

## ARTICLES

### THE IRONY OF JUDICIAL ELECTIONS

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*Judicial elections in the United States have undergone a dramatic transformation. For more than a century, these state and local elections were relatively dignified, low-key affairs. Campaigning was minimal; incumbents almost always won; few people voted or cared. Over the past quarter century and especially the past decade, however, a rise in campaign spending, interest group involvement, and political speech has disturbed the traditional paradigm. In the “new era,” as commentators have dubbed it, judicial races routinely feature intense competition, broad public participation, and high salience.*

*This Article takes the new era as an opportunity to advance our understanding of elective versus nonelective judiciaries. In revisiting this classic debate, the Article aims to make three main contributions. First, it offers an analytic taxonomy of the arguments for and against electing judges that seeks to distinguish the central normative concerns from the more contingent, empirical ones. Second, applying this taxonomy, the Article shows how both the costs and the benefits of elective judiciaries have been enhanced by recent developments, leaving the two sides of the debate further apart than ever.*

*Finally, the Article explores several deep ironies that emerge from this cleavage. Underlying these ironies is a common insight: As judicial elections achieve greater legitimacy as elections, they will increasingly undermine the judiciary’s distinctive role and our broader democratic processes. There is an underappreciated tradeoff between the health of judicial elections and the health of the judiciary, the Article posits, that can help recast the controversy over the new era.*

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## INTRODUCTION

Judicial elections have long been something of a curiosity in our legal and political order. Since the mid-nineteenth century, the majority of U.S. states have subjected at least some of their courts to popular elections; roughly ninety percent of state general jurisdiction judges are currently selected or retained this way.<sup>1</sup> No other advanced democracy elects any sizable portion of its judiciary.<sup>2</sup> Yet notwithstanding their historical pedigree and practical significance, judicial elections in the United States have scarcely resembled other contests for public office. Whereas high-level legislative and executive races have typically inspired intense competition, partisanship, and publicity, judicial elections have been “sleepy,” “low-key” affairs.<sup>3</sup> Codes of conduct prevented candidates

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1. See Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 *Geo. L.J.* 1077, 1105 app. 2 (2007) [hereinafter Schotland, *New Challenges*] (indicating that as of 2004 eighty-nine percent of state appellate and general jurisdiction trial judges were selected or retained through popular election).

2. See Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 *DePaul L. Rev.* 423, 431 (2007) (stating that judicial elections are used outside United States only in various small Swiss cantons and in Japan for its high court retention elections); see also Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 *S. Cal. L. Rev.* 1995, 1996 (1988) (“To the rest of the world, the American adherence to judicial elections is as incomprehensible as our rejection of the metric system.”).

3. These two descriptors are ubiquitous in discussions of the traditional model of judicial elections. See, e.g., Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* 185 (2006) (“Prior to the 1970s, judicial elections were sleepy events garnering little attention and involving relatively small sums of money.”); Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 *Ind. L. Rev.* 819, 819 (2002) [hereinafter Briffault, *Public Funds*] (“[Judicial elections] were once low-key affairs, conducted with civility and dignity . . . .”) (internal quotation marks and citation omitted); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 *U. Chi. L. Rev.* 689, 752 (1995) (“[J]udicial elections historically have tended to be sleepy events . . . .”); Marie Hojnacki & Lawrence Baum, “New-Style” Judicial Campaigns and the Voters: Economic Issues and Union Members in Ohio, 45 *W. Pol. Q.* 921, 921 (1992) (“Electoral campaigns for judgeships in the United States typically have been small in scale, low-key, and devoid of issue content.”); David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Selection*, 69 *Alb. L. Rev.* 985, 985 (2006) (“Judicial selection is a historically sleepy affair for many states.”); see also Matthew J. Streb, *Judicial*

from announcing their views on controversial topics, criticizing other candidates, or directly soliciting campaign contributions. In most states, affiliation with a political party was (and is) disallowed. Many incumbents ran unopposed. Voter turnout was minimal, voter rolloff substantial.<sup>4</sup> Those who did vote, surveys indicated, often made their selections based on factors such as the candidates' ethnicity, gender, or name familiarity. (A man named Gene Kelly once won a Texas primary against a far more experienced and widely endorsed candidate, without campaigning. His opponent in the general election was able to eke out a victory only after spending nearly all of his funds on advertisements saying, "He's Not That Gene Kelly.")<sup>5</sup> While in theory the method of selecting judges most consistent with popular sovereignty and majority rule,<sup>6</sup> in practice these elections tended to be democratic affairs only in the most superficial, formalistic sense.<sup>7</sup>

No longer. As scores upon scores of commentators have observed—and, almost to a person, lamented—we are in a new era of judicial elections.<sup>8</sup> Contributions have skyrocketed;<sup>9</sup> interest groups,<sup>10</sup> political par-

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Elections: A Different Standard for the Rulemakers?, in *Law and Election Politics: The Rules of the Game* 171, 171 (Matthew J. Streb ed., 2005) (“[Legislative and executive elections] are fun to watch and interesting to study. The excitement of judicial elections, on the other hand, has been compared to playing a game of checkers by mail.”).

4. Rolloff occurs when voters cast their ballots for other races but decline to do so for judicial races. See Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 *Ohio St. L.J.* 13, 19–20 (2003).

5. See Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 *Mich. St. L. Rev.* 849, 856.

6. See *infra* Part I.A.

7. For good overviews of the traditional model of judicial elections explaining these characteristics in more detail, see generally Patrick M. McFadden, *Am. Judicature Soc'y, Electing Justice: The Law and Ethics of Judicial Election Campaigns* (1990); Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 *Sw. L.J. (Special Issue)* 31 (1987) [hereinafter Dubois, *Selection of State Judges*].

8. See, e.g., *Am. Bar Ass'n Comm'n on the 21st Century Judiciary, Justice in Jeopardy* 13–50 (2003) [hereinafter *Am. Bar Ass'n, Justice in Jeopardy*] (describing and decrying recent politicization of state courts, especially state courts of last resort); Deborah Goldberg et al., *The New Politics of Judicial Elections 2004*, at vi (Jesse Rutledge ed., 2005), available at <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf> (on file with the *Columbia Law Review*) [hereinafter Goldberg et al., *New Politics 2004*] (documenting “new politics” of state supreme court elections and asserting that 2004 witnessed “[a] perfect storm of hardball TV ads, millions in campaign contributions and bare-knuckled special interest politics . . . descending on a growing number of . . . campaigns”); Anthony Champagne, *Tort Reform and Judicial Selection*, 38 *Loy. L.A. L. Rev.* 1483, 1486–89 (2005) [hereinafter Champagne, *Tort Reform*] (characterizing “new judicial politics” in contradistinction to old); Patrick Emery Longan, *Judicial Professionalism in a New Era of Judicial Selection*, 56 *Mercer L. Rev.* 913, 947 (2005) (arguing that “[t]he environment in which judicial elections will be held in the future has been forever changed”).

9. See Goldberg et al., *New Politics 2004*, *supra* note 8, at 13–22.

10. See *id.* at 23–33; Anthony Champagne, *Interest Groups and Judicial Elections*, 34 *Loy. L.A. L. Rev.* 1391 *passim* (2001) [hereinafter Champagne, *Interest Groups*]; Dorothy

ties,<sup>11</sup> and mass media advertising<sup>12</sup> play an increasingly prominent role; incumbents are facing stiffer competition;<sup>13</sup> salience is at an all-time high. Campaign rhetoric has changed dramatically, becoming more substantive in content and negative in tone.<sup>14</sup> Following the Supreme Court's ruling in the 2002 case *Republican Party of Minnesota v. White*, all judicial candidates must be allowed to announce their views on disputed legal and political issues.<sup>15</sup> *White*'s direct legal impact was limited to the nine states that still maintained an "Announce Clause," but the decision was widely interpreted as "open[ing] the door, as both a practical and jurisprudential matter, to forces seeking to benefit from highly politicized courts"<sup>16</sup>—as a tipping point toward increasingly politicized elections beyond which there would be no return.<sup>17</sup> Lawsuits around the country are currently challenging many of the other canons that have traditionally constrained judicial campaign conduct.<sup>18</sup> With remarkable speed, the distinctive rules, norms, and politics of judicial elections have begun to disappear.<sup>19</sup>

Samuels, *Judges for Sale: How Special Interests Are Buying Up the Nation's Justice System*, *Judges' J.*, Winter 2007, at 12 *passim*.

11. See Goldberg et al., *New Politics 2004*, *supra* note 8, at 8–9 (explaining how political parties increasingly "inject themselves into court campaigns"); Anthony Champagne, *Political Parties and Judicial Elections*, 34 *Loy. L.A. L. Rev.* 1411, 1421–25 (2001) [hereinafter *Champagne, Political Parties*] (noting "new level of partisanship in many judicial elections").

12. In a trend that encapsulates all the others, television advertising has emerged as a central feature of judicial campaign strategy. As late as 2000, television ads aired in only twenty-two percent of states with contested supreme court elections. Goldberg et al., *New Politics 2004*, *supra* note 8, at 3. By 2006, this figure had risen to ninety-two percent. Press Release, Brennan Ctr. for Justice, *Once Courtly, Campaigns for America's High Courts Now Dominated by Television Attack Ads* (Nov. 2, 2006), at [http://www.brennancenter.org/press\\_detail.asp?key=100&subkey=38281](http://www.brennancenter.org/press_detail.asp?key=100&subkey=38281) (on file with the *Columbia Law Review*).

13. See Baum, *supra* note 4, at 16–17, 26–41 ("Changes in campaign practices almost surely have increased the number of judges who face opposition based on the content of their decisions.").

14. See Lindsay E. Lippman, Note, *Republican Party of Minnesota v. White: The End of Judicial Election Reform?*, 13 *Cornell J.L. & Pub. Pol'y* 137, 147 (2003) ("Perhaps the most blatant trend infiltrating judicial elections in recent years is the increasingly hostile nature of campaigns—judicial elections are noisier and nastier.") (internal quotation marks, brackets, and ellipses omitted).

15. 536 U.S. 765, 788 (2002). For a discussion of *White*, see *infra* Part III.A.2.

16. Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 *Washburn L.J.* 503, 506 (2007).

17. See, e.g., Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 *Colum. L. Rev.* 563, 570–71 (2004) ("I . . . argue that the ultimate implication of *White* is that states concerned about judges campaigning in a manner similar to other politicians . . . have no recourse but to eliminate the practice of electing judges.").

18. See *infra* notes 138–143 and accompanying text.

19. To be sure, these developments have not been uniform across all states, or across all courts within a given state. State courts of last resort, for example, have been much more affected than the lower courts, and in some jurisdictions the new era has only just

Given these dramatic developments, now seems like an opportune time to revisit the arguments for and against elective judiciaries. So much has been written about this subject that to proffer yet another disquisition risks being redundant or worse.<sup>20</sup> This Article tries to avoid this charge by setting the debate within a new analytic framework and by drawing out some unexplored connections between the upheaval in judicial elections and the role of the state courts. In particular, the Article suggests that recent developments help illuminate several latent ironies—several largely unnoticed incongruities between what might be expected and what will actually result—in the practice of electing judges. These ironies can exist because of the inherent tradeoffs entailed by selecting judges in a constitutional democracy.

The first irony is that at the same time that many court watchers have been obsessing over how judicial elections have “gone wild”<sup>21</sup> in the past decade, these elections have been finally and irreversibly losing their niche role within the electoral law and politics of the United States. If one takes this broader view, judicial elections are not going wild; they are going normal. Characterizing their evolution as a mainstreaming phenomenon, rather than a radicalizing one, turns out to have significant implications.

The second irony is that the healthier judicial elections continue to become along standard measures, such as turnout and competitiveness, the more they will undermine the capacity of state courts to safeguard nonjudicial elections and public values more generally. There is an inescapable tradeoff, it seems, between the integrity of judicial elections and the integrity of our broader democratic processes. The current realignment thus contains a hint of paradox, if not parody.

The third irony is that while elective judiciaries might appear to possess greater legitimacy—now more than ever—to do aggressive interpretation in the service of disfavored causes, their very nature as popularly chosen bodies means that they will not likely tap this reserve of decisional discretion. Elective judiciaries are theoretically more free, but practically less free, to seek justice in the face of popular opposition. Some progressive scholars have missed this important point.

To set the stage for these arguments, Part I provides an overview of the classic rationales for and against electing judges. While these rationales have been invoked countless times, they have rarely been parsed in

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begun to take root. While the descriptive account I provide in this Article is thus somewhat stylized and simplistic, I believe it is faithful to the basic transformation of judicial elections.

20. One frequently hears the remark that judicial selection—of which elections are a major component—is the single most written-about topic in the entire modern legal literature. See, e.g., John L. Dodd et al., *Federalist Soc’y, The Case for Judicial Appointments* (2003), available at [http://www.fed-soc.org/publications/pubID.89.css.print/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.89.css.print/pub_detail.asp) (on file with the *Columbia Law Review*); Dubois, *Selection of State Judges*, *supra* note 7, at 31.

21. See *infra* note 178 and accompanying text.

any systematic way. This Article offers an analytic taxonomy that seeks to move beyond the hoary independence/accountability dichotomy by fleshing out these concepts and exposing their underlying commitments. The majoritarian difficulty, it argues, is the crux of the debate. Part I's critical synthesis is intended as a freestanding contribution to the literature, separate from any considerations of the new era. (Readers interested chiefly in the new era may therefore wish to skip ahead.)

Applying this framework, Part II examines normative dimensions of the new era in judicial elections and derives a simple, yet almost entirely overlooked, conclusion: Both the costs *and* the benefits of elective judiciaries have been enhanced by recent developments, leaving the two sides of the debate further apart than ever. Three deep ironies emerge from this cleavage, as Part III explains. Only through wholesale reform, the Article concludes, can states truly curb the majoritarian difficulty and preserve for their courts a guardian role over individual rights and constitutional values.

There is something unsatisfying, perhaps, about evaluating judicial elections at such a level of abstraction. No matter what their critics might say, judicial elections are unlikely to be abandoned in the foreseeable future.<sup>22</sup> Accepting this reality, commentators have advocated many different reforms to mitigate the worst excesses of the new era. These incremental measures have with good reason dominated the conversation, for they define the realm of the possible. This Article, in contrast, offers little in the way of policy analysis or prescription. By taking a broader view, I do not mean to deny the importance of such reform efforts or to insist on a "unilocular, 'an election is an election,' approach."<sup>23</sup> I do, however, want to make some unilocular observations about judicial elections, as a collective institution, and to explain why I believe both sides of the debate ought to find incremental solutions ultimately unsatisfying.

## I. THE VIRTUES AND VICES OF ELECTIVE JUDICIARIES

A tremendous body of scholarship evaluates the relative merits of different methods of judicial selection.<sup>24</sup> Because judicial elections can

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22. Following a movement toward appointment and merit selection from 1940 through the late 1980s, efforts to end judicial elections have consistently failed over the past two decades. As the Conference of Chief Justices recently observed, "[t]he fact—which becomes constantly clearer and more widespread—is that whatever may be the view of a State's courts and lawyers, 'Don't let them take away your vote' . . . has been an insuperable hurdle" to wholesale reform. Schotland, *New Challenges*, *supra* note 1, at 1090.

23. *Republican Party of Minn. v. White*, 536 U.S. 765, 805 (2002) (Ginsburg, J., dissenting).

24. The basic methods of initial selection at the state level are popular election, gubernatorial or legislative appointment, and merit selection (also known as the "Missouri Plan"), in which a nominating commission provides a short list of candidates from which the governor makes her selection. These same methods may be used for the reselection of judges at the end of their term, or, as is common in many states, incumbents may be put to

take many forms, a vast subliterate evaluates how best to structure an elective regime—for example, whether to allow partisan affiliation<sup>25</sup> and the extent to which campaign conduct should be regulated. Without exploring every facet of these well-rehearsed debates, this Part offers a broad, opinionated summary of the arguments made for and against elective judiciaries, as well as an original analysis of the majoritarian difficulty. To structure the discussion, I divide each side's arguments into two camps: the core principled arguments<sup>26</sup> and the more contingent, empirical arguments.<sup>27</sup> The Article focuses almost entirely on the former because they constitute the points of deepest disagreement between the two sides, they have been more directly affected by the recent trends in judicial elections, and they present especially intriguing conceptual and normative challenges.

Often, the debate over judicial selection methods is distilled to a single tradeoff: independence versus accountability.<sup>28</sup> Elected judges are less independent than appointed judges in the sense that the public can vote them out of office if it does not like their decisions. (All states that use judicial elections at the initial selection stage also use some form of elections at the reselection stage.)<sup>29</sup> Elected judges are more accountable for the same reason: There are few disciplinary measures cruder or more powerful than the prospect of electoral defeat. Given that judicial independence and public accountability are both seen as foundational

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a retention election, in which there is a straight up-or-down vote on whether they will be granted an additional term. There are almost as many variations on these basic models as there are states, and I simplify throughout this Article by referring generically to "elections" and "appointments"—disaggregating these categories only when necessary for the analysis. For detailed explanations of the selection methods used by the states, see Am. Judicature Soc'y, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (2004), available at <http://www.ajs.org/js/JudicialSelectionCharts.pdf> (on file with the *Columbia Law Review*) [hereinafter Am. Judicature Soc'y, *Judicial Selection*]; Dodd et al., *supra* note 20; Schotland, *New Challenges*, *supra* note 1, at 1084–86, 1104 app. 1.

25. For a concise summary of the debate over partisan judicial elections, in which candidates are nominated by a political party and run under that party's label, see Champagne, *Political Parties*, *supra* note 11. The classic defense of partisan affiliation remains Philip Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* (1980). While I address partisan affiliation at several points, I am unable in this Article to do justice to all of the theoretical and empirical complications raised by the distinction between partisan and nonpartisan elections.

26. See *infra* Parts I.A–B.

27. See *infra* Part I.C.

28. See F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 *J. Legal Stud.* 205, 205 (1999) ("Much of the debate [over judicial selection] focuses on the trade-off between judicial accountability and judicial independence, and appointment is enacted when the desire for independence holds sway.").

29. Am. Judicature Soc'y, *Judicial Selection*, *supra* note 24, at 7–14. For the reselection of judges, a few of the elective jurisdictions use retention elections while the majority require incumbents to compete in regular reelections. *Id.*

ideals in the American polity, the tension between them makes judicial selection an inherently contestable practice.

Americans are conflicted about how we select our judges because we are conflicted about what we want them to do. We want judges to uphold the rule of law, to check the excesses of the legislature and the executive, and to protect constitutional rights and deep-seated values against majority encroachments—all functions associated with and facilitated by judicial independence—and yet we also want judges to be deferential to the “political” branches and to administer faithfully the laws on the books—functions protected by external accountability mechanisms.<sup>30</sup> We want judges to be resolute but not activist. The debate over judicial selection, then, is to some extent a debate over the judicial role. Ideally, a theory of judicial selection and reselection should be grounded in a theory of what and how judges are supposed to judge. Very few writers on judicial elections have proffered such a theory, and it is beyond this Article’s scope to fill the gap in any systematic sense. I want to suggest, however, that the debate over state judicial selection has been implicitly premised on competing normative visions of the judiciary and that these visions are coherent, even if incompletely theorized. What I call the democratic conception of the judicial role will tend to favor elective judiciaries on account of its overriding commitment to a certain form of majority rule. Those conceptions that privilege ideals other than majority rule will tend to favor appointment or merit selection.<sup>31</sup>

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30. There are countless formulations of this tension in the legal literature. To take just two, see Peter H. Russell, *Toward a General Theory of Judicial Independence, in Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* 1, 5 (Peter H. Russell & David M. O’Brien eds., 2001) (discussing potential conflicts between ideals of judicial autonomy and public accountability); Louis Michael Seidman, *Ambivalence and Accountability*, 61 *S. Cal. L. Rev.* 1571 *passim* (1988) (describing inherent ambivalence about judicial review generated by typical American’s twinned commitments to liberalism and democracy); see also Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 *Harv. L. Rev.* 1833, 1908, 1914 (2001) [hereinafter Hershkoff, *State Courts*] (characterizing judicial function as “an ‘essentially contested concept,’” the proper use of which will endlessly be debated without hope of resolution (quoting Eric Foner, *The Story of American Freedom*, at xiv (1999))).

31. Although I challenge the notion that popular election of judges is necessarily more democratic, see *infra* Part III.B, I use the “democratic” label for the first camp because it best captures the link to the demos and the theory of the judicial function that anchor this view. If it helps to give these two camps additional labels, the divide between what I am calling the democratic conception of the judicial role and the other conceptions largely tracks Bruce Ackerman’s distinction between “monistic democrats” (who believe that “during the period between elections, all institutional checks upon the electoral victors are presumptively undemocratic”) and “rights foundationalists” (who believe that “populist enthusiasms [ought to be] constrained by deeper commitments to fundamental rights” and that the judiciary is an appropriate body to apply these constraints). See I Bruce Ackerman, *We the People: Foundations* 7–16 (1991). Monistic democrats, to simplify drastically, tend to worry about the (appointed) judiciary’s democratic deficits. Rights foundationalists tend to worry about the political branches’ moral deficits.



*A. The Core Virtues*

The most fundamental argument made on behalf of elective judiciaries is rooted in notions of popular sovereignty and collective self-determination. Its premise is enticingly straightforward: As important officials in our democracy, judges should be selected by those over whom they hold power. Public participation should not be attenuated by an appointive scheme, in which judges are chosen not by the voters but by the voters' representatives, or, worse yet, by a merit selection scheme, in which unelected cognoscenti are allowed to narrow the field. Just as they do for the other branches of government, elections can ensure that the people themselves have a measure of control over, and are reasonably well served by, the judiciary; they can preserve judges' link to the demos. Even such a noted ally of judicial independence as Judith Resnik concedes that "[g]iven democratic preferences for empowerment of leaders through the popular will, judicial election . . . nests easily inside democratic principles."<sup>32</sup> Indeed, by expressly honoring our commitment to popular sovereignty and public accountability, judicial elections would seem to have a *prima facie* claim to democratic legitimacy (or at least to democratic legitimation), a claim that any proponent of an alternative selection method needs to overcome. A system of periodic majoritarian elections may lead to any number of harms, but it is our default means of choosing and constraining those who would speak for us.

