political parties. And the resulting tension cannot be easily tamed by creative carve-outs to campaign speech.

elections; eight states employ the former while thirteen employ the latter.³⁵² And some states, for example Michigan, formally utilize a non-partisan system, though the two major political parties vet, nominate, and even indirectly fund candidates.³⁵³

II. Judicial Elections in the Twenty-First Century

As shown above, states have generally enjoyed broad authority to structure their judicial elections. The twenty-first century, however, has seen the Supreme Court and others severely constrain that freedom. Informed by developing conceptions of political speech, the Court started its perilous endeavor of trying to ensure robust judicial elections while simultaneously recognizing the states’ interest in encouraging an unbiased and impartial judiciary. Over the last decade and a half,

³⁴⁸ These states include: Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Mexico, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, and Wyoming. See *id.* at 171, 180 (citing AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2004), http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173_077.pdf).

³⁴⁹ See *Judicial Selection in the States*, NAT’L CTR. FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/ (last visited Dec. 23, 2016).

³⁵⁰ *Id.*

³⁵¹ For an in-depth discussion on the difference between partisan and non-partisan elections, see generally Chris W. Bonneau & Damon M. Cann, *Party Identification and Vote Choice in Partisan and Nonpartisan Elections*, 37 POL. BEHAV. 44 (2015).

³⁵² See *Judicial Selection in the States*, *supra* note 28.

³⁵³ *Id.*

the Court's project has resulted in a web of distinctions between protected campaign speech and that which states may proscribe. Though these distinctions may be reasoned, the results are absurd.

Republican Party of Minnesota v. White sparked this development.³⁵⁴

In that case, five Justices of the Supreme Court invalidated part of Minnesota's Code of Judicial Conduct prohibiting judicial candidates from "announc[ing] his or her views on disputed legal or political issues."³⁵⁵ Justice Scalia, writing for the majority, found that the Announce Clause did not pass constitutional muster because the speech restriction was not narrowly tailored to serve a compelling state interest.³⁵⁶ In reaching this conclusion, the Court rejected the argument that a candidate announcing her views posed a special threat to her actual or perceived open-mindedness.³⁵⁷ Avoiding preconceptions on legal issues is impossible, the Court reasoned, and pretending that a judge lacks such preconceptions would be foolish and undesirable. And regardless, a meaningful distinction exists between a judge announcing her views and her promising a particular ruling.³⁵⁸ According to the Court, the judge who has merely announced a view – rather than promised a specific outcome – will not feel wed to a particular ruling once elected.

The majority also worried that the restriction prevented the electorate from forming and casting knowledgeable votes. Though the Minnesota Supreme Court had construed the Announce Clause to allow general discussions of caselaw and

judicial philosophy – allowing, for instance, a candidate to assert that she is a "strict constructionist" – Justice Scalia criticized this as insufficient to ensure an informed electorate.³⁵⁹ The Court specified that judicial philosophies carry "little meaningful content for the electorate unless [they are] exemplified by application to a particular issue of construction likely to come before a court."³⁶⁰ So while states can decide whether or not to hold judicial elections, "[that] greater power... does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance."³⁶¹ Candidates must be allowed to inform the voters on the issues.

The majority's opinion provoked impassioned dissents. Justice Stevens stressed the uniqueness of the judiciary, noting that "[e]lected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials."³⁶² He acknowledged the foolishness of pretending that judges lack preconceptions, but explained: "The lawyer who writes an article advocating harsher penalties for polluters surely does not commit to that position to the same degree as the candidate who says 'vote for me because I believe all polluters deserve harsher penalties.'"³⁶³ Indeed, to an electorate forming views on the court's impartiality, the difference between an announcement and a promise is a distinction without a difference. As Justice Ginsburg contended in her dissent, when candidates publicize their positions the public reasonably expects a "*quid pro quo*

³⁵⁴ 536 U.S. 765 (2002).

³⁵⁵ *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

³⁵⁶ *Id.* at 776.

³⁵⁷ *See id.* at 778–80.

³⁵⁸ *Id.* at 780–81.

³⁵⁹ *Id.* at 773 (quoting Transcript of Oral

Argument at 29, *White*, 536 U.S. 765).

