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THE AGNOSTIC'S GUIDE TO JUDICIAL SELECTION

James Sample*

INTRODUCTION

*[O]ur aim in founding the State was not the disproportionate happiness of any one class, but the greatest happiness of the whole; we thought that in a State which is ordered with a view to the good of the whole we should be most likely to find justice*¹

—Plato

The vast majority of judicial selection discussions, whether in academia, on the bench, or in the bar, portray an unintended erudition. Although dressed down in the sartorial language of pragmatics, judicial selection debates are, albeit unintentionally, actually abstract philosophical discussions of competing Platonic Forms. The debates exist in an ethereal realm entirely separate from the earthly grime of the manner in which judges are actually selected.² This Article asserts that, while the Forms debate has its place, its high temperatures, infinite circularity, and chasm of separation from the actual day-to-day grind of administering justice for the rule of law's true consumers, renders the debate a luxury that, as a citizenry, we should no longer blindly indulge. Instead of asking "which method of judicial selection is 'best,'" we should ask "how can we improve our current judicial selection systems, whatever they may be?"³

Professor Charles Geyh characterizes the judicial selection debate as an "endless" attempt to reconcile the "perennial struggle to strike an optimal balance between judicial independence and judicial accountability."⁴ Nevertheless, "accountability and independence are

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1. PLATO, *THE REPUBLIC* 93 (Benjamin Jowett trans., Floating Press 2009).

2. "[W]hen a man has discovered the instrument which is naturally adapted to each work, he must express this natural form, and not others which he fancies, in the material, whatever it may be" PLATO, *CRATYLUS* 55 (Benjamin Jowett trans., Echo Library 2006).

3. *But see* Charles Gardner Geyh, *Judicial Selection and the Search for Middle Ground*, 67 *DEPAUL L. REV.* 330 (2018).

4. *See* Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 *GEO. J. LEGAL ETHICS* 1259, 1259 (2008).

two sides of the same coin: accountability ensures that judges perform their constitutional role, and judicial independence protects judges from pressures that would pull them out of that role.”⁵ Professor Geyh subscribes to the theory that, when determining which method of selection to advocate for, we may have a difficult time distinguishing our views between the relative merits of a method of selection and our views as to how a particular case should be decided.⁶ He further contends that an individual’s outcome determinative perspective may be prematurely tipping the scale in favor of elections or appointments, without weighing the pros and cons of either method.⁷ The heuristic shortcomings to which he points further convolute an already deeply entrenched debate that is “in its third century, with no end in sight.”⁸ Professor Geyh equates the debate to a tennis match that appears to be plagued with perpetual lead changes where neither appointments nor elections are able to serve the final ace to win.⁹

The endless nature of this debate makes “additional categorical indictments”¹⁰ not only unproductive, but counterproductive. It is axiomatic that both elective systems and appointive systems are defective, and states are sticking to their respective status quos. The last state to shift its selection system for supreme court justices was New Mexico in 1988, almost three decades ago.¹¹ As recently as 2010, Nevada voters rejected a constitutional amendment that called for merit selection, as did South Dakota and Florida in 2004 and 2000 respectively.¹² With

[T]he perennial policy struggle is to strike an optimal balance between judicial independence and accountability, to ensure that judges are independent enough to follow the facts and law without fear or favor, but not so independent as to regard the facts or law to the detriment of the rule of law and public confidence in the courts.

Id. at 1260.

5. Sandra Day O’Connor & Ronnell Andersen Jones, *Reflections on Arizona’s Judicial Selection Process*, 50 ARIZ. L. REV. 15, 23 (2008).

6. See Charles Gardner Geyh, *Lies, Damn Lies and Judicial Elections: How America Picks its Judges and Judges its Picks* 8–9 (unpublished manuscript) (on file with author).

7. See *id.*

8. *Id.* at 8.

9. *Id.* at 8–14. Ultimately, Geyh believes appointive systems are “most compatible with the appropriate role of the judiciary in America’s brand of representative democracy.” *Id.* at 29.

10. James Sample, Caperton: *Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 302–03 n.38 (2010).

11. ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, *RETHINKING JUDICIAL SELECTION IN STATE COURTS* 19 (2016), https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf.

12. Am. Judicature Soc’y, *Chronology of Successful and Unsuccessful Merit Selection Ballot Measures*, JUDICIAL SELECTION 4–5, http://judicialselection.us/uploads/documents/Merit_selection_chronology_1C233B5DD2692.pdf (last visited Jan. 22, 2017). One South Dakota city official chastised his state’s constitutional amendment by characterizing it as “anti-baseball and apple pie” and even “anti-American.” Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1082 (2007).

structural shifts away from elective or appointive systems unlikely,¹³ incremental reforms should be emphasized, at the expense of deemphasizing the selection debate.