Defending judicial elections on these grounds requires no particular view about the nature of judicial review except, perhaps, a rejection of strict formalism as a theory of what judges do. A formalist of this sort should not care how judges are selected, so long as they are competent, because in her view judging is "a mechanistic enterprise" in which the legal materials alone determine case outcomes.<sup>33</sup> Consequently, elections would not offer voters any meaningful choices, and an appointive scheme would seem preferable as a way to economize on selection costs and to ensure that candidates have the necessary technical qualifications. Ever since the advent of legal realism, however, it has been untenable to believe in any such Langdellian conception of judging. Judges may be constrained in any number of ways—by the reactive nature of the judicial role, by the conventional legal materials, by professional norms, and so

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32. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 *Cardozo L. Rev.* 579, 594 (2005) [hereinafter Resnik, *Judicial Selection*]; see also *id.* at 595 (asserting that move to direct judicial elections in antebellum America was "illustrative of the commitment to popular sovereignty"). Implicit in Professor Resnik's assertion quoted in the main text are several assumptions shared by most every advocate of electing judges: that selecting leaders through appointment or merit selection would not honor the popular will to the same extent; that judges are "leaders" in the relevant sense; and that the "democratic preference" for direct election applies categorically across substantive areas.

33. Virginia A. Hettinger et al., *Judging on a Collegial Court: Influences on Federal Appellate Decision Making* 30 (2006) (describing mainstream American view of judging prior to 1920s).

forth—but their interpretive discretion plainly implies that they “make” law as well as apply law, in state courts as well as federal courts.<sup>34</sup> Even the Supreme Court, which has a vested institutional interest in downplaying its policymaking discretion,<sup>35</sup> has acknowledged that “judges do engage in policymaking at some level.”<sup>36</sup> There is no need to take the attitudinal view of judicial behavior, in which judges are assumed to act in accordance with their political or ideological preferences,<sup>37</sup> to think it desirable, as a matter of democratic self governance, for “a free people to choose those officials who exercise policy-making authority.”<sup>38</sup>

This core democratic argument for electing judges takes on special force in the modern context, in which judges make more policy than ever before. The United States is now more legalized—with more rules and regulations covering more realms of human endeavor—and more litigious than at any point in its history.<sup>39</sup> State courts have inserted themselves into numerous social controversies, from school finance, to affirma-

34. By saying that judges inevitably make law, I do not mean to imply that judges inevitably “legislate” or that the legal rules will always underdetermine outcomes. I mean only to assert the very thin proposition that judges have some amount of interpretive discretion, and that this entails the exercise of judgment. This is consistent with both interpretivist and positivist legal theories. See, e.g., Ronald Dworkin, *Law’s Empire* 256–58 (1986) [hereinafter Dworkin, *Law’s Empire*] (asserting that, subject to constraints of “fit,” judges necessarily apply their own convictions about political morality in deciding hard cases); H.L.A. Hart, *The Concept of Law* 272 (2d ed. 1994) (asserting that law is “partly indeterminate” and describing judicial role as “filling the gaps by exercising a limited law-creating discretion”). Even the most formalistic jurist could not be replaced with a computer program.

35. See generally Mitchel de S.-O.-L’E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* 72–78 (2004) (discussing Supreme Court’s extreme aversion to acknowledging its policymaking role, such that term “policy” appears in opinions almost exclusively as means to denigrate other side’s position).

36. *Chisom v. Roemer*, 501 U.S. 380, 399 n.27 (1991) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 466–67 (1991)).

37. The attitudinal view can thus be seen as the inverse of formalism. See Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 *B.U. L. Rev.* 1049, 1051–53 (2006) [hereinafter Posner, *Role of the Judge*] (contrasting attitudinal conception of judging with formalist and pragmatic conceptions); see also Hettinger et al., *supra* note 33, at 30–46 (explaining basic attitudinal model and its primacy in social science literature). The classic work on attitudinalism is Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (1993).

38. Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 *N. Ky. L. Rev.* 267, 268 (2005). Professor Dimino develops a popular sovereignty defense of judicial elections at greater length in Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 *Yale L. & Pol’y Rev.* 301, 370–78 (2003) [hereinafter Dimino, *Pay No Attention*].

39. Cf. Lillian R. BeVier, *A Commentary on Public Funds or Publicly Funded Benefits and the Regulation of Judicial Campaigns*, 35 *Ind. L. Rev.* 845, 849 (2002) (“In recent decades, law has become ubiquitous, with legal rules and regulations governing seemingly every facet of American life. American citizens are notoriously litigious.”).

tive action, to same-sex marriage.<sup>40</sup> If basic principles of democratic theory suggest that public officials should be selected by those over whom they hold power, this seems particularly true the more power the officials hold.<sup>41</sup> Arguably, state judges are better candidates for election than federal judges for the same reason. State judges may operate on a smaller canvas, but they handle the vast majority of the nation's judicial workload,<sup>42</sup> they have a greater ability to make common law, they are more likely to decide cases on their own (rather than on a panel), they are not as constrained by federalism concerns, and "because state constitutions often include positive rights and regulatory norms, their texts explicitly engage state courts in substantive areas that have historically been outside the Article III domain."<sup>43</sup> It might also be argued, although I have not seen it done, that against the backdrop of appointed, life-tenured federal judges, there is an extra democratic benefit to having state courts selected directly by the people.

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40. The growing practical and symbolic significance of state courts has been well documented. See, e.g., Am. Bar Ass'n, *Justice in Jeopardy*, supra note 8, at 13–50 (exploring possible factors driving this trend); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 Rutgers L.J. 871, 873 (1999) [hereinafter Reed, *Popular Constitutionalism*] ("Despite [the] academic debate over the desirability and the limits to [the] growth of state court activism, that growth has continued virtually unabated. State constitutions and state supreme courts now stand as key elements in activists' strategies for legal, political and social change.").

41. In this vein, some have argued that federal judges should also be elected. See, e.g., Dennis B. Wilson, *Electing Federal Judges and Justices: Should the Supra-Legislators Be Accountable to the Voters?*, 39 Creighton L. Rev. 695 *passim* (2006) (rooting this argument in critique of federal courts' increasingly aggressive review of "morals legislation"). The idea that federal judges should be popularly selected has almost never been taken seriously in the government or the academy, however. See Croley, supra note 3, at 696; Barry Friedman, *Mediated Popular Constitutionalism*, 101 Mich. L. Rev. 2596, 2604 (2003) [hereinafter Friedman, *Constitutionalism*].

42. See Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. Rev. 1065, 1069 (1998) (observing that state courts handle ninety-five percent of this workload and that this proportion will only increase if Congress acts to limit diversity jurisdiction, as is often proposed).

43. Hershkoff, *State Courts*, supra note 30, at 1889–90; see also *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well." (citation omitted)); Linde, supra note 2, at 1997 (explaining ways in which trial court judges, the vast majority of whom serve at state level, have more power and discretion than appellate judges, notwithstanding academia's preoccupation with latter); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924, 982–83 (2000) ("[S]tate judges . . . do frankly generative work in law development, resulting in at least anecdotal accounts by individuals who have held both state and federal judicial positions that they often had more power and more interesting work when they were on the state bench."). "Unlike the federal Constitution," Professor Hershkoff further points out, many state constitutions "require lawmakers to effectuate highly specific social goals, such as the provision of free public schools and the regulation of corporations, banks, and railroads." Hershkoff, *State Courts*, supra note 30, at 1890 (citations omitted).

Elective judiciaries can thus satisfy a democratic conception of the judicial role in a direct sense, in that the process of selecting this set of officials is made explicitly majoritarian. But elective judiciaries can also satisfy a democratic conception of the judicial role in a secondary, indirect sense, if their rulings are more likely to reflect the popular will. Scholars worried about the judiciary's democratic credentials have often argued that judges should be modest and restrained, exercising their power cautiously and carrying out the democratically enacted legislation to the extent allowed by the Constitution. At the state level, a question of institutional design then arises: What sort of selection and reselection system will be most likely to generate judges who exhibit these characteristics? Direct elections would appear to be an obvious solution, for they can help lead judges to be more attuned to majority preferences through a variety of mechanisms.

First, and most basically, there is the reelection incentive. Inasmuch as judges have decisional or procedural discretion, elections will give them a structural incentive to avoid unpopular rulings. Inasmuch as judges believe that voters would prefer them to respect legislative outcomes, elections will likewise give them a structural incentive to adopt relatively deferential methods of interpretation. Of course, legislatures may be imperfectly democratic on any number of dimensions, and even the most perfect legislature could not claim to represent the people unproblematically.<sup>44</sup> But on the whole, it seems reasonable to believe that legislative outcomes are more likely to instantiate the popular will than anything a judge might come up with, and that judges know this.<sup>45</sup> In this way, judicial elections may tend to undercut the functional consequences of judicial supremacy in constitutional and statutory interpretation.<sup>46</sup>

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44. See generally Ackerman, *supra* note 31, at 179–86 (providing classic exploration of problematics of representation).

45. Even granting the standard caveats about conflating legislative outcomes with the voters' will, this assertion may still be a little too quick, because some judges are elected locally whereas legislatures are statewide bodies. There may be times when overriding legislation enacted at the state level would be the most popular move for a lower court judge to make within her community of potential voters. Such judicial action could be seen as counterdemocratic, in that the will of the many is subordinated to the will of the few, even if it helps win elections. I bracket this intriguing point, graciously flagged to me by Larry Solum, because, as a modal claim, I am skeptical that it covers many real-life cases, and, as an academic claim, it has played no discernible role in the literature on judicial selection. It is the statewide appellate courts, not the local trial courts, that are really the focus of the debate over both judicial selection methods and the new-style campaigns. Cf. *supra* note 19 (noting distinctions within the "new era"). But to the extent that this sort of local override does occur, it complicates the instrumental link between popular election of judges and promajoritarian judicial decisionmaking.

46. This normative argument need not collapse into an argument for legislative or popular supremacy. For any number of practical, historical, and constitutional reasons, those who want judicial decisions to reflect the public's views may nevertheless want courts to have ultimate interpretive authority. Moreover, some proponents of electing judges may see any form of judicial modesty or deference to the legislature or the people as

Second, an elective regime might influence its judges' jurisprudential philosophy such that they will tend to care more about popular acceptance of their rulings, not simply to preserve their positions but also for consequentialist or epistemic reasons.<sup>47</sup> Elections, that is, may send a signal to judges that sensitivity to public opinion is part of the job description. Third, an elective regime might influence jurisprudence at a subconscious level, such that its judges, without fully theorizing or even processing what they are doing, will be more prone to conflate electorally popular outcomes with legally sound ones. And fourth, elections might tend to attract and reward candidates who are already predisposed to any of the above tendencies. It is natural to assume that the voting public will generally be more inclined to select and reselect promajoritarian judges than will state appointing bodies<sup>48</sup> and that relatively populist candidates will be more inclined to seek election. Compared to appointment and merit selection, judicial elections can therefore be seen as triply majoritarian, in their instrumental effects on jurisprudence and on what sorts of lawyers become judges, as well as in their intrinsic nature as elections.

For the democratic defender of judicial elections, then, the fact that judges facing reelection might have an incentive to align their decisions with majority preferences—in high-salience cases if not in others—is no cause for alarm.<sup>49</sup> She might see such an influence on judges' decision-making as a regrettable but acceptable consequence of democratic control, or indeed as a positive virtue in that it reflects accountability in action. She would not see such an influence as a threat to judicial integrity. Justice Scalia, in his *Republican Party of Minnesota v. White* majority opinion, observed that elected judges “always face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench. Surely the judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view . . . .”<sup>50</sup> The emphasis on “always” and the wry parenthetical could easily be read to imply that Scalia finds this form of electoral pressure on judges not only permissible but also appropriate.

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unnecessary, even undesirable, so long as the judges themselves are majoritarian democratic actors. (Put in terms of the distinction drawn in the main text, these proponents might want judges to be directly, but not indirectly, majoritarian.)

47. Cf. Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 *Stan. L. Rev.* 155 *passim* (2007) (discussing consequentialist and epistemic grounds on which judges might legitimately internalize prospect of public outrage).

48. See *infra* notes 78–87 and accompanying text (discussing theory and evidence supporting this assumption).

49. One might have cause for alarm if judges had to violate their professional oaths or subvert the law to do this sort of aligning, but in many cases judges would not have to do so, and there is no need to assume they will. See *infra* notes 96, 119–120 and accompanying text (explaining concepts of judicial “range of legitimate discretion” and “zone of reasonableness”). And indeed, I have seen no evidence to suggest that voters would respond positively to a judge who manifestly contravenes the controlling law.

50. 536 U.S. 765, 782 (2002).

### B. *The Core Vices*

American arguments against judicial elections date back at least to Alexander Hamilton—who asserted in *Federalist 78* that judges are “the citadel of the public justice and the public security” and that anything less than life appointment would be “fatal to their necessary independence”<sup>51</sup>—and they have now been developed at glorious length by critics of the practice. If judicial selection is the most heavily discussed topic in the entire legal literature,<sup>52</sup> the outstanding theme of the discussion may be disdain for elective judiciaries.<sup>53</sup> To understand what has inspired this disdain, it is useful to conceptualize the criticisms in two main buckets: those that worry about what popular elections will do to the decisional incentives of judges,<sup>54</sup> and everything else.<sup>55</sup>

Within the decisional critique of judicial elections, this Part makes a distinction between concerns over how elections will influence judges’ decisionmaking at a systemic level (the “majoritarian difficulty”) and how they will influence decisionmaking at a particularized level (“favoritism”). Both of these concerns speak to the essence of the judicial role—the rulings with which judges bind litigants and, sometimes, the broader populace—and both draw on the public choice notion that, whatever other aspirations or intentions they might have, the basic objective function of elected judges, like all other elected officials, is to get reelected.<sup>56</sup> Of the

51. The *Federalist* No. 78, at 466, 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *id.* at 471 (warning that if periodic judicial selection were committed “to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity”).

52. See *supra* note 20.

53. See Friedman, *Constitutionalism*, *supra* note 41, at 2604 (observing that state electoral systems for selecting judges “are commonly considered objects of woe”); Roy A. Schotland, Comment, *Law & Contemp. Probs.*, Summer 1998, at 149, 150 [hereinafter Schotland, Comment] (“[M]ore sweat and ink have been spent on getting rid of judicial elections than on any other single subject in the history of American law.”). Judicial elections are often portrayed in the literature as an excess of Jacksonian populism. See, e.g., Samuel Issacharoff et al., *The Law of Democracy: Legal Structure of the Political Process* 130 (rev. 2d ed. 2002); Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 *U. Miami L. Rev.* 1, 5–7 (1994).

54. See *infra* Parts I.B.1–2.

55. See *infra* Part I.C.

56. For representative works of political science identifying reelection as the “objective function” of legislators, see Morris Fiorina, *Congress: Keystone of the Washington Establishment* 37–39 (2d ed. 1989); David Mayhew, *Congress: The Electoral Connection* 13–77 (1974). As Justice Scalia once quipped, “[t]he first instinct of power is the retention of power.” *McCconnell v. FEC*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part). Note, though, that for electoral considerations to influence judicial decisionmaking in ways many would find objectionable, the retention of power need not be the first instinct of judges; it just needs to skew the decisional calculus enough to change certain outcomes.

Jack Balkin argues in a recent paper that not only is it plausible that institutional features of a judicial system—such as selection method—shape and constrain judicial behavior; it is implausible that anything else—such as interpretive theory—influences judicial behavior to remotely the same degree. Jack M. Balkin, *Original Meaning and*

two, however, the majoritarian difficulty is the more fundamental. Most of this subpart is devoted to elaborating its thesis and developing it in some new directions.

1. *The Majoritarian Difficulty*. — As Hamilton suggested, the practice of judges facing periodic elections seems to sit in tension with some basic normative and institutional features that many seek in a judiciary.<sup>57</sup> The concern is that by making judges more responsive to majoritarian political influences, elections undermine (in a way that other selection methods do not) the interrelated values of judicial independence, judicial impartiality, the appearance of impartiality, due process, separation of powers, minority rights protection, constitutionalism, and the rule of law. This being a rather significant set of values, the Hamiltonian critique of judicial elections would be devastating if accurate.

The leading treatment of these arguments is Steven Croley's 1995 article *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*.<sup>58</sup> Croley starts from the observation that all constitutional democracies such as the United States experience a fundamental tension between constitutionalism—the commitment to rule of law and individual rights—and democracy—the commitment to rule by the people.<sup>59</sup> As interpreters of the law, courts have a special role to play in negotiating this tension and safeguarding constitutionalism. Croley then introduces the term “majoritarian difficulty” to explain the central problem of elective judiciaries and to contrast it with the countermajoritarian difficulty that Alexander Bickel famously assigned to appointed, life-tenured federal judges.<sup>60</sup> Whereas the countermajoritarian difficulty asks “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.”<sup>61</sup> The answer is unclear, for elections entail democratic governance and “constitutionalism entails, among other important things, protection of the individual and of minorities from democratic governance over certain spheres.”<sup>62</sup> More precisely:

Insofar as judicial elections are salient—that is, to the extent the outcomes of judicial elections reflect majoritarian sentiment, or the will of “the impassioned majority” rather than “the enlightened majority”—and insofar as the (impassioned) majority casts its votes for judges according to criteria similar to those guiding

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Constitutional Redemption, 24 Const. Comment. (forthcoming 2008) (manuscript at 88, on file with the *Columbia Law Review*), available at <http://ssrn.com/abstract=987060>.

57. See *supra* note 51 and accompanying text.

58. Croley, *supra* note 3.

59. *Id.* at 701–06. But cf. *infra* note 244 (noting recent scholarship that challenges perceived tension between constitutionalism and democracy).

60. Alexander M. Bickel, *The Least Dangerous Branch* 16–23 (2d ed. 1986); see Croley, *supra* note 3, at 713–48.

61. Croley, *supra* note 3, at 694.

62. *Id.*

their votes for candidates for other offices, elective judiciaries pose two problems for the constitutional democrat. First, the rights of individuals and unpopular minority groups may be compromised by an elective judiciary. Second, and more mundane but no less important, the impartial administration of “day-to-day” justice may be compromised.<sup>63</sup>

Canvassing the leading theories of judicial review, Croley concludes that neither the “representation-oriented model” (in which courts are meant to safeguard higher values), nor the “participation-oriented model” (in which courts are meant to ensure that policy decisions are made through open democratic processes), nor the “rights-oriented model” (in which courts are meant to protect moral precepts) can tolerate elective judiciaries, because each model demands that judges have the institutional independence to repudiate majority outcomes.<sup>64</sup> These theories are related in that each sees certain forms of judicial countermajoritarianism not only as reconcilable with democratic rule, but also as essential for shearing that rule of some of the uglier potentialities of majority tyranny. Other theories of judicial review—for example, those versions of strict constructionism and originalism that want judges to invalidate legislation only when it contravenes specific constitutional text or intent—would seem to have no inherent problem with elected judges.<sup>65</sup>

But that just shows that these theories have no answer for the majoritarian difficulty. To be responsive to its core concerns, one need not subscribe to a theory of judicial review that would have judges aggressively thwart every encroachment on minority and individual rights. But one must subscribe to a theory that would have judges give unpopular litigants and arguments a fair hearing and, on occasion, resist the legislature and public opinion because the judges’ best interpretation of the law dictates such an outcome, even if the Constitution and other legal sources do not ineluctably command it.

Echoes of Croley’s arguments were evident in Justice Ginsburg’s dissent and Justice O’Connor’s concurrence in *Republican Party of Minnesota*

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63. *Id.* at 726 (citation omitted). For another, earlier expression of this basic concern, see Burt Neuborne, *The Myth of Parity*, 90 *Harv. L. Rev.* 1105, 1127–28 (1977).

64. Croley, *supra* note 3, at 765–77. The representation-oriented model, Croley indicates, is most associated with Alexander Bickel and Bruce Ackerman; the participation-oriented model with John Hart Ely; the rights-oriented model with Ronald Dworkin. *Id.*

65. See *id.* at 753–60. Hardline originalists and textualists might still have reason to object to judicial elections if they make judges less likely to invalidate even manifestly unconstitutional statutes or to apply clear law in unpopular ways, or, as Croley notes, if they “threaten the unbiased administration of day-to-day justice.” *Id.* at 760 n.197. Those originalists and textualists who would allow judges in certain situations to supplement a clause-bound focus with considerations of policy or of the (federal or state) constitution’s broader structure, spirit, or purpose, might have further reason to be concerned about the majoritarian difficulty.



*v. White*.<sup>66</sup> Justice Ginsburg began her opinion by asserting that judges perform a function “fundamentally different” from that of legislative and executive officials.<sup>67</sup> Whereas those representatives act on behalf of constituencies, judges must “neutrally apply [ ] legal principles, and, when necessary, ‘stand [ ] up to what is generally supreme in a democracy: the popular will.’”<sup>68</sup> For the judiciary to fulfill its special role as “an essential bulwark of constitutional government, a constant guardian of the rule of law,”<sup>69</sup> Ginsburg suggested, it must be selected in a manner that insulates it to some extent from public opinion. Justice O’Connor made this suggestion more concrete. “Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects,”<sup>70</sup> she said. To ignore the political consequences of one’s decisions would be “‘like ignoring a crocodile in your bathtub.’”<sup>71</sup> This is the majoritarian difficulty in a nutshell (or a bathtub).

Many scholars have expanded upon the theoretical arguments made by Croley, Ginsburg, and O’Connor. Owen Fiss has stressed that “political insularity” among judges is necessary both to allow them to pursue justice and to breathe life into the separation of powers doctrine.<sup>72</sup>

66. Croley’s article was in fact cited seven times by Justice O’Connor, though only to support empirical claims about how judicial elections have operated. See 536 U.S. 765, 788–92 (2002) (O’Connor, J., concurring).

67. *Id.* at 803 (Ginsburg, J., dissenting) (citing *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting)); see also *Chisom*, 501 U.S. at 400 (discussing “[t]he fundamental tension between the ideal character of the judicial office and the real world of electoral politics”).

68. *White*, 536 U.S. at 804 (Ginsburg, J., dissenting) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989)). Ginsburg’s double citation of Scalia at the beginning of her dissent contained a not-so-subtle suggestion that his majority opinion was inconsistent with his prior comments on the special nature of the judicial role.