³⁶⁰ *Id.*

³⁶¹ *Id.* at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

³⁶² *Id.* at 797 (Stevens, J., dissenting).

³⁶³ *Id.* at 801.

– a judicial candidate’s promises on issues in return for the electorate’s votes at the polls.³⁶⁴ Query: What other way could they possibly view it?

Though *White* only addressed Minnesota’s Announce Clause, its consequences rippled. Spurred by the new pronouncement, judicial hopefuls successfully mounted challenges to campaign restrictions across the country. Challengers appealed rules prohibiting judicial candidates from overt political acts including: making promises or commitments, personal solicitation of funds, endorsing other politicians, announcing political party affiliations, and making false or misleading statements.³⁶⁵ And some states, in a deliberate effort to avoid litigation, amended their rules to make them less restrictive and thereby make the elections more political. For instance, North Carolina welcomed the newly politicized judiciary by altering its rule from, “A judge should refrain from political activity inappropriate to his judicial office,” to the polar opposite, “A judge *may* engage in political activity consistent with his status as a public official.”³⁶⁶ *White* did not predetermine these changes, but the difficulty of balancing the central tension of judicial elections was clearly evident.

One particular area exemplifying this difficulty is courts’ treatment of partisan-affiliation clauses – that is, rules prohibiting a judicial candidate from announcing whether she is, say, a Republican or a Democrat. The Supreme Court has not addressed the issue, but

the Sixth, Seventh, and Eighth Circuits have all overturned party-affiliation restrictions.³⁶⁷ The Sixth Circuit’s decisions are worth scrutinizing. In *Carey v. Wolnitzek*, Judge Sutton likened Kentucky’s party-affiliation clause with the Announce Clause at issue in *White*. Party affiliations, he explained, are a type of “shorthand” that allow candidates to “announc[e]” their views on many issues at once.³⁶⁸ Preventing such shorthand announcements violates the candidate’s right to speak and the electorates’ right to be meaningfully informed.

Six years later, the Sixth Circuit reviewed an almost identical rule in *Winter v. Wolnitzek*, on appeal from the Kentucky Supreme Court.³⁶⁹ Because Kentucky’s judicial elections are non-partisan, the new rule prohibited candidates from “suggesting to the voters that the candidate is *the* endorsed judicial nominee of a political party.”³⁷⁰ A candidate could not claim, for instance, “I am *the* conservative Republican,” because it insinuated that the candidate was supported by the Republican Party. Judge Sutton, writing again, held that the regulation was impermissibly vague because it provided a candidate little guidance for when she could exercise her right to affiliate with a political party, versus when she implied an impermissible connection.³⁷¹ The article “*the*” proved a constitutionally insufficient differentiator.³⁷²

Though both *Carey* and *Winter* are well-reasoned, the results are absurd. While it is true that party-affiliation can be

³⁶⁴ *Id.* at 818 (Ginsburg, J., dissenting).

³⁶⁵ See J.J. GASS, BRENNAN CTR. FOR JUST., AFTER *WHITE*: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS 2–3 (2004), <http://www.brennancenter.org/sites/default/files/legacy/d/ji4.pdf>.

³⁶⁶ *Id.* at 4 (emphasis added).

³⁶⁷ See *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010); *Siefert v. Alexander*, 608 F.3d 974 (7th

Cir. 2010); *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005) (en banc).

³⁶⁸ *Carey*, 614 F.3d at 202.

³⁶⁹ *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016).

³⁷⁰ *Winter v. Wolnitzek*, 482 S.W.3d 768, 776 (Ky. 2016).

³⁷¹ *Winter*, 834 F.3d at 689.

³⁷² *Id.*

used as a shorthand announcement for a variety of positions, it also communicates a great deal more to the electorate. Party-announcements paint candidates in partisan colors, transforming them into the judicial counterpart of the Red and Blue legislative and executive candidates. Moreover, the advantage of informing the electorate of this association is doubtful. From a jurisprudential viewpoint, it is unclear what it means to be a “Republican judge” or a “Democrat judge.” Political machines do not enlighten judicial voters; they merely politicize the contest. Kentucky surely understood this when it chose to employ non-partisan elections. And while Kentucky remains free to hold non-partisan elections post *Carey* and *Winter*, it may not prevent a candidate from informing the electorate of her party-affiliation or bending her words to suggest that she is party-endorsed. Now, Kentucky may only withhold party-affiliation from the ballot – information that voters likely already came to know through the candidate’s campaign.