69. *Id.*

70. *Id.* at 789 (O’Connor, J., concurring). Notice that Justice Scalia seconded this point in his majority opinion, see *supra* note 50 and accompanying text, though he appeared to find it less troubling.

71. *White*, 536 U.S. at 789 (O’Connor, J., concurring) (quoting Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L. Rev. 733, 739 (1994)).

72. Owen Fiss, *The Right Degree of Independence*, in *The Law as It Could Be* 59, 61 (2003) [hereinafter Fiss, *Right Degree*]; see also Ronald Dworkin, *Taking Rights Seriously* 85 (1977) (“A judge who is insulated from the demands of the political majority whose interests [one party’s] right would trump is, therefore, in a better position to evaluate [arguments from principle].”). But see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 57 (1980) (questioning utility of political insularity for moral judgment). Professor Fiss has not, to my knowledge, specifically critiqued the practice of judicial elections, but this argument seems to carry an implicit condemnation.

Others have explicitly applied the separation of powers criticism to judicial elections. See, e.g., BeVier, *supra* note 39, at 847 (“[J]udicial elections are an anomaly when considered . . . in terms of separation of powers principles and the function of judges within a separated powers regime.”); John A. Ferejohn & Larry D. Kramer, *Independent*

“Courts are supposed to do what is right, not what is popular.”<sup>73</sup> The two will often diverge, Judith Resnik notes, because our simultaneous commitments to the rule of law, individual liberties, and public consent will inevitably generate conflict.<sup>74</sup> Erwin Chemerinsky has argued that electoral pressures on judges are not only in tension with the rule of law but also incompatible with it: “[T]he entire concept of the rule of law *requires* that judges decide cases based on their views of the legal merits, not based on what will please voters.”<sup>75</sup> In a recent speech, Chemerinsky augmented this claim with the subtler point that majoritarianism cannot in itself tell us when the majority position should be overruled, even though virtually everyone agrees that sometimes it should. Political insularity is therefore needed for judges to break out of the political branches’ majoritarian circularity.<sup>76</sup> Some critics have asserted that elections so distort judges’ ability to serve as neutral arbiters that the very practice violates constitutional due process, at least for certain classes of cases.<sup>77</sup>

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Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, 77 N.Y.U. L. Rev. 962, 969 (2002) (“Separating the judiciary from the other branches of government means little if judges are then subjected directly to the very same pressures that caused us to mistrust executive and legislative influence in the first place.”). Separation of powers may be especially compromised in a state system that uses partisan elections, in which judicial candidates are nominated by a political party and run under that party’s label. In a partisan election jurisdiction, sitting judges who want to keep their jobs would have to consider not only the possible reaction of the public to their rulings but also, it would seem, the possible reaction of their party’s leaders.

73. Fiss, *Right Degree*, supra note 72, at 61.

74. Resnik, *Judicial Selection*, supra note 32, at 591–93.

75. Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. Cal. L. Rev. 1985, 1988 (1988).

76. Video: Panel Discussion, *The Independence of the Judiciary*, Boston University School of Law Conference, *The Role of the Judge in the Twenty-First Century* (Boston University School of Law Apr. 21, 2006), available at <http://www.bu.edu/law/events/audio-video/role.html> (statement of Erwin Chemerinsky, Professor of Law and Political Science, Duke University).

77. See, e.g., *Brief Amicus Curiae of the Idaho Conservation League and the Louisiana Environmental Action Network in Support of Neither Side at 24–30, Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (No. 01-521) [hereinafter *ICL & LEA White Brief*] (asserting that “state judicial election procedures violate litigants’ rights under the Due Process Clause to have their cases heard by fair and impartial courts”); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 822 (1995) (arguing that constitutional due process implies that “judges should be disqualified from presiding over cases in which there is the appearance that political considerations could tempt judges in their rulings”); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 498 (1986) (“[I]n cases involving the assertion of a liberty or property interest in which the state is a party, the use of non-tenured state judges seems to be a clear violation of procedural due process.”).

The argument that the use of elective judiciaries inherently violates due process in any given class of cases has never attracted much support in the courts, and in *White Justice* Scalia specifically rejected it:

To believe in the majoritarian difficulty does not require any particularly rosy view about the political insularity of judges selected and retained through appointment or merit selection. (Many state judges initially selected through one of these methods are reselected, or not, on the basis of retention elections;<sup>78</sup> these hybrid systems are better classified as elective regimes for purposes of the majoritarian difficulty.<sup>79</sup>) If these unelected judges do not have life tenure—as they do in only one state<sup>80</sup>—and do not face a scrupulously apolitical reappointment authority, they too may face majoritarian pressures related to the likelihood of retaining their post.<sup>81</sup> Moreover, for reasons of efficacy and esteem, all judges will have good reason to care about the popular reception of their rulings. And through many other channels, even life-tenured federal judges are significantly constrained in their political insularity.<sup>82</sup>

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[I]f, as Justice Ginsburg claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process. . . . [These views] are not, however, the views reflected in the Due Process Clause of the Fourteenth Amendment, which has coexisted with the election of judges ever since it was adopted.

*White*, 536 U.S. at 782–83. For a more extended rebuttal, see Dimino, *Pay No Attention*, *supra* note 38, at 338–46.

78. This is almost universally the procedure following an initial merit selection. See *Am. Judicature Soc’y, Judicial Selection*, *supra* note 24, at 7–14; *McFadden*, *supra* note 7, at 5.

79. Indeed, Hans Linde has suggested that retention elections may create an even greater majoritarian difficulty than multicandidate reelections because of the way they concentrate attention on the incumbent judges’ records. See Linde, *supra* note 2, at 2004 (“Retention elections, with their simple yes or no choice, more directly but crudely hold judges politically accountable on a single popular issue, usually but not always crime, and therefore are a greater challenge to judicial independence and courage.”).

80. That state is Rhode Island, which grants life tenure even to the judges on its Worker’s Compensation Court. See *Am. Judicature Soc’y, Judicial Selection*, *supra* note 24, at 7–14. Two other states, Massachusetts and New Hampshire, grant their (unelected) general jurisdiction judges tenure during good behavior until age seventy. *Id.*

81. Term limits might mitigate these pressures, but no state appears to apply them to general jurisdiction judges. A recent ballot proposal that would have limited appellate court judges to ten years of service narrowly failed in Colorado. See *Limit the Judges: Campaign for Judicial Term Limits*, at <http://www.limitthejudges.com/> (last visited Feb. 8, 2008) (on file with the *Columbia Law Review*).

82. See generally Fiss, *Right Degree*, *supra* note 72, at 62–65 (identifying appointment process, potential for promotion and impeachment, and Congress’s ability to control jurisdiction, remedies, and number and desirability of judgeships as constraints on federal judges’ political insularity); Jack M. Balkin, *Abortion and Original Meaning*, 24 *Const. Comment.* (forthcoming 2008) (manuscript at 22–23, on file with the *Columbia Law Review*), available at <http://ssrn.com/abstract=925558> (cataloguing internal and external features of political and legal system that constrain federal judges); Ferejohn & Kramer, *supra* note 72, at 994–1003 (suggesting that posture of judicial self-restraint characterizes dynamic relationship between federal judges’ theoretical independence from and practical vulnerability to political branches). Mitchel de S.-O.-L’E. Lasser has observed that, in its emphasis on “public discursive justification,” the American model of judicial opinion-writing creates political accountability for even its life-tenured federal judges in a way that is not replicated among Western European democracies. Lasser, *supra* note 35, at 311–15.

The key claim of the majoritarian difficulty, however, is that there is something special about electoral incentives as compared to these other routes through which politics might influence judicial decisionmaking. Appointive systems in which the governor or the legislature has the power to retain judges will suffer from the majoritarian difficulty to the extent that judges believe their reappointment odds hinge on the majority's view of their decisions. Yet it is reasonable to assume that these reappointing agents will tend to see judicial performance in more nuanced, role-based terms than does the voting public, especially when guided by a nominating commission as in some merit selection states. Historically, at least, it appears that state judges who desire another term have normally been reappointed.<sup>83</sup> Elections, on the other hand, tie the incumbent judge's career prospects to the majority will in the most direct way possible: No institutional actor mediates between the two; that is the whole point. While it is theoretically possible that a majority of voters would reward, rather than punish, incumbent judges for having ruled in unpopular ways, such an outcome would be counterintuitive in the extreme.<sup>84</sup>

States might choose to grant elected judges relatively long tenure during good behavior in order to mitigate some of populism's "grosser threats,"<sup>85</sup> at least in the front part of the judges' terms. Partly for this reason, every state that elects its judges grants them relatively long tenure as compared to other elected officials.<sup>86</sup> That is a significant concession. But the more relevant comparison for the debate over judicial selection methods is with the tenure of other, unelected judges. The average state high court judge who faces a reelection or retention election after her

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83. See, e.g., Richard L. Hasen, "High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. Rev. 1305, 1328–30 (1997) (suggesting that state judges are typically reappointed); Henry A. Span, How the Courts Should Fight Exclusionary Zoning, 32 Seton Hall L. Rev. 1, 71 (2001) (describing frequent reappointments to New Jersey courts).

84. It would also run counter to what the judges themselves seem to think. Joanna Shepherd at Emory Law School is working on an ambitious empirical study that may shed new light on the differential effects of reelection versus reappointment on state supreme court decisionmaking. Her preliminary results show that, *ceteris paribus*, justices facing reelection are significantly more likely than justices facing reappointment to decide cases in accord with the political preferences of the group responsible for their retention decisions. Thus, justices facing a majority-Republican electorate are more likely than justices facing a majority-Republican reappointing authority or a majority-Democratic electorate to rule in favor of businesses over individuals, employers over employees in labor cases, manufacturers over litigants in product liability suits, original defendants over plaintiffs in tort suits, and the state over criminals in criminal appeals. Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Decisions passim* (June 30, 2007) (unpublished manuscript, on file with the *Columbia Law Review*), available at <http://ssrn.com/abstract=997491>.

85. Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1159 (1999) [hereinafter Hershkoff, Positive Rights] (quoting Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605, 630 (1981)).

86. Schotland, *New Challenges*, *supra* note 1, at 1094.

first term will do so within five-and-a-half years, according to my calculations, as compared to an initial term of nine-and-a-half years for the average high court judge who faces reappointment.<sup>87</sup> Nine-and-a-half years is long enough to encompass several changes in a state's political leadership. This possibility makes it more difficult for appointed judges to forecast what will prove to be a popular or unpopular decision with the group who will eventually rule on their reselection. It is not surprising that elective regimes use comparatively short terms—to do otherwise would risk vitiating the democratic accountability that is the *raison d'être* of using elections. So while state reappointment systems may indeed manifest the majoritarian difficulty, on at least two levels (the nature of the reselection decision and length of tenure) their judges seem relatively less susceptible.

Once the distinctive nature of electoral pressures is brought into focus, it becomes easier to see certain weaknesses in two prominent rebuttals to the majoritarian difficulty. Jonathan Remy Nash's<sup>88</sup> and Michelle Friedland's<sup>89</sup> recent articles in the *Columbia Law Review* offer good examples. In *Prejudging Judges*, Professor Nash argues that, given how politicized the judicial appointments process has become, elections may actually offer a means to depoliticize judicial selection.<sup>90</sup> The suggestion is that the distinction between elections and appointments, and the idea that the latter minimizes political dependence, no longer holds up in the modern era. Yet while Nash is surely right that judicial appointments have become much more partisan and cantankerous in recent years, his argument is not really responsive to the majoritarian difficulty, which looks to the decisional incentives faced by sitting judges, not by potential ones. Prejudging judges may raise any number of problems, but it is the *postjudging* of them that systematically threatens individual and minority rights and the rule of law. Were a state to elect its judges but then give them life tenure or allow an independent commission to control their reappointment, this threat could be averted. But no state has ever used such a hybrid system, and it is hard to imagine that any state ever would;

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87. Am. Judicature Soc'y, *Judicial Selection*, *supra* note 24, at 7–14; see also Schotland, *Comment*, *supra* note 53, app. at 154–55 (providing aggregate statistics on term length frequencies). These calculations reflect the length of judges' initial terms on all state courts of last resort that fit the category, divided by the total number of courts in the category. No allowance is made for different numbers of judges on different courts, and an assumption of an initial term of two years is made for Maryland, New Mexico, and Tennessee high court judges, who must face the voters at the next general election following their initial merit selection. The nine-and-a-half years figure does not include Massachusetts, New Hampshire, or Rhode Island, the three states that give their high court judges a form of life tenure.

88. Jonathan Remy Nash, *Prejudging Judges*, 106 *Colum. L. Rev.* 2168 (2006).

89. Friedland, *supra* note 17.

90. Nash, *supra* note 88, at 2204–05.

elections at the initial selection stage make little sense without elections at a reasonably proximate retention stage.<sup>91</sup>

Friedland takes on the majoritarian difficulty directly. She argues that because the Supremacy Clause commits state courts to follow federal constitutional law, including the Bill of Rights, these courts are bound to be at least as protective of individual and minority rights as their federal counterparts.<sup>92</sup> To buttress this argument, she cites empirical evidence that “suggest[s] that state courts are just as likely to uphold claims of federal rights as federal courts are,”<sup>93</sup> and she references a Second Circuit opinion in which the court “refused to assume ‘that all elected judges will invariably disregard their oath and subvert justice’ in sensational cases.”<sup>94</sup> Friedland offers a thoughtful corrective against extreme statements of the majoritarian difficulty, but her rebuttal is also incomplete. The fact that state judges are bound by the Federal Constitution may indeed establish some baseline of minority and individual rights protection, but only in constitutional cases. Electoral pressures can still pull judges toward the populist outcome in the vast range of cases in which federal rights are not clearly implicated, not to mention in the day-to-day administration of justice.<sup>95</sup> Likewise, the fact that judges will be reluctant to disregard their professional oaths is only partially relevant. The judge who is thinking ahead to the next election need not be so brazen to advance her chances; to trigger the majoritarian difficulty she just needs to privilege the more voter-friendly legal views within the range of her legitimate discretion.<sup>96</sup>

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91. I realize that this assertion is not a logical or normative truth and that some students of judicial elections may disagree. See, e.g., *id.* at 2198 (“There is no reason that citizens cannot elect judges to terms with life or some otherwise lengthy tenure.”); E-mail from Michael Dimino, Sr., Assistant Professor of Law, Widener University School of Law, to author (June 3, 2007, 20:46:12 EDT) (on file with the *Columbia Law Review*) (“In fact, I think initial popular selection of judges can provide the benefit of popular input, while long terms (perhaps good behavior) can ensure that judges don’t have to decide cases while looking over their shoulders.”). But I stand by it. The motivating values behind the choice to elect judges—democratic accountability, popular sovereignty, collective self-determination—demand that judges be subject to regular reelection as well. While there may be many virtues to longer terms for elected judges, see Schotland, *New Challenges*, *supra* note 1, at 1099–1110 (providing summary list, with emphasis on increasing judicial independence), these virtues are not the same as, and at some point will conflict with, the core reasons why we might want to elect judges in the first place.

92. Friedland, *supra* note 17, at 627–31.

93. *Id.* at 628–29.

94. *Id.* at 599 n.159 (quoting *Brown v. Doe*, 2 F.3d 1236, 1249 (2d Cir. 1993)).

95. As former Oregon Supreme Court Justice Hans Linde points out, “while constitutional issues are important, they are neither the primary nor the most controversial cases for state judges.” Letter from Hans Linde, Distinguished Scholar in Residence, Willamette College of Law, to author (Mar. 23, 2007) (on file with the *Columbia Law Review*).

96. Although this privileging would not necessarily violate a judge’s oath, some might think it violates a judge’s duty to decide cases based on the legal merits alone. See *infra* note 120 and accompanying text. In practice, however, separating legal considerations from electoral considerations may prove quite difficult, and in principle many would

For appellate judges, especially, that range will often be vast enough to encompass a great range of potential holdings.

Criminal sentencing provides a good illustration. If privacy and equal protection historically have been the most potent subjects for the countermajoritarian difficulty, the locus classicus of the majoritarian difficulty has been the criminal law.<sup>97</sup> Given the political unpopularity of criminal defendants as a group and the unique salience of crime in the public perception of judicial behavior, incumbent judges may be most vulnerable when their opponents are able to characterize them as soft on crime.<sup>98</sup> A famous example of this was the 1986 retention election defeat of three California Supreme Court justices—the first ever such defeats in the state’s history—after a campaign that attacked the justices’ low rates of affirmance in death penalty cases.<sup>99</sup> Criminal defendants who face an elected judge concerned to look “tough” will generally find little succor in the Federal Constitution.<sup>100</sup> Defendants who then bring habeas corpus claims will also generally find little succor in the federal courts, in light of the Antiterrorism and Effective Death Penalty Act’s stringent standard for reversal.<sup>101</sup>

Over the past two decades, scholars have been moving beyond the theoretical and developing a body of empirical research on the effects of elections on judicial behavior. The criminal law results are bracing. As standing for reelection approaches, judges become significantly more punitive, meting out longer sentences<sup>102</sup> and imposing the death penalty

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contest the notion that elected judges should be striving for a rigid separation of the two. See *supra* Part I.A.

97. See Croley, *supra* note 3, at 730 n.126.

98. See Baum, *supra* note 4, at 34–35 (describing criminal justice’s “unique place” in minds of voters and summarizing survey evidence that American voters overwhelmingly believe courts to be too lenient on criminals—“a striking finding in an era of increasing severity in sentencing and declining crime rates”); Linde, *supra* note 2, at 2000–01 (observing that, notwithstanding Announce Clauses and other campaign speech restrictions, “tough on crime” rhetoric has long been a staple of judicial campaigns).

99. See B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 *Loy. L.A. L. Rev.* 1429, 1431–33 (2001). This result, and Chief Justice Rose Bird’s defeat in particular, was seen as a landmark event for many opponents of judicial elections; it spawned scores of angry articles, see, e.g., Edwin Chen, *Rose Bird Runs for Her Life*, *Nation*, Jan. 18, 1986, at 42, and at least one symposium. Symposium, *Judicial Election, Selection, and Accountability*, 61 *S. Cal. L. Rev.* 1555 (1988).

100. Friedland herself points out that the Due Process Clause of the Fourteenth Amendment, as it has been interpreted, will only require a judge to be disqualified for something she has said if her remarks appear to prejudge the merits of that particular case, display extreme animosity toward a specific party, or indicate an intent to disobey the law. Friedland, *supra* note 17, at 577–604; see also Kim Taylor-Thompson, *Tuning up Gideon’s Trumpet*, 71 *Fordham L. Rev.* 1461, 1503 n.196 (2003) (noting that even in states that have adopted sentencing guidelines, judges are typically given “considerable discretion in sentencing”).

101. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (codified as amended at 28 U.S.C. § 2254(d) (2000)).

102. See 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) (finding that

more frequently.<sup>103</sup> Beyond crime, other studies have found elected judges to be significantly more likely to rule in ways that are consistent with public opinion<sup>104</sup> and to favor in-state litigants.<sup>105</sup> Additional evidence for the majoritarian difficulty might be gleaned from findings that individual rights litigation has not grown as much in states with elective judiciaries<sup>106</sup> and that elected state supreme courts are associated with lower overall rates of litigation than appointed ones (the theory being

Pennsylvania trial court judges give significantly longer sentences for aggravated assault, rape, and robbery convictions the closer they are to reelection). As Huber and Gordon note, this result makes sense given that voters are largely uninformed about judicial behavior, such that “a single publicized case can be decisive in their evaluations,” and are more likely to respond to perceived underpunishment than to overpunishment. *Id.* at 247.

103. See, e.g., Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 *Pol. Res. Q.* 5, 22–24 (1995) (finding, in preferred specification, statistically significant positive relationship between partisan electoral competition and use of death penalty among state supreme court justices); Richard R.W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 *J. Crim. L. & Criminology* 609, 637 (2003) (finding that criminal defendants convicted of murder in Chicago were fifteen percent more likely to be sentenced to death when sentence was issued during judge’s election year).

104. See, e.g., Daniel R. Pinello, *The Impact of Judicial-Selection Method on State-Supreme-Court Policy* 130 (1995) (finding that appointed judges are more likely than elected judges to innovate in area of business law and to adopt unpopular policies in area of criminal procedure); Paul Brace et al., *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 *Alb. L. Rev.* 1265, 1290 (1999) (indicating that judges in merit selection and life tenure jurisdictions are significantly more likely to hear and uphold challenges to state abortion statutes than judges selected and retained through regular elections); see also *supra* note 84 (describing Joanna Shepherd’s new study). But cf. Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* 29 (Aug. 21, 2007) (unpublished manuscript, on file with the *Columbia Law Review*), available at <http://ssrn.com/abstract=1008989> (finding that elected high court judges are roughly equal in independence to appointed judges when independence is measured as frequency of conflicting opinions with judges of same party).

105. See Alexander Tabarrock & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 *J.L. & Econ.* 157, 186 (1999) (finding that elected judges are more likely to redistribute wealth from out-of-state businesses to in-state plaintiffs). Tabarrock and Helland use as their epigraph a remarkably candid statement by Justice Richard Neely of the West Virginia Supreme Court of Appeals:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else’s money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

*Id.* at 157 (quoting Richard Neely, *The Product Liability Mess* 4 (1988)).

106. See Ronald K.L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, *Publius*, Summer 1986, at 141, 150–52; see also Neuborne, *supra* note 63, at 1116 n.45 (“[I]t is from among those appellate courts which closely approximate the independence enjoyed by the federal courts that one finds the state courts which have been most vigorous in protecting individual rights.”). Neuborne’s article helped launch a vast body of “parity” research that compares state and federal courts’ relative ability and willingness to protect federal rights. Erwin Chemerinsky summarizes this debate, which he deems “probably unresolvable



that appointed judges' greater political independence generates more uncertainty about litigation outcomes).<sup>107</sup>

Of course, it is difficult to identify what portion of these elective/appointive differentials is being driven by the type of candidates who tend to enter and win elections, as opposed to what the majoritarian difficulty does to these candidates once elected. But all of the studies include at least some controls for the judges' background characteristics, and at any rate the effect of elections on what sorts of jurists attain the bench may itself be seen as an aspect of the majoritarian difficulty. Taken together, this research suggests that the majoritarian difficulty exists along a continuum, with certain types of cases (such as violent crime) the most susceptible, and that its effects ripple outward to inform litigant behavior. The results also suggest that while the majoritarian difficulty has generated anxiety predominantly among political liberals, conservatives too can find plenty to dislike.<sup>108</sup>

A final note on the majoritarian difficulty. In conjuring this subject (however titled), the focus of commentators has been almost wholly on outcomes—on the potential for electoral incentives to skew judges' case decisions in ways the commentators find undesirable or illegitimate. Less noticed is the way in which these incentives may skew the practices and norms of judicial decisionmaking—what might be termed the sociology and the internal perspective of judging, respectively—separate from the decisions themselves. One possibility is that the intensely personal, atomistic experience of campaigning might undermine the norm of collective deliberation among elected appellate judges who sit on panels. “Every judge for herself,” might be the mentality fostered by a regime of such public interpersonal competition. More basically, in a world in which every case of significance raises the specter of electoral backlash, judgments on legality, morality, and justice will, one assumes, come to be filtered through the lens of public opinion. Electoral pressures could infiltrate a judge's thought processes consciously or subconsciously; over time, the judge might come to internalize these pressures into her instinctive reaction to cases, her jurisprudential approach, maybe even her sense of the judiciary's proper function. By rewarding judges who are able to discern the majority sentiment and assimilate it into their decisionmaking without a crisis of conscience and punishing those who are not, an elective regime would seem to reflect a particular conception of

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because parity is an empirical question,” in Erwin Chemerinsky, *Federal Jurisdiction* § 1.5, at 35–39 (5th ed. 2007).

107. See Hanssen, *supra* note 28, at 232 (examining rates of utility litigation and total filings in state high courts).

108. Cf. Robin West, *Progressive and Conservative Constitutionalism*, 88 *Mich. L. Rev.* 641, 645 (1990) (noting that “conservatives and progressives agree that untrammelled majoritarianism poses dangers” and therefore agree on need for independent judiciary to enforce constitutional restraints, even though conservatives and progressives disagree sharply over content of these dangers (emphasis omitted)).

accountability, in which the judge sees herself as accountable to the voters she serves at that moment in time.

In reifying this vision of the judicial role, elective judiciaries mark a dramatic departure from the legal culture's more ennobling visions of the judge, such as the Dworkinian Hercules,<sup>109</sup> the Fissian heroic adjudicator,<sup>110</sup> or, more universally, the blindfolded Justitia holding balanced scales.<sup>111</sup> Those models of judging conceptualize accountability very differently: The judge is accountable to the law itself and, transitively, to the judicial role. The Dworkinian/Fissian judge and Justitia are also meant to serve the public's interests, but in a deeper, value-driven, potentially paternalistic, and not necessarily instantaneous way.

In contrast, elective judiciaries can be seen as the real-world compatriots of the critical legal studies (CLS) and law and economics movements, in that each sees judicial decisionmaking in instrumental terms.<sup>112</sup> As with the CLS-style judge pursuing elite domination or the economic-minded judge pursuing efficiency, the elected judge with an eye on the polls is pursuing something other than the best legal answer. Or, rather, her vision of the best legal answer may be conditioned on something—public opinion—that cannot be found in any accepted legal or moral source. Not only will the elected judge not act as heroically in standing up to majority prejudices or abuses; she will never inhabit the heroic mindset of the judge as guardian of private rights and expositor of public values. She will never commit to a course of justice.

2. *Favoritism.* — Whereas the majoritarian difficulty posits that elections will, by their very nature, give judges an incentive to cater to public opinion, other features of elections may give judges an incentive to cater to *private* interests. The most obvious feature is the need to raise campaign funds. When a judge's campaign contributors show up in court,

109. Dworkin, *Law's Empire*, supra note 34, at 238–40.

110. See, e.g., Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 58 (1979) (envisioning judge as “forever straddling two worlds, the world of the ideal and the world of the practical, the world of the public value and the world of subjective preference, the world of the Constitution and the world of politics,” and asserting that judge “derives his legitimacy from only [the first]”); see also Jules L. Coleman, *Owen Fiss and the Aspirational Conception of Law*, 58 U. Miami L. Rev. 369, 370–72 (2003) (identifying image of heroic judge as central trope in Professor Fiss's work and sketching its connection to Fiss's larger theory of law).

111. I reference Dworkin and Fiss here because their conceptions of the ideal judge have been so influential and deeply developed, if controversial. The ideal of judicial impartiality and integrity represented by Justitia, however, is central to most Americans' understanding of the judicial role, and it has long attracted support from jurists across the ideological and jurisprudential spectrum. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 384 (2007) (noting that “[f]rom the internal perspective of the law, the law/politics distinction is constitutive of legality” and citing to numerous U.S. Supreme Court opinions that “proudly and insistently proclaim” duty of apolitical judicial decisionmaking).

112. Cf. Tamanaha, supra note 3, at 118–23, 185–89 (positing instrumentalism as unifying theme across these and other modern legal developments).

the judge might feel a backward-looking obligation to compensate them for their largesse and/or a forward-looking obligation to motivate them to give again. The majoritarian difficulty suggests a systemic bias in favor of particular types of outcomes; this critique of judicial elections suggests a case-by-case bias in favor of particular litigants. Favoritism threatens the rule of law by having judges care too much not about the views of the majority, but about the views of a very small (though often wealthy and powerful) minority. The deviation from the ideals of judicial neutrality and public-mindedness is even more pronounced.

The favoritism argument appears to have excited more opposition to judicial elections than any other. Countless critics have emphasized that elections tend to make judges feel beholden to their supporters—be they major financial contributors, ideological advocates, or political parties—and perhaps also ill-disposed toward those who assisted the judges' opponents (and who might therefore be expected to assist future opponents as well).<sup>113</sup> These supporters will rarely be representative of the broader public; more likely they will be individuals or entities with a stake in the judge's rulings, such as local plaintiffs' lawyers or corporations anticipating litigation.

The mechanisms of judicial recusal and disqualification provide little relief, because in most states judges are allowed to rule on their own challenges, and in all jurisdictions it is extremely difficult to remove a judge for having previously expressed a position on a legal or political issue implicated by the case or for having received campaign contributions or other forms of support from a litigant or her lawyers.<sup>114</sup> Even though the American Bar Association's Model Code of Judicial Conduct has contained a *per se* rule requiring disqualification of judges from cases involving significant contributors for almost a decade,<sup>115</sup> only one state

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113. See, e.g., Am. Bar Ass'n Standing Comm. on Judicial Independence, Public Financing of Judicial Campaigns 20 (2002), available at [http://soros.org/initiatives/justice/articles\\_publications/publications/judcampaigns\\_20020201/commissionreport.pdf](http://soros.org/initiatives/justice/articles_publications/publications/judcampaigns_20020201/commissionreport.pdf) (on file with the *Columbia Law Review*) (describing "pervasive public perception that campaign contributions influence judicial decision-making").

114. See Goldberg, Sample & Pozen, *supra* note 16, at 520–21, 525–34 (explaining impotence of recusal and disqualification in these situations and recommending possible reforms); see also *infra* notes 155–164 and accompanying text (discussing evidence that suggests underuse of recusal by certain state judges).

115. Model Code of Judicial Conduct Canon 3E(1)(e) (2004). As John Nagle notes, academia has sided squarely with the ABA on this issue: "Indeed, the scholarly opinion is just as unanimous that a campaign contribution should require a judge to recuse as the courts are agreed that recusal is unnecessary." John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 *Harv. J. on Legis.* 69, 88 (2000).

(Alabama) employs such a rule,<sup>116</sup> and even there it appears that many courts refuse to apply the relevant statute.<sup>117</sup>

It is important to see that the potential for favoritism and the majoritarian difficulty are distinct phenomena.<sup>118</sup> Richard Posner has written about the “zone of reasonableness” within which various legal judgments can plausibly be defended in a given case.<sup>119</sup> When a judge opts for the more popular outcome, so long as that outcome is within the zone there is nothing necessarily unethical or illegitimate about such a move, many would agree, even if it is made precisely for the reason of electability.<sup>120</sup> Indeed, one might think that that judge is doing exactly what an elective regime expects of her. By contrast, when a judge opts for a particular outcome so as to reward her supporter or inspire a litigant to become her supporter, she has plainly transgressed the bounds of judicial propriety. Even a hardened pragmatist like Posner would be quick to affirm that personal bias can never provide a legitimate ground on which to rule. Favoritism is a form of corruption; it is always outside the zone of reasonableness. All of the canons of judicial conduct reflect as much.<sup>121</sup>

The conceptual distinction between favoritism and the majoritarian difficulty implies a further, practical distinction: Whereas the latter seems inherent to, if not the purpose of, an elective judiciary, the former might possibly be overcome. As it turns out, virtually no states have been willing to disqualify judges from hearing the cases of campaign supporters,<sup>122</sup> and only one state has been willing to enact full public financing

116. Ala. Code § 12-24-2(c) (LexisNexis 2005); cf. *Petition for Writ of Certiorari at 24, Jones v. Burnside*, 127 S. Ct. 576 (2006) (No. 06-53) (identifying Alabama as only state with similar provision to ABA’s Canon 3E(1)(e)).

117. See Val Walton, *Suit Claims Governor, AG Not Enforcing Campaign Law*, Birmingham News, Aug. 2, 2006, at 2B; see also *Finley v. Patterson*, 705 So. 2d 834, 835 n.1 (Ala. 1997) (Cook, J., concurring) (describing enforcement of Ala. Code § 12-24-2 as being “in legal limbo” because statute was not precleared under Voting Rights Act).

118. Professor Croley also suggests this distinction in his seminal article on the majoritarian difficulty. Croley, *supra* note 3, at 728 n.124, 790 n.262.

119. Posner, *Role of the Judge*, *supra* note 37, at 1053, 1065–66. Posner is notable, of course, for seeing this zone as especially wide.

120. Not everyone would agree. A critic might argue that a judge’s selection method should have no effect on her rulings, that a judge must decide cases based solely on her view of the legal merits—with public opinion given no epistemic or consequentialist weight—or else she has defaulted on her duty. For this critic, the Platonic ideal of the judge does not change when the selection method changes; even elected judges should act as if they have life tenure when in the courtroom. For an implicit argument to this effect, see *supra* note 75 and accompanying text (quoting Erwin Chemerinsky). Given the practical implausibility of selection method being irrelevant in this sense, it is hard to see how this critic could ever be reconciled to an elective judiciary.

121. See, e.g., Model Code of Judicial Conduct Canon 3E (2004) (mandating disqualification whenever judge is biased, interested, or otherwise partial in given case).

122. See *supra* notes 114–117 and accompanying text.

for any of its judicial elections.<sup>123</sup> These options *are* available, however. Politically unpopular, administratively burdensome, and fiscally expensive as they might be, regulatory reforms might be able to mitigate the tendency of elections to foster judicial decisionmaking based on private interest.

### C. *Additional Arguments*

Apart from what I have been calling the decisional critiques, so many other arguments have been leveled against judicial elections, and so many rebuttals offered, that it would be impractical (not to mention tedious) to canvas them all. A summary list will suffice to give a feeling for the most persistent of the bunch. Whereas the core vices and virtues discussed above all draw on some underlying normative vision of the judicial function, these arguments tend to be more purely instrumental and contingent, based on secondary assumptions about how judicial elections will play out in practice. They are more easily subjected to empirical tests, for they are more focused on the practice of electing judges than on the practice of judging.

This does not make these arguments less important functionally, but it does make them less central to the debate over elective judiciaries. The practice of judging, of course, sweeps broader than judicial review to include everything that judges do in conducting trials, executing administrative duties, and interacting with the bar and members of their community. For trial judges especially, these other tasks may be much more apparent than their discretionary power to apply law. Nonetheless, across all courts in all jurisdictions, it is the legally binding decisions judges render that constitute the fundamental and defining feature of their role. Important as the following arguments are, the decisional critiques explored above thus remain—logically, analytically, normatively—the core critiques in the debate over elective judiciaries.

1. *Unqualified, Unmotivated Voters*. — Because it requires specialized legal knowledge and familiarity with the facts to evaluate a judge's work in any given case, much less several years' worth of cases, citizens cannot monitor judicial performance in any rational or robust way.<sup>124</sup> Nor will

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123. North Carolina adopted full public financing for qualified appellate candidates in 2002. See Goldberg et al., *New Politics 2004*, supra note 8, at 38–39 (summarizing history of this act and hailing it as model for other states to follow).

124. Judge Posner made this point particularly forcefully in a recent lecture. See Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 *Ariz. St. L.J.* 1, 5 (2006) (“Most of what courts do is opaque to people who are not lawyers. It is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently. That is a decisive objection to . . . elect[ing] judges.”). As Posner suggests, if one accepts this voter-competence point without reservation, it is a conversation-stopper: Asking citizens to elect their judges would be like asking them to elect their nuclear physicists. Many commentators are more sanguine than Posner, however, about the capacity of citizens—informed, ideally, by voter guides, candidate debates, and the like—to make reasonable

the public be motivated to improve its knowledge of the candidates, given the extreme unlikelihood that any particular voter will have to come before any particular judge. Public opinion will therefore be driven by media soundbites and irrelevant or inappropriate factors; politics and appearances will win out over substance. Low quality judges are more likely to be selected. The parity gap in competence and fairness between state courts and federal courts will widen.

Basic rebuttal (strong form): Whichever candidate the voters choose is, by definition, the best candidate.

Basic rebuttal (weak form): Media and bar endorsements and state-issued information pamphlets can adequately guide voters' choices, and appointive systems generate politically connected judiciaries that are of no better quality.

2. *Lower Quality Candidates.* — High quality candidates are also less likely to run.<sup>125</sup> Whereas appointments carry a certain prestige and insulate the judge to an extent from public scrutiny, elections breed self-selection of politically minded hacks. (This argument also feeds back into the majoritarian difficulty: Attorneys who see the judge's role as essentially countermajoritarian or nonmajoritarian may be less likely to stand for election.)

Basic rebuttal: An elected judgeship is no less prestigious, and arguably more so, and plenty of qualified candidates will run. Public scrutiny is a necessary corollary of democratic accountability.

3. *Reduced Diversity.* — Given the United States's pervasive background conditions of racially polarized voting, disproportionately low turnout among minority voters, and the importance of candidates' access to money, elections will generate a less diverse bench than well-designed appointive systems.<sup>126</sup>

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judicial selections. See, e.g., Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973, 995 (2001) ("Underlying the debate about appointed versus elected judges is a fundamental disagreement about the capacity of the voters to choose wisely. If the people need more information, it is our task to provide it."). And this Article does not want to stop the conversation, as millions of Americans certainly appear to believe that they can evaluate judicial candidates, and as there are many other grounds on which to critique or defend elective judiciaries.

125. See, e.g., Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 Cornell J.L. & Pub. Pol'y 273, 285–87 (2002) (discussing how prospect of participating in contested elections and raising large amounts of money may deter qualified candidates); see also Schotland, *New Challenges*, supra note 1, at 1087–88 (presenting evidence that initially elected judges have been disciplined more frequently than initially appointed judges).

126. The empirical evidence is mixed on which method of judicial selection has proven more effective at generating judicial diversity, however measured, but on balance the data probably tilt to appointments. For a summary of the literature, see Lawyers' Comm. for Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and Their Impact on Diversity* (2005), available at [http://www.soros.org/initiatives/justice/articles\\_publications/publications/judges\\_20050923/answering\\_20050923.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/judges_20050923/answering_20050923.pdf) (on file with the *Columbia Law Review*).

Basic rebuttal: Many appointive systems are not well-designed in this regard; they will often be white-shoe affairs subject to capture and cronyism and liable to scant diversity along any number of dimensions. Judicial elections, at least, are covered by the Voting Rights Act.<sup>127</sup>

4. *Unseemliness*.<sup>128</sup> — Campaigning is undignified and brings the judiciary into disrepute. This is bad for social cohesion and respect for the law, and it makes the judiciary less efficacious relative to the other branches.

Basic rebuttal: Judges do not need to be coddled; their dignity needs no special protection. The public will understand and appreciate the need to campaign. Moreover, appointive systems can lead to confirmation battles that are every bit as unseemly.

5. *Public Trust and the Appearance of Impartiality*. — Candidates' campaign statements and the influence of money and special interests will have pernicious effects not only on judicial impartiality, but also on the appearance thereof.<sup>129</sup> By undermining judges' claim to be our moral and constitutional guardians, elections degrade their authority and the very idea of the rule of law. Public trust in the courts will therefore decline. Disempowered groups may become especially jaded. As with our legislative and executive elections, contribution limits and other such regulations will do little to change these dynamics.

Basic rebuttal: Money, self-promotion, and interest group participation are needed for any vigorous electoral contest, and legal rules can prevent the worst abuses. Moreover, public faith in the courts may be bolstered, not undermined, by the perception that judges are responsive to the voters' will. Judicial elections can facilitate an ongoing conversation about what the community seeks from its legal system and its legal guardians.<sup>130</sup> It is healthy to deflate the pretensions of the heroic and

127. *Chisom v. Roemer*, 501 U.S. 380, 384 (1991).

128. Professor Croley described a colleague “who suggested to [Croley] that whatever else he thought about judicial elections, he considered them ‘unseemly.’” Croley, *supra* note 3, at 696 n.22. In his presentation of this anecdote, Croley suggested that many lawyers, or at least many law professors, share this colleague's pretheoretical intuition.

129. See, e.g., Behrens & Silverman, *supra* note 125, at 282–85 (asserting, based on survey and anecdotal evidence, that “[j]udicial elections are undermining the public's respect for judges and the judicial system”).

130. In an opinion handed down as this Article was going to press, Justice Kennedy, in a concurrence joined only by Justice Breyer, made an eloquent plea for the possibilities of judicial elections to stimulate a kind of court-centered active liberty:

A judicial election system presents the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process. Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates.

*N.Y. State Bd. of Elections v. Lopez Torres*, No. 06-766, slip op. at 4 (U.S. Jan. 16, 2008) (Kennedy, J., concurring). Equally noteworthy, Justice Kennedy responded to (unnamed) critics of electing judges that “[i]n light of th[e] longstanding practice and tradition in the

apolitical judge.<sup>131</sup>

6. *Time drain.* — The demands of fundraising and campaigning will drain judges' time and distract them from their duties.<sup>132</sup> Their work product will suffer as a result.

Basic rebuttal: Legal rules can limit these demands, which are both inevitable in an elective regime and, perhaps, a healthy means by which candidates are forced to gauge public opinion and refine their positions.

## II. REVISITING THE DEBATE

So what becomes of the standard arguments for and against elective judiciaries now that we have entered a “new era” in judicial elections?<sup>133</sup> Now, that is, that these elections involve much greater amounts of money, advertising, competition, partisanship, interest group involvement, and candidate speech than ever before, do they look more or less desirable? While most observers of the recent trends in judicial elections have seized on a particular development—for instance, the liberalization of campaign speech or the influx of big money—in order to attack or defend it, this Part takes a broader view. The simple yet overlooked consequence of these trends, it will suggest, is that the arguments on *both* sides of the debate become stronger. The new model of judicial elections has widened the gap between their proponents and detractors.

### A. *Judicial Elections Are Better than Ever*

The key argument in favor of electing judges, recall, is premised on democratic accountability. It holds that in virtue of their role as important public officials, judges ought to be selected directly by those over

States, the appropriate practical response is not to reject judicial elections outright but to find ways to use elections to select judges with the highest qualifications.” *Id.*

These remarks contain the seeds of a robust argument for elective state judiciaries rooted in history, popular sovereignty, and democratic accountability. Yet by focusing on judicial “excellence” and “qualifications,” Justice Kennedy sidestepped, or at least obfuscated, the central question in the debate. The core criticism of elective systems is that they allow the voters to reward or punish sitting judges for the substance of their rulings, and this invariably undermines judicial independence and associated values. It is not the popular discussion of judicial excellence that scares the critics; it is the discussion of judicial *decisionmaking*.

131. Historically, this rebutter might also note, a number of states appear to have adopted judicial elections in the nineteenth century as a means to *depoliticize* judicial selection and to reduce the role of political patronage therein. See Resnik, *Judicial Selection*, *supra* note 32, at 594 (summarizing historical literature). The relevance of these states' experience to the modern era, however, is far from clear.

132. See, e.g., Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, *Law & Contemp. Probs.*, Summer 1998, at 79, 112 (“[T]he time and effort expended by judges in fundraising can be a serious distraction from the work of the court that the judge is employed to perform.”).

133. See *supra* notes 8–19 and accompanying text (sketching main characteristics of new era).



whom they hold power.<sup>134</sup> With judges as with legislators, only direct elections can satisfy our commitment to popular sovereignty and collective self-determination. If elected judges modulate their decisions—within the zone of reasonableness<sup>135</sup>—so as to conform to voter preferences, so much the better; that is a sign of a well-functioning judiciary, not of institutional failure.

For those who hold some version of this view, the new model of judicial elections ought to be hailed as a long overdue development. In their traditional guise, judicial elections were democratic “only in a sterile, formalistic sense.”<sup>136</sup> Campaigning was minimal; incumbents almost always won; few people voted or cared. Democratic accountability, consequently, was thin. Candidates could focus on the small segment of the electorate that was paying attention: namely, local lawyers and businesses with litigation interests. Wealthy candidates who could fund their own campaigns were at a large advantage.<sup>137</sup> Once in power, judges could more or less do as they pleased without fear of electoral repercussion so long as they steered clear of public ire in the rare sensational case.

In the new era, by contrast, democratic accountability is much more robust. The demise of the Announce Clause means that all candidates for judicial office must be allowed to announce their views on controversial legal and political issues. These are, of course, precisely the issues that voters want to hear discussed. Instead of reciting platitudes about how they will be fair and efficient, judicial candidates will now have to engage each other and stake out distinct positions. They will have to develop campaign platforms, essentially, against which voters can compare their judicial records once elected. Fueled by rising levels of funds, high-profile advertisements will transmit the candidates’ messages and the assessments of interested groups to more people. Voter turnout should rise. Retention rates should fall. Judicial elections will at last have some vitality and some substantive content.