Despite these dramatic developments, the Supreme Court has only addressed judicial elections twice since *White*. In 2009, the Court dealt with campaign contributions and judicial recusal in *Caperton v. A.T. Massey Coal Co.*³⁷³ There, a justice on the West Virginia Supreme Court refused to recuse himself in a case involving a coal company that donated three million dollars to his campaign.³⁷⁴ The justice cast the deciding vote in favor of the donor, and the loser appealed arguing that it was denied due process. The Supreme Court agreed,

explaining that recusal is required when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”³⁷⁵ The Court explained that while “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal,” because of the amount of money donated here – which constituted more than all other donors combined – the “probability of bias” was simply “too high.”³⁷⁶ Of course, as Chief Justice Roberts’s dissent acknowledged, this rationale invites more questions than answers.³⁷⁷ Most importantly: How big of a contribution does it take to compromise judicial integrity? The majority didn’t even attempt an answer.

The last word from the Supreme Court came in 2015. In *Williams-Yulee v. Florida Bar*, the Court upheld a Florida restriction on judicial candidates personally soliciting campaign funds.³⁷⁸ The Court took pains to emphasize the uniqueness of the judiciary, stating not once but twice: “Judges are not politicians.”³⁷⁹ Because of the judiciary’s traditional role as an impartial moderator, Florida could lawfully restrict candidates from personally soliciting campaign funds in order to preserve “public confidence in the integrity of the judiciary.”³⁸⁰ But are appearances all that matter? The Florida rule still allowed candidates to indirectly raise funds through campaign committees and even permitted candidates to personally write thank-you notes to donors. Perhaps the Court is correct that there is a perceptible difference between candidates asking for money and directing

³⁷³ 556 U.S. 868 (2009).

³⁷⁴ *Id.* at 873–74.

³⁷⁵ *Id.* at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

³⁷⁶ *Id.* at 884.

³⁷⁷ *Id.* at 893–98 (Roberts, C.J., dissenting) (posing forty questions left unanswered by the majority’s opinion).

³⁷⁸ 135 S. Ct. 1656, 1662 (2015).

³⁷⁹ *Id.* at 1662, 1672.

³⁸⁰ *Id.* at 1666.

donors to a committee, but the bench's actual impartiality remains fully compromised. Judges may not be able to request funds, but they know who is footing the bill.

As shown, the Court's balancing project has delivered peculiar results: judges may announce their beliefs, so long as they do not promise a specific vote; judges may declare their party-affiliations and imply endorsements, even in non-partisan elections; judges may consider democratic input, but not if a specific voter gave too much money; and judges may direct potential donors to their campaign committees, but not personally solicit funds. These bizarre results – say the courts – tame the tension between meaningful elections and an actual and perceived impartial judiciary.

III. The Irreconcilable Tension

Courts' attempts to balance judicial campaigns between ensuring informed elections and an impartial judiciary are admirable, but futile. Once judges are free to announce their views, affirm political affiliations, and indirectly raise money, the bench ceases to be impartial. Because the elected judiciary's legitimacy can no longer be found in providing unbiased rulings, courts must instead stake their legitimacy in securing democratic goods. Thus, despite the Supreme Court's refrain, elected judges *are* politicians. To be sure, all of the data suggests that judges are understood by voters and among themselves as politicians, and that they act accordingly.

There are many ways to achieve judicial legitimacy. Federal judges, for instance, are largely considered

legitimate because of their electoral unaccountability. These judges are appointed by the executive, confirmed with the advice and consent of the Senate,³⁸¹ and hold their office “during good Behaviour”³⁸² – which is almost without exception life tenure. Since there can be no formal retribution resulting from the ordinary course of their decisionmaking, federal judges do not face democratic scrutiny. This is beneficial because, as Alexander Hamilton explained, an appointed and unaccountable bench protects against the “encroachments and oppressions of the representative body,” and is “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”³⁸³ Put simply, unelected judges can make unpopular rulings in order to protect individuals or minorities without fear of retribution. It is their role in ensuring adherence to the Constitution that makes them legitimate.

But an appointed judiciary is not without shortcoming. There is a conceptual difficulty with a democracy consisting of a coequal government branch that is neither elected nor accountable.³⁸⁴ Constitutional scholar Erwin Chemerinsky described this “counter-majoritarian difficulty”³⁸⁵ as “a paradigm that emphasizes the democratic roots of the American polity and that characterizes judicial review as at odds with American democracy.”³⁸⁶ An unaccountable body wielding the power to review democratically enacted laws – even striking them down as it alone sees fit – is incompatible with representative government and is therefore unjustifiable,

³⁸¹ See U.S. CONST. art. II, § 2, cl. 2.

³⁸² *Id.* art. III, § 1.

³⁸³ THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁸⁴ See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT

AT THE BAR OF POLITICS 16 (2d ed. 1986).

³⁸⁵ Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 71 (1989) (quoting BICKEL, *supra* note 63, at 16).

³⁸⁶ *Id.* at 61.

critics claim.³⁸⁷ This is no new argument: Thomas Jefferson recognized that making judges “dependent on none but themselves” ran counter to the principle of “a government founded on the public will.”³⁸⁸ Put another way, unaccountable judges may choose to act as untouchable super-legislators, impeding democratic developments and leaving the public with few options.

Judicial elections solve the counter-majoritarian difficulty, yet in so doing pose their own inverse problem – a “majoritarian difficulty.”³⁸⁹ Professor Steven Croley describes this: instead of worrying “how unelected/unaccountable judges can be justified in a regime committed to democracy,” the majoritarian difficulty asks “how elected/accountable judges can be justified in a regime committed to constitutionalism.”³⁹⁰ The concern is that when judges must answer to the public, they are less likely to impartially apply the law and more likely to respond to political pressures.³⁹¹ Critically, elected judges may be less likely to rule in favor of unpopular parties, especially if they have reason to believe that doing so will affect their chances at reelection. Reciprocally, they will be more likely to rule for favorable voters and campaign contributors. With judicial elections, rule of law takes a backseat to political expediency.

There is no easy solution to the majoritarian difficulty. Elections strike at the heart of the judiciary’s purpose, at

least as conventionally understood. Historically, judges are unique among state actors because their legitimacy is founded not in providing democratic outcomes, but rather in providing undemocratic impartiality.³⁹² Many have noted that the judiciary – more so than any other government branch – is able to develop public good will, legitimize government policies, and generate voluntary conformance with laws.³⁹³ The public’s delicate willingness to extend this deference is based at least in part on the perception that judges are removed from the ordinary sway of politics – their application of the law governed not by partisan ideology, but rather by logic or even some sense of wisdom.³⁹⁴ In fact, studies repeatedly show the most significant factor in the public’s evaluation of the judiciary is the perceived fairness of court processes.³⁹⁵ That is to say, Americans traditionally care less about outcomes than they do about fairness.³⁹⁶

But elected judges are incapable of maintaining perceptions of judicial fairness. Elections not only expose those men and women behind the bench, they explicitly require the public to choose which individuals will apply and evolve the law. This democratic exercise betrays the concept of the law as impersonal, independent, and objective. In the layman’s mind, how can there be a judicial election if the law exists in serene neutrality? Of course, critics will fault this characterization. They will argue that the

³⁸⁷ *Id.* at 70–71.

³⁸⁸ Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 12 THE WORKS OF THOMAS JEFFERSON 5 (Paul Leicester Ford ed., 1904).

³⁸⁹ Croley, *supra* note 2, at 694.

³⁹⁰ *Id.*

³⁹¹ *See id.*

³⁹² *See id.*

³⁹³ *See, e.g.,* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 17–18 (1964); Croley, *supra* note 2, at 691; James L.

Gibson, *Understandings of Justice: Intuitional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC’Y REV. 469, 470 (1989).

³⁹⁴ *See* Gibson, *supra* note 72, at 469.

³⁹⁵ *See, e.g.,* NAT’L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 43 (1999); DAVID B. ROTTMAN, NAT’L CTR. FOR STATE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS 6 (2005).