And things will only get better for the democratic proponent of judicial elections if the courts read *Republican Party of Minnesota v. White* broadly and strike down the other major canons of judicial campaign conduct. In the wake of *White*, lawsuits around the country have been challenging the Pledges or Promises Clause (which bans “pledges or promises of conduct in office other than the faithful and impartial per-

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134. See *supra* Part I.A.

135. See *supra* note 119 and accompanying text.

136. Croley, *supra* note 3, at 730; see also *supra* notes 1–7 and accompanying text (synopsizing traditional model of judicial elections).

137. See McFadden, *supra* note 7, at 29 (summarizing studies from three jurisdictions in 1970s and 1980s finding that judicial candidates supplied average of ten to thirty percent of their own campaign funds). Unsurprisingly, bigger campaign spenders have more frequently won judicial elections, though it is hard to identify the nature and extent of any causal relationship. See *id.* at 26.

formance of the duties of the office”),<sup>138</sup> the Commit Clause (which bans “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court”),<sup>139</sup> the Misrepresent Clause (which prohibits judicial candidates from knowingly misrepresenting facts concerning themselves or an opponent),<sup>140</sup> the ban on direct solicitation of contributions,<sup>141</sup> and various canons that constrain sitting judges’ political activities.<sup>142</sup> It is unclear how the lawsuits will turn out, but at present all of these canons look vulnerable.<sup>143</sup> To many critics of “new style” judicial elections, these canons provide valuable safeguards against the rising tide of threats to impartiality. To many proponents of judicial elections, however, these canons serve little function save to attenuate the connection between candidates and voters and thus to impair accountability. Indeed, to the strong democratic defender of judicial elections, there may be no clear stopping point to their reform short of an identical regulatory regime to that used in legislative and executive races.

In this vision of judicial elections, there is no necessary tension between candidates’ speech rights and the quality or sanctity of the judiciary; the goals of the First Amendment libertarian and the juridical functionalist are symbiotic. Justice Scalia suggested as much in his *White* opinion when he remarked that “[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to

138. See, e.g., Mich. Code of Judicial Conduct Canon 7(B)(1)(c) (1994); Ohio Code of Judicial Conduct Canon 7(B)(2)(c) (1997).

139. See, e.g., Kan. Code of Judicial Conduct Canon 5(A)(3)(d)(ii) (2006); Pa. Code of Judicial Conduct Canon 7(B)(1)(c) (2005).

140. See, e.g., Ill. Code of Judicial Conduct Canon 7(A)(3)(d)(ii) (1994); see also Barbara E. Reed, *Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-White Landscape*, 56 *Mercer L. Rev.* 971, 981 (2005) [hereinafter Reed, *Tripping the Rift*] (stating that canons in forty-one states had both Misrepresent Clause and Pledges or Promises Clause at time *White* was decided).

141. See, e.g., Idaho Code of Judicial Conduct Canon 5(C)(2) (2007); Ind. Code of Judicial Conduct Canon 5(C)(2) (2006).

142. See, e.g., *Wolfson v. Brammer*, No. CIV 06-2357-PHX-SMM, 2007 WL 2288024, at \*1, \*5 (D. Ariz. Aug. 8, 2007) (rejecting as unripe challenges to Arizona’s bans on participating in campaigns of others, supporting state ballot initiatives, and associating with political groups); *In re Dunleavy*, 838 A.2d 338, 347–51 (Me. 2003), cert. denied, 541 U.S. 960 (2004) (upholding canons that prohibit sitting judges from running for political office, supporting political candidates or organizations, and purchasing tickets for political party functions).

143. For a continually updated summary of post-*White* court decisions, see Brennan Ctr. for Justice, *Summaries of Relevant Cases Decided Since Republican Party of Minnesota v. White*, at [http://www.brennancenter.org/stack\\_detail.asp?key=348&subkey=35327](http://www.brennancenter.org/stack_detail.asp?key=348&subkey=35327) (last visited Feb. 8, 2008) (on file with the *Columbia Law Review*). For overviews and analyses of the litigation, see generally J.J. Gass, Brennan Ctr. for Justice, *After White: Defending and Amending Canons of Judicial Ethics* (2004), available at <http://www.brennancenter.org/dynamic/subpages/ji4.pdf> (on file with the *Columbia Law Review*); Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 *U. Pa. L. Rev.* 181, 202–33 (2004) [hereinafter Briffault, *Campaign Codes*].

express themselves on matters of current public importance.”<sup>144</sup> It is true that judicial campaign speech, like all campaign speech, may be distorted by background differentials in money and power, and that certain forms of “bad” speech—for instance, misleading or overly vituperative statements—may plague the conversation. That might be a reason to favor public financing, expanded use of voter guides, mandatory candidate debates, or other such regulatory solutions.<sup>145</sup> But in assessing the new model of judicial elections as a historical phenomenon, the relevant comparator is not an ideal world of perfect speech; it is the old world of judicial elections in which the laws on the books allowed almost no meaningful speech at all.

This is an important point, often slighted by critics of *White*.<sup>146</sup> The Announce Clause was not simply a modification of traditional campaign speech rules designed to accommodate a distinctive institutional setting; it was a complete repudiation of these rules’ cardinal tenet: that candidates should be *encouraged* to articulate positions on the issues that matter to voters so that voters can know what they are selecting for, prospectively, and can reward or punish performance, retrospectively.<sup>147</sup> The Announce Clause’s institutional pedigree—it was developed and promoted for many years by the ABA—may have blinded proponents to the reality of just how bizarre it was. This was an elective regime that systematically deprived voters of the exact information we typically pine for them to have. If one believes that the people deserve to elect their judges

144. *Republican Party of Minn. v. White*, 536 U.S. 765, 781–82 (2002) (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)).

145. Arguably, judicial elections continue to have greater safeguards against these defects than legislative and executive elections. Although on the rise, campaign spending remains comparatively low in judicial elections. And some version of the Misrepresent Clause, which prohibits candidates from “knowingly misrepresent[ing] the identity, qualifications, present position or other fact concerning [themselves] or an opponent” on penalty of sanction, Model Code of Judicial Conduct Canon 5(A)(3)(d)(ii) (2004), remains in force in the vast majority of states. Streb, *supra* note 3, at 180–81.

146. See *infra* notes 207–208 (citing to criticisms that *White* privileged First Amendment absolutism over more compelling interests such as due process and trivialized law/politics distinction and special nature of judicial role).

147. In *White*, after describing the subjects that were off-limits under Minnesota’s Announce Clause, Justice Scalia noted that “[r]espondents contend that this still leaves plenty of topics for discussion on the campaign trail. These include a candidate’s ‘character,’ ‘education,’ ‘work habits,’ and ‘how [he] would handle administrative duties if elected.’” *White*, 536 U.S. at 774. One could almost hear Scalia’s snicker. In what other elective context would anyone think it remotely plausible that these topics suffice as a basis for voter judgments?

Thus, it is somewhat curious to see critics of *White* decry the “race to the bottom” in judicial campaign speech that the opinion is bound to inspire. See Nash, *supra* note 88, at 2192 (observing that “commentators [after *White*] have recognized the potential danger of political ambition triggering a race to the bottom among judicial electoral candidates announcing positions on controversial issues”). The democratic defender of judicial elections could easily characterize this as a race to the top.

on democratic grounds, it follows, presumably, that one wants them to be able to make intelligible and reasoned selections. Now they can.

### B. *Judicial Elections Are Worse than Ever*

Why, then, have labels such as the “new politics” or the “new era” of judicial elections been coded so negatively in the public debate? (I am not aware of a single commentator who has welcomed the changes in judicial elections with any such moniker; “new” has become a pejorative in the literature.) The principal reason, this subpart suggests, is that the majoritarian difficulty and favoritism now appear more threatening than ever. Even if critics have not used these terms or invoked these concepts, they appear to underlie much of the consternation. On other grounds, too, the new era of judicial elections might seem more troubling than the quiescent past.

Professor Croley noted in 1995 that the majoritarian difficulty’s practical significance had theretofore been blunted by the fact that voters typically knew little about the judicial candidates they voted for.<sup>148</sup> Yet even then, a half-decade before *White* deregulated judicial campaign speech and big money started to flood state races, Croley observed that judicial elections were becoming increasingly visible and competitive across the country.<sup>149</sup> This is significant because the majoritarian difficulty only moves from a theoretical abstraction to a viable possibility “[i]nsofar as judicial elections are salient . . . and insofar as the (impassioned) majority casts its votes for judges according to criteria similar to those guiding their votes for candidates for other offices.”<sup>150</sup>

Both of these conditions are now more likely to be met. The rapid rise in campaign spending, the aggressive outreach done by interest groups and political parties, and the politicization of campaign speech have transformed many judicial races from sleepy, low-key affairs into high-stakes, high-salience affairs. They have broken down the traditional regulatory, stylistic, and rhetorical barriers distinguishing judicial elections from other elections. Judicial candidates increasingly invoke their beliefs on abortion, same-sex marriage, tort reform, and other controversial issues; if they do not proactively do so, interest groups may try to ferret them out through questionnaires.<sup>151</sup> It strains credulity to think that a majority of voters will witness a highly politicized, if not mean-spir-

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148. Croley, *supra* note 3, at 730.

149. *Id.* at 730, 734–39 (describing anecdotal and empirical evidence of rising salience).

150. *Id.* at 726 (emphasis omitted). See generally *supra* Part I.B.1 (explaining majoritarian difficulty).

151. See Reed, *Tripping the Rift*, *supra* note 140, at 996–1016 (documenting growing role of judicial candidate questionnaires). After *White*, some states retained canons of conduct forbidding candidates from responding to questionnaires asking their views on legal issues, while other states struck these canons. Where they persist, these canons are now facing First Amendment challenges. See James Madison Ctr. for Free Speech, Judicial Accountability Project, at <http://www.jamesmadisoncenter.org/JudicialAP/Index.html>

ited, contest with all the trappings of a legislative election and then go out and vote for a candidate who seems unlikely to further their political goals. More than ever, the candidate who proclaims that she will seek truth and justice only, that she will aspire to the Fissian heroic ideal, is (if she can even raise funds sufficient to get on the airwaves) going to draw quizzical looks from voters who have been primed to demand results, not abstract principles. If voters have any tendency to be wary of judges whose campaign statements or prior records seem to betray a lack of independence—and the empirical evidence suggests that as a rule they do not<sup>152</sup>—this tendency may wane in the face of ever more politicized elections.

All of these developments feed the majoritarian difficulty.<sup>153</sup> The judge who deviates from the majority preference in any given case is more likely to have it pointed out, and voters will be more likely to take corrective action. To the extent that sitting judges internalize these practicalities into their decisionmaking, their independence and impartiality will suffer. Populism will steal more ground from constitutionalism.

In addition to becoming a more trenchant concern, it is possible that the majoritarian difficulty will become substantively more diffuse. A perception of being soft on crime has long posed the greatest threat to a judge's reelection chances.<sup>154</sup> But now that candidates may discuss virtually any issue, and now that the full array of interest groups—from tort reformers, to cultural conservatives, to workers' unions, to environmental lobbyists—is engaged in judicial races, voters will learn about judges' performance across a wider range of potentially salient areas. This might actually free up sitting judges to be a little "softer" on crime (and to do unpopular things more generally), in that they could potentially counter-

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(last visited Feb. 8, 2008) (on file with the *Columbia Law Review*) (providing links to court documents for cases pending in seven states).

152. While voters' respect for the judiciary as an institution may fall in response to new-style campaigns, see *infra* notes 172–173 and accompanying text (describing recent survey evidence), I know of no data to suggest that voters will select judicial candidates on qualitatively different grounds than those used to evaluate legislative and executive candidates. To the contrary, the empirical literature has long shown that voters are more likely to elect judges who make rulings consistent with the voters' policy preferences, and that judges know this. See *supra* notes 84, 102–107 and accompanying text. Likewise implying that judicial independence is not foremost in voters' minds is the fact that in partisan-election jurisdictions, voters are overwhelmingly more likely to select judges from their own political party. Baum, *supra* note 4, at 24–26. It is an open question, though, just how explicitly "political" the standard new-era judicial candidate can become before turning off a decisive number of voters.

153. As noted above, these trends have been particularly acute for state supreme court justices, the judges whose rulings are the most visible and who have the most power to shape state law. See *supra* note 19. Yet even if lower court campaigns have not experienced these external trends to the same degree, their influence may nevertheless trickle down to affect trial judges' internal perceptions of their electoral circumstances. And there is no guarantee that the "new era" will not, in time, sweep in many lower courts as well.

154. See *supra* notes 97–103 and accompanying text.

act any such criticisms by pointing out how they have effectuated the majority will in other areas. More likely, though, given the potential for any one unpopular decision to override fifty popular decisions in the public mind, judges will not want to risk any such hedging strategy.

If the new model of judicial elections seems destined—and, in some respects, designed—to exacerbate the majoritarian difficulty, it also seems likely to exacerbate the threat of favoritism. The rising importance of campaign contributions and interest group endorsements to a judge's electoral prospects would seem to multiply the number of potential litigants to whom the judge will feel beholden. Judges will face more and more cases in which they have already suggested a preference for, if not a commitment to, a particular outcome, and in which they have received significant support of some kind from one or more of the litigants. It is at least theoretically possible that the heightened salience of judicial elections will have a deterrent effect on any seeming *quid pro quos*, owing to the potentially greater visibility. But favoritism can be subtle—judges' sympathies for the legal views of their supporters will often be hard to extricate from their sympathies for the supporters themselves—and even not-so-subtle favoritism will not always disqualify a judge or undermine a judge's reelection chances.

The recent *Avery v. State Farm Mutual Automobile Insurance Co.*<sup>155</sup> case provides a dramatic example. *Avery* involved an appeal to the Illinois Supreme Court from a lower court class action verdict against State Farm of over \$1 billion, including \$456 million in contractual damages. The case was pending for the duration of the 2004 race for a seat on the court between then-Illinois Appellate Judge Gordon Maag and then-Circuit Judge Lloyd Karmeier. The two candidates combined to raise \$9.3 million in campaign contributions, a national record for a state supreme court campaign.<sup>156</sup> Justice Karmeier, the eventual winner, received over \$350,000 in direct contributions from State Farm's employees, lawyers, and others involved with the company or the case (such as attorneys for supportive amici)<sup>157</sup> and over \$1 million from groups affiliated with the company.<sup>158</sup> Although he described the fundraising as "obscene"<sup>159</sup> and could surely have anticipated the negative media coverage that would fol-

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155. 835 N.E.2d 801 (Ill. 2005), cert. denied, 547 U.S. 1003 (2006).

156. Goldberg et al., *New Politics 2004*, supra note 8, at 18–19. A partisan election state, Illinois lacks contribution limits for judicial elections.

157. Petition for Writ of Certiorari at 8, *Avery*, 547 U.S. 1003 (No. 05-842).

158. *Id.* at 7–8. For example, Justice Karmeier received \$1.9 million in contributions from the Illinois Republican Party, which received over \$2 million from the U.S. Chamber of Commerce. Goldberg et al., *New Politics 2004*, supra note 8, at 26 fig.17. Judge Maag received nearly equal support from trial lawyers and labor organizations. *Id.* at 27 fig.18.

159. Brief Amici Curiae of 12 Organizations Concerned About the Influence of Money on Judicial Integrity, Impartiality, and Independence in Support of Petitioners at 20, *Avery*, 547 U.S. 1003 (No. 05-842) (quoting Justice Karmeier).

low,<sup>160</sup> Karmeier refused to recuse himself from participating in the *Avery* decision. He then cast the deciding vote on the breach of contract claims, overturning the billion-dollar verdict against State Farm.

*Avery's* fact pattern may be especially striking, but it is not necessarily a qualitative outlier. There are good theoretical reasons to think that judicial disqualification is both underused and underenforced relative to Model Code standards in almost every state,<sup>161</sup> and there is growing empirical evidence to suggest that campaign contributions influence judges' decisions. Most notably, Stephen Ware's empirical study of Alabama Supreme Court decisions from 1995 to 1999 found a "remarkably close correlation between a justice's votes on arbitration cases and his or her source of campaign funds."<sup>162</sup> Likewise, a recent *New York Times* study found that over a twelve-year period Ohio Supreme Court justices voted in favor of their contributors more than seventy percent of the time, with one justice, Terrence O'Donnell, voting for his contributors ninety-one percent of the time.<sup>163</sup> The *Times* also reported that "[i]n the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times."<sup>164</sup>

The appearance of favoritism haunting *Avery* was made possible in part by the regulatory environment: Illinois has neither contribution limits for judicial elections nor a rule preventing judges from deciding on their own disqualification challenges. The absence of these provisions might be seen as a throwback to the old era of judicial elections, when substantial campaign contributions were rare. In his *White* concurrence, Justice Kennedy implicitly acknowledged the need for reform when he suggested that states might want to consider looking into ways to make their recusal systems "more rigorous."<sup>165</sup> Thus, it is curious that in recent years there has been no broad movement to bring either of these provi-

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160. See, e.g., Editorial, *Illinois Judges: Buying Justice?*, *St. Louis Post-Dispatch*, Dec. 20, 2005, at B8 ("Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt on every vote he casts in a business case. This shakes public respect for the courts and the law—which is a foundation of our democracy.").

161. See Goldberg, Sample & Pozen, *supra* note 16, at 519–25 (explaining how fear of creating ill will, costs of filing a motion, and low odds of success deter many litigants from bringing disqualification challenges, while numerous substantive and procedural rules allow judges to remain on cases in which their impartiality might reasonably be questioned).

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

163. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, *N.Y. Times*, Oct. 1, 2006, at A1; see also Margaret S. Williams & Corey A. Ditslear, *Bidding for Justice: The Influence of Attorneys' Contributions on State Supreme Courts*, 28 *Just. Sys. J.* 135, 135, 147–52 (2007) (presenting empirical evidence that "suggest[s] that some individual judges [on the Wisconsin Supreme Court] may be influenced" by attorneys' campaign contributions).

164. Liptak & Roberts, *supra* note 163.

165. *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring) ("[States] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.").

sions to Illinois or to other states. With respect to favoritism at least, the law of judicial elections seems not to have kept pace with the politics.

Beyond the majoritarian difficulty and favoritism, the new era of judicial elections also threatens to exacerbate many of the other classic criticisms of the practice. To those who reject the democratic argument for electing judges, *unqualified voters* may now seem especially likely to make bad choices because a race to the bottom in judicial campaign tactics will lead them to pick politically appealing yet *lower-quality candidates*. There is little reason to think that the qualities that make someone more likely to win a high-salience race—charisma, political savvy, connections to powerful interest groups and wealthy donors, a winning television appearance, and so on—correlate well with the qualities that make someone a good judge. Lawyers who would make good judges may be less likely to run, on account of the greater time demands and the nastier climate of campaigning. Voters may be more motivated to vote, but not in the right ways.

*Diversity on the bench* may suffer under the new regime because the increased emphasis on access to money will hurt candidates (and would-be candidates) who lack such access, and racial and ethnic minorities in America are systematically more likely to be in that position.<sup>166</sup> *Unseemliness* has clearly been on an upswing: Examples abound of candidates publicly attacking each other in ways that would have been unthinkable ten years ago.<sup>167</sup> This trend is not only being spurred by, but will also feed back into, the broader rise in partisanship afflicting American politics.<sup>168</sup>

*Public trust and the appearance of impartiality* have likewise suffered. National public opinion surveys from 2001 and 2004 found that over seventy percent of Americans believe that campaign contributions have at least some influence on judges' decisions in the courtroom, versus only five percent who believe that campaign contributions have no influ-

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166. Cf. Lawyers' Comm. for Civil Rights Under Law, *supra* note 126, at 15 (quoting 2002 ABA recommendation of public financing "to create more opportunities for attorneys of all racial and ethnic backgrounds who do not have . . . the personal or political connectedness to raise large sums of money for elections").

167. See Press Release, Brennan Ctr. for Justice, *supra* note 12 ("The accusations fly fast and furious: soft on crime, bought and paid for by a special interest, too liberal or out of step with mainstream values . . . . This might sound like business as usual in America's congressional campaigns, but it's also increasingly defining the new politics of judicial elections."); Goldberg et al., *New Politics 2004*, *supra* note 8, at 1–12 (documenting growing role of negative television advertising in state supreme court elections). It bears noting that the trend toward more aggressive and expensive speech in supreme court campaigns predates *White* by at least several years. See, e.g., Deborah Goldberg et al., *The New Politics of Judicial Elections* 13–17 (2002), available at <http://www.justiceatstake.org/files/JASMoneyReport.pdf> (on file with the *Columbia Law Review*) (describing television advertising in 2000 campaign cycle).

168. For an overview of the evidence of this rise in partisanship, see Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 *Pol. Res. Q.* 219 (2005).



ence.<sup>169</sup> (More striking than the public perception is what judges themselves say. In a 2002 written survey of 2,428 state lower, appellate, and supreme court judges, more than a quarter of the respondents said they believe campaign contributions have at least “some influence” on judges’ decisions and nearly half said they believe contributions have at least “a little influence.”)<sup>170</sup> Another national survey found that eighty-one percent of Americans either “strongly agree” or “somewhat agree” that “judges’ decisions are influenced by political considerations.”<sup>171</sup>

A forthcoming study by political scientists Damon Cann and Jeff Yates finds significant evidence that “[c]itizens’ views of their state courts diminish as they are exposed to ‘new style’ state judicial elections races” that feature policy-oriented campaigning and high information content.<sup>172</sup> “Exacerbating this situation,” Cann and Yates also find, “are the concerns of citizens over the potential quid pro quo scenarios caused by campaign contributors appearing in [the] beneficiary’s courts.”<sup>173</sup> Given this body of evidence, it does not seem far-fetched to posit a relationship between the new politics of judicial elections and the recent rise in attacks on state courts.<sup>174</sup> By presenting judges as political actors, the new era may breed cynicism about judges’ distinctive claim to legal authority—and, ultimately, anger when that authority is applied to disfavored

169. Greenberg Quinlan Rosner Research, Inc. et al., Justice at Stake Frequency Questionnaire 4 (2001), available at [http://www.gqrr.com/articles/1617/1412\\_JAS\\_ntl\\_survey.pdf](http://www.gqrr.com/articles/1617/1412_JAS_ntl_survey.pdf) (on file with the *Columbia Law Review*); Justice at Stake Campaign, March 2004 Survey Highlights: Americans Speak Out on Judicial Elections (2004), available at <http://faircourts.org/files/ZogbyPollFactSheet.pdf> (on file with the *Columbia Law Review*); see also Champagne, Interest Groups, *supra* note 10, at 1407–08 (summarizing surveys with similar findings).

170. Greenberg Quinlan Rosner Research, Inc. et al., Justice at Stake—State Judges Frequency Questionnaire 5 (2002), available at <http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf> (on file with the *Columbia Law Review*).

171. Nat’l Ctr. for State Courts, How the Public Views the State Courts: A 1999 National Survey 41 (1999), available at [http://ppc.unl.edu/publications/documents/how\\_public\\_views\\_the\\_state\\_courts.pdf](http://ppc.unl.edu/publications/documents/how_public_views_the_state_courts.pdf) (on file with the *Columbia Law Review*). Unfortunately, I know of no survey that compares public opinion on this or related questions in states with elective versus appointive judiciaries, nor do I know of any earlier surveys that asked this same question.

172. Damon Cann & Jeff Yates, Homegrown Institutional Legitimacy: Assessing Citizens’ Diffuse Support for Their State Courts, 36 *Am. Pol. Res.* (forthcoming 2008) (manuscript at 20, on file with the *Columbia Law Review*), available at <http://ssrn.com/abstract=870592>. Another forthcoming survey-based study, by James Gibson, finds that citizens’ perceptions of state court legitimacy diminish in response to rising use of campaign contributions and attack ads, but not in response to candidates’ policy pronouncements. James L. Gibson, Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns, 102 *Am. Pol. Sci. Rev.* (forthcoming 2008), available at <http://ssrn.com/abstract=996302> (on file with the *Columbia Law Review*).

173. Cann & Yates, *supra* note 172 (manuscript at 20) (emphasis omitted).

174. See Goldberg, Sample & Pozen, *supra* note 16, at 503–09 (cataloguing recent attacks on state courts and linking these attacks to increasingly politicized climate of judicial elections); Schotland, *New Challenges*, *supra* note 1, at 1081–84 (same).

ends. Finally, the *time drain* of campaigning has, one assumes, become more pressing in recent years, as campaigns have become more expensive and competitive.<sup>175</sup>

The electoral costs and benefits of these changes in judicial elections will not likely be distributed evenly across political groups. Progressive candidates may see their stock decline relative to conservative candidates, for two main reasons. First, although trial lawyers and labor unions can be formidable allies to progressive candidates, conservative groups appear to have more resources to spend on judicial elections because of their business base.<sup>176</sup> Second, progressive judicial countermajoritarianism tends to be much more salient than its conservative counterpart. As Michael Dimino notes:

[A]t this point in our constitutional history, conservative counter-majoritarian decisions are not typically well-covered by the media, often invalidate statutes the public was not aware existed, and are not of particular concern to Congress. . . . By contrast, liberal counter-majoritarian decisions in such politically costly, divisive social issues as gay rights, religion, and the death penalty are much more likely to provoke opposition from the public because they are easier to understand and trigger more emotional reactions than does, for example, the extent of sovereign immunity under the Eleventh Amendment.<sup>177</sup>

The flip side of this imbalance is that the majoritarian difficulty is likewise more potent with respect to progressive ideals, such as giving the criminal defendant a fair deal, standing up for the rights of discrete and insular minorities, and protecting the disadvantaged. Inasmuch as the new model of judicial elections serves to increase the importance of campaign spending and populist decisionmaking to a candidate's chances, state courts may be expected to take a conservative turn.

### III. THREE IRONIES

We are now in a position to explore several deep ironies in the new world of judicial elections. First, as judicial elections are becoming more radical within the American experience of judicial selection, they are be-

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175. State codes of judicial conduct vary significantly in the extent to which they restrict sitting judges' fundraising and political activities. See McFadden, *supra* note 7, at 47–52, 99–105. Softer forms of campaigning—for instance, cozing up to powerful individuals and groups without actually mentioning a forthcoming election—generally evade all legal restrictions. Dignity requirements in state ethics codes might conceivably be enforced in flagrant cases, but these requirements are almost never applied to speech-related activities. *Id.* at 78–79.

176. See Baum, *supra* note 4, at 41.

177. Michael Richard Dimino, Sr., *Counter-Majoritarian Power and Judges' Political Speech*, 58 Fla. L. Rev. 53, 68–69 (2006) [hereinafter Dimino, *Counter-Majoritarian*] (internal quotation marks, brackets, and footnotes omitted); see also Baum, *supra* note 4, at 40–41 (“[J]udicial independence [at the state level] is now of greatest concern to political liberals, because it is chiefly judges perceived as liberal who are vulnerable to defeat by organized opposition.”).

coming concomitantly less radical from other perspectives. The dual nature of their transformation helps illuminate several nested ironies in the public debate and in the landmark *White* opinion. Second, as judicial elections achieve greater integrity as elections, they will increasingly erode the integrity of our broader democratic processes. And third, while elective judiciaries may seem to hold out new potential for legitimizing countermajoritarian decisionmaking, their very nature as elective bodies undercuts their capacity and inclination ever to realize this potential.

These assertions are ironic in that each reflects a disjuncture between what might be expected from the transformation of judicial elections and what will actually occur. The counterintuitive nature of these arguments helps explain why they raise problems for both critics and supporters of elective judiciaries, and why they have been almost entirely absent from the literature.

#### A. *Radicalization and Normalization*

As described above, the rise in campaign spending, interest group activity, partisan rancor, and political speech—partly driven by external forces affecting all state courts, partly by the relaxation of codes of judicial conduct—has forever disturbed the sleepy nature of judicial elections. Dismayed at these developments, many observers have sounded the alarm: New-style campaigns are undermining the integrity and impartiality of the courts; judicial elections have become “wild,” “crazy,” “raucous,” “radical,” “nightmarish.”<sup>178</sup> In one sense, this is a fair characterization. Judicial elections have never looked like this before, and the standard criticisms of the practice now look more potent than ever.<sup>179</sup> What this characterization elides, however, is that all of the new features of judicial elections are features we have come to expect, if not entirely to embrace, in our legislative and executive races. In the broader scheme of electoral law and politics in the United States, judicial elections have not

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178. See, e.g., Champagne, Tort Reform, *supra* note 8, at 1499 (“In the 2000 elections, judicial politics [in state elections] went wild.”); Croley, *supra* note 3, at 734 (quoting political scientist as describing recent set of judicial elections in his state as “the wildest results I’ve seen” and president of state bar association as describing new vulnerability of judicial incumbents as “surprising and extraordinary”); James A. Gardner, Forcing States to Be Free: The Emerging Constitutional Guarantee of Radical Democracy, 35 Conn. L. Rev. 1467, 1483 (2003) (claiming that *White* ruling prevents states from adopting “any model of politics other than radical democracy”); Schultz, *supra* note 3, at 985 (“In a handful of states, . . . including Texas, judicial selection is partisan, raucous, expensive, and hotly contested. For those fearing the worst of what a politicized state court system could be, Texas is an anomalous nightmare . . . or is it?” (second ellipsis in original) (footnote omitted)); Symposium, Judicial Selection and Evaluation, 4 Nev. L.J. 61, 89 (2002) (remarks of John Curtas) (“I’m not calling for an end to judicial elections. I am just calling for a system that is better than the one we have now. . . . It’s just wide open and crazy.” (brackets omitted)).

179. See *supra* Part II.B.

gone wild; they have gone normal.<sup>180</sup> The double nature of these developments—the way they represent both a mainstreaming and a radicalizing phenomenon—helps explain why they pose such a difficult challenge for critics of judicial elections and why many participants in the conversation can appear to be talking past each other.

1. *The Accommodationist Bind.* — Distilled to its essence, the current debate over judicial elections asks: Compared to contests for legislative and executive office, how distinctive should or must judicial elections be? This turns out to be a loaded question. To give a satisfactory answer, one would have to provide a theory of the judicial function and a theory of how the experience of election relates to it. There will never be consensus on these issues, because the nature of the judicial function is an essentially contested concept,<sup>181</sup> and the relative effect of different selection methods remains a matter of significant conceptual and empirical uncertainty. A further complication is that some factors that have been driving the convergence between judicial elections and nonjudicial elections are not amenable to legal reform. Since the early 1970s at least, activists of all stripes have increasingly turned to the state courts, especially the high courts, as fora in which to press their ideological and legal views. Among the reasons for this trend, a recent ABA report identified: the proliferation of controversial cases generally; the rediscovery of state constitutions; the spread of the two-party system throughout the states; the growth in skepticism about the possibility of apolitical adjudication; and the emergence of single-issue groups.<sup>182</sup> All of these trends would have increased

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180. I do not mean to imply that I am the first to notice that judicial elections have come to look much more like nonjudicial elections; numerous commentators have stressed this very point in critiquing the recent trends. See, e.g., Brief of Amicus Curiae Conference of Chief Justices in Support of Respondents at 26, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (No. 01-521); Longan, *supra* note 8, at 947. The underlying assumption, often left unstated, is that in states with elective judiciaries the public was better served by the old, sleepy model. What I have not seen anyone emphasize is that judicial elections have become *simultaneously* more radical and more normal, nor have I seen any efforts to unpack this insight.

Of course, not all campaigns for state legislative and executive office are highly salient, or even close. The majority generate little in the way of cost, heat, or substantive information. But many races for governor, state representative, and federal congressperson are indeed quite salient and vigorously contested, and these tend to predominate in the public imagination of political elections. All of the legislative and executive races, moreover, offer voters the partisan heuristic. And almost all of these races, lacking any code of conduct to constrain them, have been *less* sleepy than the traditional judicial contests. Thus, while the claim that new-era judicial elections have become more similar to political elections assumes a somewhat stylized model of the latter, cf. *supra* note 19 (noting that idea of “new era” is itself a simplifying conceit), the claim’s basic premise still strikes me as reasonable. I am grateful to Larry Baum for pushing me on this point.

181. See *supra* notes 28–31 and accompanying text.

182. Am. Bar Ass’n, *Justice in Jeopardy*, *supra* note 8, at 13–18. Other factors might be added to the ABA’s list: For example, the Reagan-era devolutionary movement in governance may have brought more attention to state-level policymaking, while social conservatives’ hostility to Supreme Court decisions such as *Roe v. Wade*, 410 U.S. 113

the salience of state court decisionmaking—and therefore of state court judicial selection—without a single change to the regulatory structures of their elections.

Thus inherently problematic, the legal debate has been warped by the fact that many of the groups who have decried the new model of judicial elections and advocated a return, as much as possible, to the traditional model, never liked judicial elections in the first place. These groups do not support the old model of judicial elections as the optimal vehicle for selecting judges; rather, they support it as a second-best strategy in a world in which judicial elections are not likely to go away anytime soon.<sup>183</sup> In their first-best world, every state would use appointments or merit selection.<sup>184</sup> These critics are not looking to make judicial elections as good as possible so much as they are looking to make them as inoffensive as possible. Their ranks include the American Bar Association and many of the other amici who defended the Announce Clause in *White*. Let's call them "accommodationists" for the purposes of this analysis.

On certain reform issues, accommodationists might hope to find common ground with those who genuinely favor elective judiciaries. For example, both sides might find objectionable the growing role of wealthy contributors and single-issue advocacy organizations in judicial campaigns. Just as in legislative and executive elections, these influences could be criticized for making races less egalitarian, drowning out certain perspectives, or giving private interests too much leverage over the eventual winners. Both sides might even agree that these influences are especially troubling in the judicial context, given how important it is that judges avoid favoritism and the appearance thereof and how difficult it is for voters to evaluate judges' performance. Solutions such as enhanced disclosure or public financing might therefore seem attractive. This is an

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(1973), and *Furman v. Georgia*, 408 U.S. 238 (1972), may have spurred them to focus more energy on the state courts.

183. See ICL & LEA *White* Brief, *supra* note 77, at 7–8 (pointing out that ABA, American Judicature Society, and other reformers have long favored merit selection but, "discouraged at the prospect of eliminating state judicial elections through the political process, have turned to various 'second best' solutions").

184. While some of these groups might prefer the federal appointive model in an abstract sense, in their public pronouncements they have tended to advocate merit selection, see Schotland, *New Challenges*, *supra* note 1, at 1086, perhaps on the belief that the appointive model would not be politically viable in most states. Given that an initial merit selection is almost always followed by a retention election, see *supra* note 78 and accompanying text, this stance implies support for a state selection regime that includes an electoral component. But this electoral component has traditionally been a formality: From 1964 to 1998, judges facing retention elections were retained almost ninety-nine percent of the time. Larry Aspin, *Trends in Judicial Retention Elections, 1964–1998*, 83 *Judicature* 79, 79 (1999). Now that retention elections are becoming more competitive, these groups will have to think hard about whether they are truly comfortable with them or if they ought to demand instead that states give nominating commissions a lead role in retention decisions or institute some form of guaranteed tenure.

area in which accommodationists can fruitfully protest the normalization of judicial elections because some true believers in elective judiciaries are also troubled by the norm with which these elections are converging.<sup>185</sup>

However, on other issues—most importantly, competition and speech—there is an unbridgeable gulf between those accommodationists who seek to deradicalize judicial elections and those who genuinely support them. It is almost axiomatic in democratic and legal theory that elections become increasingly legitimate the more they are able to incorporate substantive competition among the candidates and the more they are able to attract voters to the polls. Pioneering scholars of the “law of democracy” have gone so far as to suggest that in reviewing the constitutionality of legislative and executive elections, courts’ signal concern should be to ensure that there is sufficiently open competition.<sup>186</sup> Yet in

185. The ban on direct solicitation by judicial candidates, still in force in many states, poses a trickier issue. The “campaign committees” that must make solicitations in these states are typically staffed by the candidates’ close friends and relatives, and campaign finance laws in every state require contributor lists to be publicly available. As commentators have pointed out, there is thus a whiff of unreality about this regulation. See Gerald Uelman, *Disqualification of Judges for Campaign Support or Opposition*, 3 *Geo. J. Legal Ethics* 419, 422 (1990) (“If [the prohibition on direct solicitation] was ever a realistic approach to regulating campaign fundraising by judges, its continuing vitality was seriously compromised by widespread enactment of campaign disclosure laws during the 1970s.”); Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 *Stan. L. Rev.* 449, 470–74 (1988) (suggesting numerous reasons why campaign committee system has proven ineffectual). Supporters argue that this rule is necessary to prevent the partiality and appearance of partiality that would result from judges going cap-in-hand to wealthy potential donors. See, e.g., Briffault, *Campaign Codes*, *supra* note 143, at 227–28 (“Personal meetings or other contacts by judges with donors and potential donors would . . . pose a greater threat to the appearance of impartiality and to impartiality itself than would meetings of other elected officials with donors.”). For those who believe that democratic accountability demands popular election of judges, however, the campaign committee firewall might seem like an inappropriate (as well as porous) barrier between the judicial candidate and those whose support she hopes to secure, and perhaps also an inappropriate symbol of mistrust concerning the ability of elected judges to remain sufficiently impartial.

186. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *Harv. L. Rev.* 593, 600–01 (2002) (arguing that true cost of gerrymandering is “the insult to the competitiveness of the process” and that courts should therefore adopt “a prophylactic per se rule that redistricting conducted by incumbent powers is constitutionally intolerable”); Richard H. Pildes, *The Constitution and Political Competition*, 30 *Nova L. Rev.* 253, 255 (2006) (arguing that true cost of suppression of competitive elections “lies in the structural harm to representative self-government” and that courts should therefore adopt per se prohibition against mid-decade redistricting). Professors Issacharoff’s and Pildes’s theories of how courts ought to approach election law are of course more nuanced, but I think it fair to say that antientrenchment is the central normative value and legal standard motivating each.

Judicial elections would seem to put Issacharoff’s and Pildes’s theories under considerable stress. Drawing on the work of John Hart Ely, they recommend that reviewing courts focus on breaking up self-entrenching arrangements both because these arrangements undermine political accountability and electoral competition and because an antientrenchment focus provides a manageable hook for judges to use. See Samuel Issacharoff, *Surreply: Why Elections?*, 116 *Harv. L. Rev.* 684, 694–95 (2002); Richard H.

the area of judicial elections, the value of competition becomes much more ambiguous. The very lack of competitiveness in the old model—in which the public voted on the basis of radically incomplete information and incumbents almost always retained their seats—was the key to restraining the majoritarian difficulty.<sup>187</sup> Incumbent judges had some freedom to make unpopular rulings precisely because they could expect to face a reelection environment with little to no public participation or contestation.

Speech plays a similarly paradoxical role in judicial elections. A related axiom of democratic and legal theory is that open, issue-based dialogue augments the quality and legitimacy of popular elections. Certain normative theories of democracy, such as deliberative theories, see in this dialogue the very core of what makes democracy attractive. Against this axiom, the old model of judicial elections would likewise receive failing marks. Candidates were sanctioned for coining slogans such as “Friend of the Working Man” or “Fighter for Civil Rights” because these slogans were considered too suggestive.<sup>188</sup> Yet by masking the true beliefs of candidates, the old model helped to preserve judicial impartiality—sitting judges did not feel bound to abide by their campaign positions because they never took any—and it helped to abate the majoritarian difficulty by limiting candidates’ ability to appeal to popular sentiment or to criticize incumbents.

Consider, in light of this tension, the question of whether states should encourage candidates who have advanced sufficiently far in an election to face each other in a public debate. With legislative and executive contests, I suspect that almost all of the accommodationist groups would support such debates as a vehicle for increasing public participation, informing voters about the candidates’ substantive positions, and correcting, to an extent, for possible distortions created by money differentials, manipulative advertising, and mass media characterizations. But one almost never hears these groups call for debates in the judicial context.<sup>189</sup> Any manner of substantive discourse is threatening to the accommodationist. As campaigns for the bench have finally come to feature wide-open competition and speech, they have brought to the surface just how awkward it always was for the accommodationist to condition her

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Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 *Election L.J.* 685, 690 (2004) (book review). As I discuss in the main text, however, in judicial elections the value of accountability and competition is much more ambiguous—and may, in fact, be highly debilitating to more fundamental democratic and constitutional values. The theoretical modesty of Issacharoff’s and Pildes’s approach to judicial review thus renders it underdetermined in the area of judicial election law; its preoccupation with entrenchment leaves it no resources to address the special institutional role of the courts.

187. See *supra* notes 148–150 and accompanying text.

188. McFadden, *supra* note 7, at 90.

189. An exception in the academic literature is Briffault, *Public Funds*, *supra* note 3, at 843 (arguing that debates “might elevate the tone of judicial campaigns” and suggesting that states might want to condition public funding on candidates’ participation).

approval of judicial elections on their inversion of basic democratic principles. The old model's delicate balance between the fears of accommodationists and the goals of election advocates looks less like a compromise and more like a contradiction.

It is curious that so little commentary has addressed this tension.<sup>190</sup> Criticism of the new era has tended toward the categorical. Those who have identified the "normalization" of judicial elections have invariably done so as the basis of an attack. "Th[e] transformation of judicial elections into a form indistinguishable in cost, rhetoric, and partisanship from executive and legislative elections," one article notes, "has led many scholars, judges, and court-watchers to condemn the [*White* decision]."<sup>191</sup> "The vitriolic name-calling, the attack ads, the million-dollar fundraising, [and] the influence of special interest groups," adds another, "are rapidly making judicial elections indistinguishable from other campaigns. Hardly anyone thinks this is a good thing."<sup>192</sup> Descriptively, these observations are correct: Hardly anyone writing on the new era has had anything positive to say. Yet such monochromatic criticism is unsatisfying when the prescription is to restore the old model of judicial elections, because it demands, without ever defending, the view that competition, speech, participation, and turnout are negative attributes in this context. That position may be coherent, but it is at least superficially paradoxical, and defending it requires some dialectical skill. Defending accommodationism, that is, requires a theory of judicial elections that can transform competition, speech, participation, and turnout from legitimizing forces into "delegitimizing forces,"<sup>193</sup> from virtues into vices. I have seen no attempts at such an affirmative theory; accommodationism is a fundamentally defensive creed.

It might be objected that judicial elections have always been different. Historically, some scholars have argued, states adopted them in the mid-1800s in an effort to reduce political patronage and thereby rationalize judicial selection.<sup>194</sup> As a recent Conference of Chief Justices brief coauthored by Roy Schotland points out, "the constitutions of the 39 States wherein judges face elections feature a wide array of provisions

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190. The closest I have seen is the very brief but stimulating discussion in Dimino, *Pay No Attention*, *supra* note 38, at 372–73.

191. James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 *Alb. L. Rev.* 775, 780 (2004).

192. Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 *Alb. L. Rev.* 713, 715 (2005).

193. Dimino, *Pay No Attention*, *supra* note 38, at 373.

194. See, e.g., Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 *Historian* 337, 353 (1983) ("Moderates resorted to popular [election] to improve judicial administration, to increase the prestige of the bench and bar, to curtail partisan domination of judicial patronage, and to restore separation of powers by curbing legislative excess."); see also Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 *Am. J. Legal Hist.* 190, 224 (1993) (arguing against "early commentators who disparaged the elective judiciary as the outgrowth of unthinking Jacksonianism").



unique to the judiciary, designed to reconcile the popular selection of judges with the constitutional values of judicial independence and impartiality.”<sup>195</sup> These unique provisions include longer terms, special impeachment and disciplinary processes, training and experience requirements, resign-to-run rules, and mandatory retirement ages.<sup>196</sup> “That most of the foregoing provisions would be unthinkable for other elected officials,” the brief continues, “establishes that judicial elections do ‘not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly.’”<sup>197</sup>

It is not clear to me, however, that these provisions really would be unthinkable for other elected officials. What would be unthinkable are rules or norms aimed specifically at suppressing competition, speech, participation, or turnout—rules like the Announce Clause, off-cycle election dates, bans on party affiliation, and the expectation that candidates treat each other with aristocratic civility. Measures designed to make officials more professional, competent, or, to a point, independent in their duties do not necessarily clash with the decision to select those officials by popular election. Measures designed to sever their connection to the demos do.