³⁹⁶ *See* NAT’L CTR. FOR STATE COURTS, *supra* note 74, at 43; ROTTMAN, *supra* note 74.

perception of law being applied by nondescript, objective, and wise men and women is pure fantasy – and they would be absolutely correct. The law is not self-executing and there are many flaws with the “judge-as-umpire” analogy made famous by Chief Justice John Roberts.³⁹⁷ Calling “balls and strikes” necessarily involves subjectivity, and judges – whether appointed or elected – bring their preconceptions to the bench.

To succumb to this critique, however, is to misunderstand both the judiciary and the analogy’s depth. The umpire’s decisions are legitimate not because he is objective in marking the strike zone, but because he benefits from the systemic integrity of the game. The coaches may spit, bump chests, and kick dirt as much as they please; none of it changes the umpire’s position as the disinterested arbiter. Yet imagine that it came to be known that one of the teams had selected this particular umpire from among many, surrounded him with influential and moneyed individuals, and showered him with power and prestige. They further told him that if he did not rule in their team’s favor that he would fast find himself out of the park. In this hypothetical, all of the umpire’s calls would be rightly compromised, regardless of how “objectively” he called the game. Each of his calls would be scrutinized for real or imagined bias. This is precisely the predicament of the elected judiciary: from the public’s seat, elected judges mean a rigged game.

Yet even a rigged game can be played. And this is precisely what has happened with the advent of hyper-politicized judicial elections following *White*. New free-for-all

contests have entangled jurists in voters’ minds with the executive and legislative branches, as well as with the political parties. Judges have come to be seen not as neutral and independent arbiters, but as Red and Blue politicians for the third political branch. This result is unsurprising. If a judge is to be held democratically accountable, she cannot assert legitimacy as an independent arbiter. She is necessarily seen as in the pocket of those who put her on the bench. The only alternative, then, is to abandon conceptions of judicial impartiality and, instead, provide democratic goods. That is to say, elected judges must call “balls and strikes” as the people who put them there would want. The majoritarian difficulty so commands.

This need not be an apocalyptic prospect. If, as the data suggests, Americans are more interested in having a neutral and independent judiciary than one that is ruled by partisan ideology,³⁹⁸ then that public is apt to support and fund those judicial candidates whom they believe will rule most fair-mindedly. Justice Kennedy makes precisely this point in his *Williams-Yulee* dissent. “If the State is concerned about unethical campaign practices,” he suggests, “it need not revert to the assumption that voters themselves are insensitive to ethics.”³⁹⁹ Ensuring free and open elections “might stimulate discourse over the requisite and highest ethical standards for the judiciary, including whether the people should elect a judge who personally solicits campaign funds.”⁴⁰⁰ Citizens are free to elect judges who will adhere to traditional notions of judicial neutrality, or instead choose those who

³⁹⁷ See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55–56 (2005)* (statement of John G. Roberts, Jr.).

³⁹⁸ See, e.g., MURPHY, *supra* note 72; Croley, *supra* note 68; Gibson, *supra* note 72.

³⁹⁹ 135 S. Ct. 1656, 1684 (Kennedy, J., dissenting).

⁴⁰⁰ *Id.*

actively deliver political goods. Democracy is the solution to, not the problem with, judicial elections.

Still, the general public, and even the judges themselves, see things differently. According to a 2007 poll conducted by the Annenberg Public Policy Center, “69% [of the public] thinks that raising money for elections affects a judge’s rulings to a moderate or great extent.”⁴⁰¹ These sixty-nine percent appear to be onto something. According to another poll, over sixty percent of judges indicated that fear of losing an election affects their judicial behavior.⁴⁰² Judges express that they experience this fear even when losing an election is highly unlikely, for instance in unopposed retention elections.⁴⁰³ Former California Supreme Court Justice Otto Kaus explained this phenomenon: “There’s no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.”⁴⁰⁴

Statistics bear out this crocodile. For instance, the Brennan Center for Justice at New York University School of Law found that judges hand out significantly longer sentences in serious, violent

criminal cases the closer the sentencing judge is to running for re-election.⁴⁰⁵ And the more frequently television ads air during an election, the less likely elected state supreme court justices are to rule in favor of criminal defendants.⁴⁰⁶ Imposition of capital punishment is particularly affected by judicial elections: over the past fifteen years, appointed judges reversed death sentences twenty-six percent of the time, while judges facing retention elections reversed fifteen percent of the time and judges facing competitive elections reversed only eleven percent of the time.⁴⁰⁷ Elected judges, either implicitly or explicitly, regularly rule against those who are politically disfavored.