Thus, while the Conference of Chief Justices and other accommodationists have debunked the “unilocular, ‘an election is an election,’ approach,”<sup>198</sup> they have not, to my knowledge, considered the limits of this position. They have not considered at what point compromise shades into contradiction. To the question, “Compared to contests for legislative and executive office, how distinctive should or must judicial elections be?” accommodationists have implicitly said, “*very* distinctive,” on account of the judiciary’s special institutional role. The difficulty with this answer is that an elective regime may become so distinctive that it conflicts with the theoretical basis for a state’s decision—not historically, but today—to elect its judges. At some level, perhaps, an election really is an election.

In posing this question more sharply than ever, the new era has exposed a further gap in the literature. It has already been noted that, while we have enormously rich bodies of scholarship on the practice of judicial elections and the role of a judge in a constitutional democracy, there are disconnects between the two.<sup>199</sup> Parts I and II of this Article

195. Brief of Conference of Chief Justices Amicus Curiae in Support of Defendants/Appellees at 6, *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005) (No. 99-4021) [hereinafter CCJ Brief].

196. *Id.* at 6–7.

197. *Id.* at 7 (quoting *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991)).

198. *Republican Party of Minn. v. White*, 536 U.S. 765, 805 (2002) (Ginsburg, J., dissenting).

199. See *supra* notes 20, 24–31 and accompanying text; see also Croley, *supra* note 3, at 691–92 (remarking that “the institution [of judicial elections] has received scant theoretical attention” and that “[t]he debate about judicial politics . . . does not often confront [the] larger normative questions”).

explored this intersection. As the analysis in this subpart suggests, there has likewise been very little theoretical work connecting judicial elections, as an institution, to scholarship on election law, the law of democracy, or democratic theory more generally. Scholars in these fields might have quite a lot to say about questions of institutional legitimacy and how specialized judicial elections ought to be. This Article makes only a small amount of headway in plugging these gaps, but is, I hope, suggestive. These areas are ripe for further exploration.

2. *Two Shades of White*. — Against this backdrop of simultaneous normalization and radicalization, it is possible to see how the *White* ruling—which has already spawned a voluminous and highly conflicted academic literature<sup>200</sup>—can be seen as both a modest and an aggressive intervention.

Consider, first, the way in which the two sides framed their arguments. “Normalization” and “radicalization” have opposite connotations: Normalization implies a healthy, natural correction for historic deficiencies; radicalization implies a dangerous, unwarranted break from the past. In emphasizing just how odd it was for states to prevent judicial candidates from announcing their views on disputed legal or political issues, Justice Scalia sought to frame the majority holding as a normalizing move:

[T]he notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. Debate on the qualifications of candidates is at the core of our electoral process . . . , not at the edges. . . . We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.<sup>201</sup>

By invalidating the Announce Clause, Scalia suggested, the Court would merely be bringing judicial campaign speech law closer to the basic norms and doctrines of election law. Why, then, would four Justices oppose such a commonsensical move? It must be, Scalia surmised, because the dissenters never wanted judges to be elected in the first place: They would preserve the Announce Clause because it supports their purpose of “undermining . . . judicial elections.”<sup>202</sup> Scalia was calling the accommodationist bluff.

The dissenters, however, sought to frame the majority’s ruling as a radical break, both from the states’ traditional control over judicial elections and from the Court’s traditional understanding of the judicial role. After beginning the principal dissent by accusing the majority Justices of

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200. The Westlaw Journals and Law Reviews database contained 360 published articles that cite to *White* as of June 27, 2007, a rate of seventy-two articles per year since the opinion was handed down. Search for “536 U.S. 765” in full text.

201. *White*, 536 U.S. at 781–82 (internal quotation marks and citations omitted).

202. *Id.* at 782.

overlooking the special function of judges in a democracy,<sup>203</sup> Justice Ginsburg ended it by accusing them of disrupting the delicate balance that states like Minnesota had, “[f]or more than three-quarters of a century,” been trying to strike between “the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary.”<sup>204</sup> Ginsburg observed the rising politicization of state courts and saw additional reason to preserve the Announce Clause, not to condemn it and thereby fuel the fires. The Court’s intervention into this state domain, she argued, was not modest but reckless.<sup>205</sup>

In its approach to the law of democracy, as in its background assumptions, *White* is similarly hard to pin down. Underlying the legal arguments in *White* was a basic disagreement about which was more objectionable: the old world of judicial elections in which these races lacked any real substance, or the ascendant world of judicial elections in which these races come to look more and more like any other political contest. The dissenters were clear on this point. The latter world—with its compromised, instrumentalist, lower-quality judges—is the dystopic one. They rejected the idea that all elections, to be legitimate, need to share certain ground rules such as open debate if the very integrity of the background institution (here, the judiciary) may be compromised by those rules.

The majority Justices, on the other hand, appeared to take the view that all elections, to be constitutionally permissible, need to satisfy some threshold conditions of openness and honesty. Once the state “‘chooses to tap the energy and the legitimizing power of the democratic process,’”<sup>206</sup> they said, it cannot then subvert that process by cutting off the candidates’ speech. To the majority, then, states like Texas known to have “wild” judicial races were not the problem; states like Minnesota with purposely “sleepy” contests were the embarrassment to our democracy. Hence, while a number of critics have construed *White* as a devastating victory for formalistic First Amendment libertarianism<sup>207</sup> or crass le-

203. *Id.* at 803–05 (Ginsburg, J., dissenting); see also *supra* notes 67–69 and accompanying text.

204. *White*, 536 U.S. at 821 (Ginsburg, J., dissenting).

205. See *id.* (“I would uphold [the Announce Clause] as an essential component in Minnesota’s accommodation of the complex and competing concerns in this sensitive area.”).

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

207. See, e.g., Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. Miami L. Rev. 265, 316–19 (2003) (arguing that *White* Court’s “attachment to existing constitutional categories ‘election’ and ‘speech’” led to “all or nothing” approach that privileged First Amendment above compelling state interests); Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens’s Free Speech Jurisprudence*, 74 Fordham L. Rev. 2201, 2208 & n.41 (2006) (contrasting Justice Stevens’s “focus on the consequences of free speech decisions” with “formal adherence to some libertarian abstraction” evident in decisions such as *White*); Richard H. Pildes, *Formalism and Functionalism in the Constitutional Law of Politics*, 35

gal realism<sup>208</sup> over a broader, functional approach to the law of democracy, those readings do not necessarily do justice to the breadth of the majority's normative vision. Alongside its specific concern to vindicate the speech rights of judicial candidates, the *White* majority seemed to be demanding that any time a state uses elections, it assure them a minimum level of robustness. *White* reflects a concern to protect the positive liberty of voters as well as the negative liberty of candidates.

Finally, and perhaps most intriguingly, *White* can be seen as both modest and radical in its aspirational content. The modest reading is straightforward: All the Court intended was to remove an especially poorly tailored speech restriction. Beyond the Announce Clause, the majority was careful to say, the Court "neither assert[ed] nor impl[ied] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."<sup>209</sup> But a more radical interpretation

Conn. L. Rev. 1525, 1528 (2003) [hereinafter Pildes, Formalism] (asserting in discussion of *White* and related cases that "the law of democracy remains one of the last bastions of legal formalism in constitutional law"); Developments in the Law—Voting and Democracy, 119 Harv. L. Rev. 1127, 1144 (2006) (explaining "*White*'s libertarian impulses").

208. See, e.g., Dimino, Counter-Majoritarian, *supra* note 177, at 74–84 (identifying "realism" as guiding principle of *White*); William P. Marshall, Constitutional Law as Political Spoils, 26 Cardozo L. Rev. 525, 531 (2005) (asserting that *White* represents "[t]he ultimate triumph of realism"); Toni M. Massaro, Constitutional Law as "Normal Science," 21 Const. Comment. 547, 584 (2004) (citing *White* as example of Justice Scalia's legal realist beliefs about judges). The realist readings of *White* are, I think, correct to see as significant the fact that the majority passed up an opportunity to articulate a distinctive vision of the judicial function, emphasizing instead the lawmaking power of state courts and the inevitability of judges' bringing various predilections to their work. But *White*'s realism does not necessarily extend to other areas of judicial campaign conduct. Minnesota's Announce Clause really was a remarkably speech-restrictive provision—significantly less tailored to the state's interest in judicial impartiality than the Commit Clauses, Pledges or Promises Clauses, and Misrepresent Clauses that are now under attack—and the *White* majority was careful to say that it "neither assert[s] nor impl[ies] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." *White*, 536 U.S. at 783.

In the area of judicial districting, however, *White*'s candid admission that state judges "make" law and that subjective beliefs influence this task, *id.* at 776–84, may pave the way for constitutional revision. In *Wells v. Edwards*, 409 U.S. 1095 (1973), *aff'g* 347 F. Supp. 453 (M.D. La. 1972), the Court upheld without opinion a lower court ruling that judicial districts need not comport with the equipopulation principle (better known as "one person, one vote") because judges "are not representatives in the same sense as are legislators," *Wells*, 347 F. Supp. at 455 (internal quotation marks and citation omitted). Along with the Court's holding in *Chisom v. Roemer* that the Voting Rights Act applies to judicial elections and its acknowledgement in that case that judges "do engage in policymaking at some level," 501 U.S. 380, 384, 399 n.27 (1991), *White* undermines this logic. Both opinions suggest why there would be a cognizable injury to the judicial-election voter in a more populous district: Her vote would count less in the formulation of public policy. For further explication of this argument, see Briffault, Campaign Codes, *supra* note 143, at 191–92; see also Issacharoff et al., *supra* note 53, at 192 (expressing skepticism about idea that equipopulation principle is "'simply not relevant' to election of state court judges").

209. *White*, 536 U.S. at 783.

of the Court's purposes is also available if one believes, as Richard Pildes has suggested, that the Justices were motivated by a "singular contempt for judicial elections."<sup>210</sup> This contempt was fairly explicit in Justice O'Connor's concurrence, which began, "I join the opinion of the Court but write separately to express my concerns about judicial elections generally,"<sup>211</sup> and ended, "[i]f the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."<sup>212</sup>

In the radical reading, the Court was not trying to normalize the practice of judicial elections so as to comport with minimal constitutional requirements; it was trying to accelerate the radicalization of judicial elections so that their defects would finally become apparent to all. Call this the subversive interpretation of *White*. By letting judicial candidates say what they really intend to do, the Court sought to liberate the people from their false consciousness and help them recognize elective judiciaries as the instruments of oppression that they really are. By setting in motion a dynamic by which judicial elections would become "nastier, noisier, and costlier"<sup>213</sup> over time, the majority set the course to revolutionary upheaval. Tired of the accommodationist game, the Court came not to fix judicial elections but to bury them.<sup>214</sup>

#### B. *Healthy Elections, Diseased Democracy*

As the previous discussion has elaborated, judicial elections are becoming "healthier" than ever on many standard indices. Compared with their old model, these elections can now be expected to have more inter-

210. Pildes, Formalism, *supra* note 207, at 1527.

211. *White*, 536 U.S. at 788 (O'Connor, J., concurring).

212. *Id.* at 792. Since retiring from the bench, Justice O'Connor has expressed misgivings about siding with the majority in *White*, see Rachel Caufield, Judicial Elections: Today's Trends and Tomorrow's Forecast, Judges' J., Winter 2007, at 6, 9, and has become an outspoken critic of the new era, see, e.g., Press Release, Justice at Stake Campaign et al., Report Shows Spread of Special Interest Pressure, Growing Clout of Business Groups in State Supreme Court Elections (May 17, 2007), at <http://www.justiceatstake.org/contentViewer.asp?breadcrumb=7,55,973> (on file with the *Columbia Law Review*) (quoting Justice O'Connor as warning that "in too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the constitution").

213. This is the felicitous formulation of Roy Schotland, see Schotland, Comment, *supra* note 53, at 150, often invoked by critics of the new model of judicial elections.

214. As a matter of conscious intent, it may be implausible that this captures what the Justices, with the possible exception of Justice O'Connor, saw themselves as doing. But functional interpretations of this sort do not require subjective intent. They operate on the premise that anticipatable outcomes can reveal the underlying nature of a practice or pattern of reasoning. See Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 25 (2001) (citing as example certain Marxian explanations of law in capitalist societies). Whatever the majority Justices thought they were doing, the subversive critic might say, their true purpose was to eradicate a practice (electing judges) that they found offensive but that they could not, for legal and prudential reasons, directly invalidate.

candidate competition and debate, higher voter turnout, lower voter roll-off, and greater public participation. Basic civics tells us that these are positive developments. Elections will confer greater legitimacy on judges now that voters will know more about whom they are voting for and why. Controversial influences such as major contributors and special interests may play a larger role in the new model, but in some ways these too may be positive developments—minimizing the once-enormous advantage of self-financers, giving candidates more means to reach the public, helping voters make sense of the legal issues—and policies such as enhanced judicial disqualification can mitigate some of their most troubling potential consequences.<sup>215</sup> The irony here, though, is that the healthier judicial elections become as elections, the more they will debilitate state courts' ability to protect the health of our democracy. Three main factors contribute to this perverse result.

The first should by now be obvious: Healthier judicial elections will undermine the capacity of state courts to defend against majority tyranny. This is, recall, the basic premise of the majoritarian difficulty: that judicial elections are objectionable because they inject populist incentives into the branch of government that is meant to be most immune from them.<sup>216</sup> As judicial elections become more salient, elected judges will have to become more careful not to offend majority sentiment if they want to keep their jobs.<sup>217</sup> A truly minimalist theory of democracy that envisions legitimacy as deriving solely from the contest for power would not find this troubling. But most thicker, substantive theories of democracy seek to constrain majority rule through constitutional commitments and principled protections for individuals and minorities, and they assign to the courts the institutional duty of enforcing these constraints.

These theories will have good reason to be concerned about judges becoming more punitive to criminal defendants, more inhospitable to discrete and insular minorities and to out-of-state parties, and more politically dependent and instrumentalist generally.<sup>218</sup> The erosion of the

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215. This is the central argument of Goldberg, Sample & Pozen, *supra* note 16; and James Sample & David E. Pozen, Making Judicial Recusal More Rigorous, *Judges' J.*, Winter 2007, at 17. See also Schotland, *New Challenges*, *supra* note 1, at 1101–02 (calling for “readier resort to recusal” in post-*White* elective court systems).

216. See generally *supra* Part I.B.1 (explaining majoritarian difficulty).

217. Cf. *supra* note 152 and accompanying text (arguing that voters in new era will continue, and most likely deepen, longstanding practice of selecting judges who make politically popular rulings).

218. Interpretivist theories of law such as Ronald Dworkin's might have reason to be concerned about the new model of judicial elections for a still deeper, and more ironic, reason. For Dworkin, the law itself is an interpretive practice. Judges determine legal outcomes through an act of constructive interpretation that seeks to put the existing legal materials in the best light possible. See Dworkin, *Law's Empire*, *supra* note 34, at 190–216. If, in a given case, the judge neglects the constraints of “fit” and “justification” and reaches her decision on the basis of political considerations, this constructive interpretation will never occur. The judge who bows to the majority's wishes would not only be failing in her institutional duty to find and articulate the law; she would not be doing law at all.

courts' countermajoritarian role may be especially damaging to minority interests at the state level, for both historical experience and standard political science suggest that state legislatures are more likely than their federal counterpart to partake in discrimination and subordination.<sup>219</sup> The basic point here is that for those who believe in the majoritarian difficulty, the new model of judicial elections poses a threat not only to the integrity of elective state courts, but also to the legitimacy of the entire democratic system that depends on those courts' playing a special protective role. For those who reject the classic antinomy between democracy and constitutionalism, who see constitutional commitments as themselves part of the project of establishing popular rule, the new model of judicial elections poses an even sharper threat to democratic values.<sup>220</sup>

A second way in which healthier judicial elections can undermine our broader democratic structures concerns the separation of powers. Judicial elections have always threatened this doctrine by subjecting the courts to the same political pressures that motivate the legislative and executive action the courts are supposed to be checking.<sup>221</sup> But in the old model of judicial elections, there was significant slack in the system. Elected judges felt these pressures only in certain violent-crime decisions and in the rare sensational case.<sup>222</sup> Arguably, state judges who had to face a reappointment decision by the governor or the legislature had stronger incentives to appease those branches (although these judges have tended to hold longer terms and the state political branches have often operated on a strong presumption of reappointment).<sup>223</sup> As judicial races become healthier, however, elected judges will become more accountable to the majority's present desires and therefore more reluctant to invalidate popular policies or to engage in any sort of interbranch

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219. See Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 *Colum. L. Rev.* 552, 582–99 (1999) (arguing that influence of middle-class suburban voters, demands of interstate competition, and reduced capacity for logrolling and coalition building, among other factors, make state policies more likely to marginalize low-income, urban, and minority groups); Hershkoff, *State Courts*, *supra* note 30, at 1903 (“The literature emphasizes . . . that smaller communities are structurally more vulnerable to factional capture, more prone to parochialism and bias, and more likely to generate external costs . . .”).

220. If favoritism were truly to run amok under the new model of judicial elections, this too could create a variety of serious democratic harms. Unlike the majoritarian difficulty, however, favoritism can be substantially curbed through regulatory reforms such as enhanced judicial disqualification and campaign contribution limits, see *supra* Part I.B.2, and I assume that, at some critical threshold, sufficient outrage would emerge to inspire these reforms.

221. See *supra* note 72 and accompanying text (noting prior critiques of judicial elections' effects on separation of powers).

222. See *supra* notes 97–98 and accompanying text (explaining centrality of crime to judicial campaigns).

223. See *supra* notes 78–87 and accompanying text (discussing term length statistics and dynamics of reselection decisions).

dialogue that might draw attention to the unpopular aspects of their rulings. This may actually make state governance *less* majoritarian overall, in the Madisonian sense that the judiciary would provide a weaker check against legislative and executive action that rewards small, politically influential factions at the expense of the greater good.<sup>224</sup>

There was an additional type of slack in the old system. Because judicial candidates were often prohibited from discussing their legal and political views and were rarely endorsed by interest groups, voters in many nonpartisan elections must have been unaware of the candidates' political affiliations. Nowadays, however, even in the (majority of) states in which overt affiliation with a political party remains prohibited, the liberalization of campaign speech and the influx of interest groups mean that judicial candidates will be more readily identifiable with one or the other party. The candidate who is endorsed by the local Right to Life group and the Chamber of Commerce and who inveighs against judicial activism, big government, and gay marriage in her campaign ads—that, voter, is the Republican candidate. No explicit party heuristic is needed to see this. When that candidate attains the bench, she can be confident that the local Republican leaders will be paying attention to her rulings and that, if those rulings disappoint, they will find a way to communicate this to the party's base come the next election. Judicial candidates from the party that currently holds more power in the state will be more likely to win elections, and then once in office, these judges will feel greater pressure to comport with the party line. The more unified the state government is, the stronger this pressure will be—just the inverse of what the separation of powers doctrine would want.<sup>225</sup>

The separation of powers concerns raised by the new era suggest that the distinction between the majoritarian difficulty and favoritism<sup>226</sup> may not be as clean as it used to be. The majoritarian difficulty worries about judges being overly concerned with the views of the many, because they are future voters. Favoritism worries about judges being overly concerned with the views of the few, because they are campaign supporters. The critiques are joined in their concern that elected judges will feel beholden to something other than the judges' best independent view of the law. The new era, however, enhances possibilities for other forms of beholden-ness: not only to the general public or specific contributors, but

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224. See generally The Federalist Nos. 47–51 (James Madison) (explaining how separation of powers and checks and balances can serve to curb factionalism).

225. Cf. Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2312, 2367–68 (2006) (arguing that judicial review “may be most needed as a supplemental source of checks and balances in eras of strongly unified government,” yet “[o]nly during divided government do courts have the independence to act as a meaningful check on national majorities”). This “deep irony of [federal] countermajoritarian judicial review” that Levinson and Pildes identify, *id.* at 2368, is all the more ironic at the state level, where judges are even more vulnerable to unified opposition from the political branches.

226. See *supra* Part I.B.2.



also to interest groups, political parties, and the other branches of government. Whether one should classify these influences under the majoritarian difficulty or favoritism is less clear, as they contain both private and public dimensions. Narrow lobbies pressing for specific judicial reforms may tend to invite favoritism, political parties pressing for general legal or ideological approaches, the majoritarian difficulty. Lobbies that appeal to specific groups of voters but conceal their true motives (for instance, business interests that attack candidates' positions on crime or abortion) may further confound this distinction—as well as the notion that higher salience races necessarily lead to election outcomes that better capture the people's will.

Inasmuch as the new politics of judicial elections has trickled down to lower court races, some judges may feel increasingly beholden to an additional extralegal source—the views of local, rather than statewide, majorities. When these views diverge, local judicial overrides of state legislation or doctrine may undermine democratic governance as well as the consistency and stability of state law.<sup>227</sup> Compared to judicial elections, a system of gubernatorial or legislative appointment with short terms would not necessarily be better for preserving courts' independence from interest groups, political parties, or the other branches (although it quite possibly would be, as would merit selection). But it would certainly be better for preserving courts' independence from deviant local majorities.

At the same time that healthier judicial elections threaten tyranny of the majority, then, they threaten tyranny of the government (by undermining legal constraints on legislative and executive officials and aligning judges more closely with the dominant political party) and tyranny of the minority (by giving more leverage to interest groups, factions, and local sentiment). The new era has not only exacerbated threats to constitutional democracy, but also proliferated them.

Finally, and perhaps least obviously, there is a third structural means by which healthier judicial elections may threaten our democracy: by making *nonjudicial* elections less healthy. Whereas the first two threats involved competing conceptions of democracy and the judicial role, this threat largely concerns self-dealing. The argument starts from the observation that the United States has an “extraordinarily decentralized voting system,”<sup>228</sup> in which state procedures vary widely and state laws control many aspects of both internal and national elections. Unlike virtually every other advanced democracy, the United States does not use specialized intermediate institutions to oversee elections.<sup>229</sup> Indeed, we are “the only country that places the power to draw election districts—and the

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227. See *supra* note 45.

228. Richard H. Pildes, Judging “New Law” in Election Disputes, 29 Fla. St. U. L. Rev. 691, 729 (2002) [hereinafter Pildes, Judging].

229. See Richard H. Pildes, The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 29, 44, 78–80 (2004) [hereinafter Pildes, Constitutionalization].

power to regulate much else concerning elections—in the hands of self-interested political actors.”<sup>230</sup> State courts, consequently, end up playing the lead role in safeguarding our electoral processes and institutions.

The fact that most state judges are themselves elected (another American anomaly)<sup>231</sup> can compromise their ability to play this role in two main ways. First, in some cases the judges may have a direct interest in the outcome. Consider, for example, state laws that require ballots to list incumbent candidates first. Because being listed first increases the odds of being selected, some courts have struck down this procedure as unconstitutionally anticompetitive and demanded random rotation of ballot-order listings across counties.<sup>232</sup> Notice, however, that in a state with elected courts, the judges who would hear this challenge would themselves stand to gain from the old ballots—they too are incumbents.<sup>233</sup> Challenges to voting technologies, vote-counting methods, campaign rules, redistricting proposals, and the like might similarly bear on an elected judge’s self-interest and thus predispose her to the anticompetitive option.

Second, and less dramatically, a judge may have an indirect interest in certain election law case outcomes because of her political or ideological affiliations. State courts often play “a significant role” in both drafting and supervising redistricting plans,<sup>234</sup> and they render countless election law decisions that work to the benefit of one party or the other. (A certain Florida case from 2000 springs unbidden to mind.)<sup>235</sup> When the judges on these courts are affiliated formally or informally with one of the parties, there is a risk that these relationships will influence their decisionmaking.<sup>236</sup> Partisan elections, in particular, appear to have led to “decisions explainable only by partisanship [and to] decisions grounded in re-election concerns.”<sup>237</sup> Others have noted that state courts appear to

230. *Id.* at 78.

231. See *supra* note 2 and accompanying text.

232. Pildes, *Constitutionalization*, *supra* note 229, at 76.

233. These judges would not be disqualified from hearing such a challenge on account of their possible self-interest. The judges’ personal stake in the outcome could easily be found too speculative to warrant disqualification, and even if it were not, the “rule of necessity” dictates that when no impartial judge is available (as would be the case on an elected court), the original judge assigned to the case must take it. See Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 20.2, at 576–81 (2d ed. 2007) (explaining rule of necessity).

234. *Grove v. Emison*, 507 U.S. 25, 33 (1993); see also Nat’l Conference of State Legislatures, *Redistricting Law 2000*, at 118–23 (1999) (providing further explanation and citations).

235. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), *rev’d sub nom. Bush v. Gore*, 531 U.S. 98 (2000).

236. Unfortunately, I know of no empirical studies that look at how a court’s selection method might influence its review of election law cases. My analysis here is, I hope, plausible, but it is admittedly quite speculative.

237. CCJ Brief, *supra* note 195, at 13.

have inappropriately made “new law” in numerous election cases.<sup>238</sup> State courts have also been rather unambitious about interpreting their own constitutions to provide law-of-democracy guarantees beyond what the Federal Constitution has been deemed to require. And it appears that the only case ever to have granted a preliminary injunction against a partisan gerrymander on constitutional grounds involved a federal court reviewing a state districting plan for judicial elections.<sup>239</sup>

None of this proves anything, to be sure, and to some extent the risk of indirect interest is an inevitable byproduct of the United States’s failure to use specialized intermediate institutions. Those (few) state judges who are reappointed by the governor or the legislature might be even more compromised because of their explicit link to the party in power. Only merit selection, term limits, or life tenure for state judges would begin to approximate the European model.

The new wrinkle on these points is that, as judicial elections become healthier along the standard dimensions, elected judges will only become more compromised in their role as election arbiters. Candidates who strongly identify with partisan causes will have a better chance at winning; incumbent judges will be more vulnerable to competition and more closely aligned with one political party; and the norm of apolitical decisionmaking will tend to diminish over time. On multiple fronts, sitting judges will face stronger incentives to make decisions that will protect their own jobs and those of their allies. The United States will be left even farther away from the ideal of independent oversight of its democratic institutions. There is a temporal tradeoff motivating this irony: While healthier judicial elections might make our electoral system stronger now—judicial elections are, after all, a significant piece of this system—they will do so only at the price of later, and deeper, defects.

These criticisms of the new era have a different cast from the criticisms typically offered. As noted above,<sup>240</sup> commentators have excoriated the new era’s “wildness” as being harmful to the judiciary’s integrity, impartiality, and quality, to the rule of law and constitutionalism, to public trust and social cohesion, and so on. Those arguments may well be valid, even damning, but they are not directly responsive to the other side’s core argument, which is that judicial elections are desirable because they are intrinsically and instrumentally more “democratic,”<sup>241</sup> today more than ever.<sup>242</sup> The intrinsic argument is unassailable as it goes; voting for judges puts them under the people’s direct control. But the analysis here suggests a way to challenge the instrumental link between judicial elections and larger democratic values. Judicial elections can undermine pro-

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238. See generally Pildes, *Judging*, supra note 228 (examining this phenomenon).

239. *Republican Party of N.C. v. N.C. State Bd. of Elections*, Nos. 97-1057, 94-1113, 1994 WL 265955, at \*2–\*3 (4th Cir. June 17, 1994).

240. See supra note 178 and accompanying text; see also supra Part II.B.

241. See supra Part I.A.

242. See supra Part II.A.

tections against majority tyranny, governmental tyranny, factional tyranny, regional tyranny, and electoral mischief. Paradoxically, healthier elections only magnify these threats. It may be a risky strategy to play the other side's game, but the new era suggests the possibility of a new language with which to critique judicial elections, one that sounds not in constitutionalism or professionalism but in democracy itself.

### C. *Activism and Restraint*

The core argument for elective judiciaries, recall, holds that democratic legitimacy for state judges, as for other important officials, can arise only through popular elections.<sup>243</sup> Although rarely discussed in the context of the debate over judicial selection—and thus excluded from the discussion in Part I.A above—two further arguments about the virtues of judicial elections follow naturally from this line of reasoning.

By linking the judiciary directly to the demos, judicial elections seem to dissolve two of the foundational problems in constitutional theory: the countermajoritarian difficulty and the charge of judicial activism. The countermajoritarian difficulty, as formulated by Alexander Bickel, is “the moral and political problem posed by the power of courts to invalidate legislation supported by democratic majorities (or at least legislative ones).”<sup>244</sup> When they are elected and reelected, however, judges are directly answerable to democratic majorities; the popular will is not being countered but effectuated. The countermajoritarian difficulty thus fades away,<sup>245</sup> and the majoritarian difficulty rises in its stead. The countermajoritarian concern is further mitigated by the nature of state courts, whose common-law lawmaking powers are broadly respected and whose

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243. See *supra* Part I.A.

244. Levinson & Pildes, *supra* note 225, at 2364 (recapitulating Bickel, *supra* note 60, at 16–23). As Levinson and Pildes note, a number of academics now see the countermajoritarian difficulty as somewhat overblown on account of the political constraints that make it practically difficult for “judicial decisions [to] stray far or for long from the policy preferences of national majorities.” *Id.* at 2365. Others have challenged the countermajoritarian difficulty on philosophical grounds. See, e.g., Ackerman, *supra* note 31, at 261–65 (rejecting idea that judicial invalidation of legislative or executive action necessarily impedes democracy, given that all elected representatives are imperfect stand-ins for the people themselves); Jed Rubenfeld, *Revolution by Judiciary: The Structure of American Constitutional Law* 96 (2005) (arguing that constitutionalism is not at odds with democracy but rather “is democracy” in that intertemporal commitments are constitutive of democratic self-government). Notwithstanding these revisionist views, persuasive as I find them to be, I take it that the countermajoritarian difficulty still represents a significant concern for many.

245. Several prominent scholars have explicitly noted this point in discussions of subjects other than judicial selection. See Michael J. Perry, *The Constitution, the Courts, and Human Rights* 168 n.17 (1982); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 *Yale L.J.* 1564, 1629 (2006); Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 *UCLA L. Rev.* 1079, 1083 n.10 (2004).

decisions are relatively easily reversed through constitutional amendment or legislative action.<sup>246</sup>

“Judicial activism” likewise looks less threatening when the activists have been elected.<sup>247</sup> Activism is a relational idea—for a judge to be an activist she must rule in a way that is sufficiently out of sync with some widely held normative conception of the judicial role.<sup>248</sup> Elected judges, however, are selected and reselected precisely because they are sufficiently *in* sync with the public’s desires. It is not clear that it even makes sense to think of elected officials, however bold they might be, as activists.

Building on these insights, a cadre of scholars has argued that elected judges should not feel as inhibited as their unelected counterparts to engage in aggressive constitutional interpretation. Although this basic argument has been around for some time,<sup>249</sup> a particularly strong formulation might be gleaned from the popular constitutionalism literature. Some scholars working in this field have argued that because state courts are physically and culturally closer to the people and, in elective jurisdictions, selected by the people, assigning them a greater role in constitutional decisionmaking “helps achieve popular constitutionalism’s objective of reasserting democratic control over the Constitution’s meaning.”<sup>250</sup> Elected judges, in this view, would have a special legitimacy to

246. See Reed, *Popular Constitutionalism*, supra note 40, at 887–89 (describing relative “mutability and responsiveness” of state constitutions).

247. See Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 71 n.26 (1991). “In a democracy,” Burt Neuborne wrote at the close of his pioneering article *The Myth of Parity*, “actions bearing the imprimatur of democratic decisionmaking should be overturned by courts only when absolutely necessary.” Neuborne, supra note 63, at 1131. Many would agree. Yet when judges are chosen through periodic election, their rulings may themselves be said to bear the imprimatur of democratic decisionmaking.

248. “Judicial activism” is a “notoriously slippery term.” Keenan D. Kmiec, Comment, *The Origin and Current Meanings of “Judicial Activism,”* 92 Cal. L. Rev. 1441, 1442–44 (2004) (quoting Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. Colo. L. Rev. 1401, 1401 (2002)). Kmiec identifies five “core meanings”: “(1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial ‘legislation,’ (4) departures from accepted interpretive methodology, and (5) result-oriented judging.” *Id.* at 1444. All of these meanings, it seems to me, incorporate a relational notion of judges overstepping their role compared to the expectations of some relevant group.

249. Mark Tushnet observed nearly twenty years ago that it is intuitive to “think that judges subject to periodic election may be justified in using relatively free wheeling methods of interpretation, while life tenured judges should use more stringent ones. . . . [M]ajoritarian constraints up, interpretive constraints down; or, conversely, majoritarian constraints down, interpretive constraints up.” Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers*, 61 S. Cal. L. Rev. 1669, 1669 (1988).

250. Helen Norton, *Reshaping Federal Jurisdiction: Congress’s Latest Challenge to Judicial Review*, 41 Wake Forest L. Rev. 1003, 1023 (2006); see also Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53 Am. J. Comp. L. 403, 431 (2005) (noting that popular constitutionalism scholars have argued that judicial supremacy may be “more palatable”

interpret both their state constitutions and the Federal Constitution, in ways that add to or even diverge from Supreme Court precedent.

The most developed and celebrated argument to this effect belongs to Helen Hershkoff. In a series of widely cited articles, Professor Hershkoff has challenged the premise that state courts ought to conceptualize their role in similar terms as the federal courts do theirs. The federal courts' rational basis standard of review and justiciability doctrines, Hershkoff argues, reflect concerns of federalism, separation of powers, and democratic legitimacy that are not wholly apposite at the state level.<sup>251</sup> State courts work out of a common law tradition that accepts a judicial policymaking role, discharge many extra-adjudicative duties, are in closer dialogue with and are more easily reversed by the legislature and the people, and interpret state constitutions that often include positive rights and regulatory norms absent from the Federal Constitution. And, of course, many state judges are elected. For all of these reasons, Hershkoff urges state courts to break free from their self-imposed interpretive constraints and go beyond the federal model.<sup>252</sup> In particular, she urges state courts to apply a form of heightened scrutiny to cases involving certain social and economic rights that are unlikely to be secured by the legislative process.<sup>253</sup> In public benefits litigation, Hershkoff wants state courts to take a consequentialist approach and demand that their state welfare systems provide all citizens with a minimally decent standard of living.<sup>254</sup> Hershkoff does not use the term, but her argument seeks to validate what Robin West has called a "possibilistic" mode of constitutional interpretation.<sup>255</sup> Whereas most left-liberal commentators have been afraid of elected state courts, Hershkoff seeks to flip this presumption and mine their elective nature for additional freedom to facilitate progressive values and policies.

Hershkoff's argument is elegant and has considerable appeal, but I think that she—like virtually everyone who has written about the counter-majoritarian difficulty in relation to elected courts—neglects a crucial point: Elective judiciaries dissolve the counter-majoritarian difficulty at not one, but two levels. Conceptually, as noted above, these courts dis-

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when constitution at issue is easier to amend); Aaron Jay Saiger, *Constitutional Partnership and the States*, 73 *Fordham L. Rev.* 1439, 1456–62 (2005) (arguing that Larry Kramer-style popular constitutionalism is most viable at state level and providing examples). Relatedly, the idea that state courts possess a special legitimacy to interpret their own constitutions to protect rights has been a hallmark of the "new judicial federalism" movement. See Lawrence Friedman, *Reckoning with Dissonance: Thoughts on State Constitutional Law and Constitutional Discourse*, 40 *New Eng. L. Rev.* 437, 440 (2006).

251. See generally Hershkoff, *Positive Rights*, *supra* note 85 (challenging state court reliance on federal rationality review); Hershkoff, *State Courts*, *supra* note 30 (challenging state court reliance on federal justiciability doctrine).

252. See Hershkoff, *Positive Rights*, *supra* note 85, at 1155–69; Hershkoff, *State Courts*, *supra* note 30, at 1876–1905.

253. See Hershkoff, *Positive Rights*, *supra* note 85, at 1169–94.

254. *Id.* at 1191–94.

255. West, *supra* note 108, at 648.

solve it because they are themselves subject to direct majoritarian control. This is the point Hershkoff and others emphasize.<sup>256</sup> But elective judiciaries also dissolve the countermajoritarian difficulty at an empirical level. As a consequence of being subjected to regular popular vote, these courts are less likely, in practice, to offend the majority's wishes, even if in theory they have more latitude to do so.

This is the bitter irony for the progressive possibilist. At the same time that elective judiciaries would seem to possess greater legitimacy to engage in aggressive, even "activist," interpretation in the service of unpopular causes, their very nature as elective bodies means that they will not likely tap this reserve of progressive lawmaking authority. This irony is more acute now than ever. The normalization of judicial elections has increased judges' public accountability and therefore bolstered their legitimacy as democratic actors, while the radicalization of judicial elections has increased the expected penalty to the judge who contravenes the majority will. The predictable consequence is that rulings that seek to protect traditionally disadvantaged or despised groups in new ways—for example, the *Goodridge v. Department of Public Health*<sup>257</sup> same-sex marriage decision by the Massachusetts Supreme Judicial Court (whose appointed justices hold office until age seventy)—will be less likely to emerge from elected courts. The elected judge who finds in her state constitution a new right to housing, health care, or other public benefits is not going to be in office for very long.

Much better, then, for progressives to turn their back on elective judiciaries, in aspiration if not in advocacy, rather than to embrace them. Professor Hershkoff offers many reasons unrelated to their selection method why state courts might have greater legitimacy to render countermajoritarian rulings; she does not need these courts to be elected to cinch her thesis. Notions of legislative supremacy pose an additional problem for those who would assign extra decisional discretion to elective judiciaries. Even when elected at regular intervals, courts will never be *as* democratic as the legislature, nor will they possess its institutional competence, deliberative structure, or proactive capabilities. Moreover, as Jeremy Waldron has noted, "to the extent that we accept judges because of their democratic credentials, we undermine the affirmative case that is made in favor of judicial review as a distinctively valuable form of political decisionmaking."<sup>258</sup> On account of recent changes to judicial elections making them more open and competitive, elected state courts will indeed have better majoritarian credentials than ever before. But for anyone whose vision of democracy incorporates robust protections for individu-

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256. See Hershkoff, *Positive Rights*, supra note 85, at 1157–60; Hershkoff, *State Courts*, supra note 30, at 1885–87, 1917; see also supra note 245 (citing to other scholars making similar arguments).

257. 798 N.E.2d 941 (Mass. 2003).

258. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L.J.* 1346, 1394 (2006).

als, minorities, and the rule of law, this does not mean that they will be more democratic.<sup>259</sup> Progressive scholars who would trade judicial independence for interpretive freedom are giving up something for nothing.

Others might view this tradeoff differently. Although limited to the state level, judicial elections are the most robust mechanism we currently have to connect the lay citizen to constitutional decisionmaking—enabling direct public participation, dissolving the claims of the heroic judge, enshrining the people’s supremacy over the courts. They are, one might say, the problematic institutional face of popular constitutionalism in America today.<sup>260</sup> In the new era, the connection between elected state courts and the people grows ever more vigorous, but at a grave cost to other democratic and rule-of-law values. This presents an interesting dilemma for the popular constitutionalist to negotiate. Like scholars in several related fields,<sup>261</sup> popular constitutionalists who turn their attention to the new era could contribute significantly to our understanding of judicial elections.

#### CONCLUSION

So what prescriptions follow from this analysis? Many of the possible responses to the growing problems created by judicial elections have been floating around for years. To attract more capable candidates, states could raise minimum qualifications and increase judicial salaries. To improve the quality of voters’ decisionmaking and engage a broader pool of voters, states could distribute information guides, sponsor debates, and develop education and outreach programs. To reduce the time drain on sitting judges, states could narrow the window in which fundraising and campaigning are allowed. To combat the risk of favoritism and public disillusionment, states could lower contribution limits; require additional disclosure of contributions, especially for interest groups and political action committees; enact public financing; and tighten restrictions on judges’ political activities. State courts could assist in this effort by invigorating their recusal and disqualification policies (which might also be done by statute), while federal courts could reject challenges to “Pledges or Promises” and “Commit” Clauses<sup>262</sup> and other remaining canons of judicial conduct. The media, the bar, and the academy could devote more attention to exposing favoritism and bias where

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259. See *supra* Part III.B.

260. Although presented in less pointed terms, shades of this insight appeared in Justice Kennedy’s concurrence in the recent *Lopez Torres* case. See *supra* note 130. It was remarkable to see a Supreme Court Justice opine so broadly and so favorably about selecting judges by popular election.

261. See *supra* note 199 and accompanying text (identifying other theoretical gaps in literature on judicial elections).

262. But see *Republican Party of Minn. v. White*, 536 U.S. 765, 819 (2002) (Ginsburg, J., dissenting) (arguing that, in jurisdictions that lack Announce Clause, “the pledges or promises provision would be feeble, an arid form, a matter of no real importance”).



they persist. To ensure the integrity of their electoral institutions, states could experiment with forms of extrajudicial oversight, such as independent commissions; federal courts could take a hard look at potentially compromised rulings;<sup>263</sup> and the Supreme Court could set more bright-line rules—starting with the extension of one person, one vote to judicial districting.<sup>264</sup> None of these reforms would be entirely satisfactory, and in some states the odds of passage are very low. But they are available, and they are being earnestly discussed nationwide.

A final irony, then. The majoritarian difficulty, I argued above, represents the core criticism of judicial elections, and the one least amenable to regulatory corrective.<sup>265</sup> Longer judicial terms might abate it somewhat, increasing judicial independence at the same time that they reduce fundraising pressures. But the abatement would occur only in the early years, if at all, and elective regimes have tended to use relatively short terms because their basic rationale is to ensure public accountability through regular decision points.<sup>266</sup> Of all the criticisms, the majoritarian difficulty has also been the most exacerbated by the new model of judicial elections; it has finally passed from a theoretical abstraction into a constant menace.<sup>267</sup> And yet, there has been almost no discussion of this difficulty (however labeled) in the recent conversation. Perhaps this is because it seems so impervious to reform, and no one wants to waste her time lamenting what cannot readily be changed. Or perhaps it is because commentators do not want to risk sounding mistrustful of the people or naïve about the political insularity of appointed judges. Or perhaps the majoritarian difficulty has seemed too esoteric relative to concerns such as favoritism and campaign improprieties.

However, under many theories of judicial review—including all theories that would assign to the courts a guardian role over individual rights

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263. Richard Pildes suggests that this form of heightened review may already occur, at least to the extent that state courts are alleged to have made “new law” in an election context. See Pildes, *Judging*, *supra* note 228, at 702–06, 711–13; see also Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges’ Interpretation of State Law in Bush v. Gore*, 29 Fla. St. U. L. Rev. 493, 507 (2002) (maintaining that U.S. Supreme Court has occasionally applied such heightened review to criminal law decisions of elected state courts).

264. See *supra* note 208.

265. See *supra* Part I.B. Some believe that voter competence is likewise unamenable to regulatory corrective, so that no amount of educational outreach would enable voters to evaluate judicial performance (and prospective performance) anywhere near as meaningfully as an appointing or merit selection body. See *supra* note 124 (quoting Richard Posner for this view). This Article is agnostic on this point, which many dispute and is ultimately an empirical question. As such, it is not a “core” critique of elective judiciaries as I have been using the term—although if accurate, it would indeed be a decisive critique.

266. See *supra* notes 85–87 and accompanying text (noting that while elected judges hold longer terms than other elected officials, they tend to hold significantly shorter terms than appointed judges); see also *supra* note 91 and accompanying text (arguing that term length increases will, at some point, become incompatible with choice to elect judges).

267. See *supra* Part II.B.

and constitutional values—the majoritarian difficulty should be seen as a devastating flaw in any institutional arrangement that breeds it. If the countermajoritarian difficulty is now viewed as less troubling than it used to be at the federal level,<sup>268</sup> the majoritarian difficulty ought to be viewed as more troubling than ever at the state level. And it will only get worse.

It does not follow that concerned states must replicate the federal model of appointment and life tenure. They could use merit selection and reselection, as a number of states currently do. They could appoint judges during good behavior but with a mandatory retirement age, as Massachusetts and New Hampshire currently do. They could give judges fixed, nonrenewable terms, say for fifteen years. Or they could use some combination of regimes for their various courts. I am not suggesting that there are universal answers when it comes to state judicial selection—just that the debate is being conducted on the wrong terms. Those who would support elective state judiciaries ought to be openly celebrating the new era. Those who would have the judiciary be more than just another majoritarian branch might do well to abandon the accommodationist posture, at least for a moment, and to remind the public and each other that there is no adequate remedy for this threat save to dismantle judicial elections.

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268. See *supra* note 244.