Judges also consistently rule in favor of their campaign donors. In a large empirical study, Stephen Ware identified a “remarkably close correlation between a justice’s votes on arbitration cases and his or her source of campaign funds.”⁴⁰⁸ And a *New York Times* study found that Ohio Supreme Court justices voted in favor of their contributors more than seventy percent of the time, with one justice voting for his contributors an astounding ninety-one percent of the

⁴⁰¹ KATHLEEN HALL JAMIESON, ANNENBERG PUB. POLICY CTR., PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS (2007), http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf.

⁴⁰² Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312 (1994).

⁴⁰³ *Id.* at 313.

⁴⁰⁴ Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1987, at 52, 58.

⁴⁰⁵ KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 7 (2015) (citing Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When it Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004)).

⁴⁰⁶ *Id.* at 2 (citing JOANNA SHEPHERD & MICHAEL S. KANG, SKEWED JUSTICE: CITIZENS UNITED, TELEVISION ADVERTISING AND STATE SUPREME COURT JUSTICES’ DECISIONS IN CRIMINAL CASES (2014), http://www.acslaw.org/sites/default/files/Joanna_Shepard_and_Michael_S_Kang_Skewed_Justice_Citizens_United_Television_Advertising_and_State_Supreme_Court_Justices%E2%80%9999_Decisions.pdf).

⁴⁰⁷ *Id.* (citing Dan Levine & Kristina Cooke, *Uneven Justice: In States with Elected High Court Judges, a Harder Line on Capital Punishment*, REUTERS (Sept. 22, 2015), <http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/>).

⁴⁰⁸ Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002).

time.⁴⁰⁹ That same study found that potentially compromised justices often refuse to recuse themselves: “In the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times.”⁴¹⁰ These judicial actors are not ensuring the neutrality of the court; they are ensuring their continued place on the democratic bench. The tension of judicial elections requires these judges to stake their legitimacy in ruling according to their voter’s wishes. To some extent, they are simply doing their jobs.

Judicial elections thereby transform the relationship between the judiciary and the public, creating a new political market for the delivery of democratic goods. No longer is the court removed and neutral, but instead it is a third political branch. As Melinda Gann Hall found in her recent empirical assessment of judicial campaigns, “Partisan state supreme court elections in many respects resemble their legislative and executive counterparts.”⁴¹¹ So now, that citizen who is concerned with, say, the death penalty,⁴¹² may look not only to her elected legislators to pass harsher laws, her elected executive to seek convictions, but now also her elected judges to impose or uphold the sentence. The Supreme Court’s belief that the tension of judicial elections can be tamed is fool-hearted: democracy demands responsiveness, and politician-judges will deliver.

Conclusion

It remains to be seen whether a judiciary legitimized by its democratic appeal rather than its role as a neutral arbiter can persevere. Although judicial elections have existed for nearly two hundred years, it has only been fifteen years since the Supreme Court and others have fully opened these contests to the political machines. This practice places the judiciary and the whole constitutional system in a perilous position. Writing on the subject more than two centuries ago, Alexander Hamilton explained: “There is no liberty, if the power of judging be not separated from the legislative and executive powers. Liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments.”⁴¹³ Today, a majority of states have merged the three branches and welcomed in the political parties. And the resulting tension cannot be easily tamed by creative carve-outs to campaign speech. Constitutionalism may wither to twenty-first century judicial populism.

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⁴⁰⁹ David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 303 (2008) (citing Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES (Oct. 1, 2006), <http://www.nytimes.com/2006/10/01/us/01judges.html>).

⁴¹⁰ *Id.* (quoting Liptak & Roberts, *supra* note 88).

⁴¹¹ MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* 5 (2014).

⁴¹² Data has shown that public perceptions of the death penalty particularly affect elected judges. See Paul Brace & Brent D. Boyea, *Judicial Selection Methods and Capital Punishment in the American States*, in *RUNNING FOR JUDGE*, *supra* note 3, at 186, 186–202.

⁴¹³ THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (internal quotation omitted) (quoting 1 BARON CHARLES DE MONTESQUIEU, *THE SPIRIT OF LAWS* 152 (Thomas Nugent trans., Colonial Press 1900) (1750)).