The purpose of this Article is simple: to encourage the de-emphasis of the Forms version of the judicial selection debate in favor of a heightened focus on incremental improvements that actually redound to the benefit of litigants and the citizenry. Scholarly energies ought to be refocused from lofty Forms questions to the less lofty, but no less difficult, questions of incremental improvements. This is not to say that the Forms debate does not matter. After all, “[w]e should care about how America picks its judges because we should care about who becomes judges because we should care about the decisions that judges make.”¹⁴ We should care because judges interpret constitutions and statutes; because judges create law; and because judges “are powerful people who control the fates of parties who petition the courts to resolve their disputes.”¹⁵ The Forms debate, perhaps because of its endlessness, offers substantial guidance as to the strengths and weaknesses of various modes of selection. But at a certain point, we must stop merely repackaging old arguments as new, and must devote energy, through academic work or advocacy, towards improving the systems that real people come in contact with every single day.

This Article proceeds in four parts. Part I offers a brief survey of American judicial selection.¹⁶ This Part notes, in particular, that most judicial selection modification efforts ultimately generate very little practical traction.¹⁷ Occasionally, change occurs; the most recent trend centers on merit-based appointment processes, often referred to, especially by its proponents, as “merit selection.”¹⁸ Part II surveys recent trends in judicial elections, paying particular attention to the

13. JOHN F. KOWAL, BRENNAN CTR. FOR JUSTICE, *JUDICIAL SELECTION FOR THE 21ST CENTURY* 3 (2016), <http://www.brennancenter.org/publication/judicial-selection-21st-century>. Further, Professor Roy Schotland notes that the advocacy for contested elections is going nowhere: “People who advocate ending contestable elections always point to some pending bill in some state . . . but for over one hundred years, the hurdles in turning proposals into constitutional amendments have been all but insuperable.” Roy A. Schotland, *A Plea for Reality*, 74 MO. L. REV. 507, 509–10 (2009). Recently, the Indiana General Assembly introduced a bill that calls for the establishment of merit selection for judges in one of its county courts. See Dave Stafford, *Merit Selection, with Recommendations for Voters, Proposed for Indy Bench*, INDIANA LAW. (Jan. 4, 2017), <http://www.theindianalawyer.com/merit-selection-with-voter-recommendations-proposed-for-indy-bench/PARAMS/article/42426>.

14. Geyh, *supra* note 6, at 14.

15. *Id.* at 14–19.

16. See *infra* Part I.

17. See *infra* Part I.

18. See *infra* Part I.

influx of campaign spending, which has transformed the previously bleak and lifeless, into the hotly contested.¹⁹ Since the fundamental argument in favor of elections is accountability,²⁰ Part III notes that the principal argument in favor of appointments is inversely, independence and the countermajoritarian role.²¹ Finally, Part IV asserts that the imperfections of both judicial elections and appointments, and the relative stasis of methodology in the states, favors an agnostic approach to the Forms discussion as a means towards invigorating dialogue regarding more achievable, incremental measures.²²

II. A BRIEF HISTORY OF JUDICIAL SELECTION

In their seminal work, Charles Sheldon and Linda Maule note that early American judicial selection methods were, in part, reactions to the “schizophrenic” experience²³ that colonists had with the English monarchs and the common law system.²⁴ Americans were accustomed to the attributes of the English common law system, but perceived colonial governors as corrupt.²⁵ These governors “ignored judicial rulings and . . . created courts in order to appoint their friends and supporters, regardless of their qualifications.”²⁶ Consequently, the colonists pursued independence on two fronts: they sought not only independence from England, but judicial independence as well by establishing at least a modicum of separation of the judiciary from the executive.²⁷

The Articles of Confederation provided each state an appointed judiciary that was insulated from executive control.²⁸ The primary methods of appointment used in the fledgling states were gubernato-

19. See *infra* Part II.A.

20. See *infra* Part II.

21. See *infra* Part III.A–B.

22. See *infra* Part IV.A–E.

23. CHARLES H. SHELDON & LINDA S. MAULE, *CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES* 1–8 (1997).

24. *Id.* at 1.

25. *Id.*

26. *Id.* at 2 (“Thus the schizophrenia over the proper role of judges resulted from a belief in the English system of law and courts but a rejection of how the system had actually operated in the colonies.”); see also KOWAL, *supra* note 13, at 4–5 (noting colonial judges were both appointed and removable by the Crown, thus those who were not appointed because of the relation to the governor were still easily controllable because of the threat of removal).

27. See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1073 (2010) (“In the years leading up to the Revolution, the independence of the judiciary from the Crown was a key issue in a majority of the colonies, and this debate focused on offices held during good behavior.”).

28. Charles Gardner Geyh, *Methods of Judicial Selection and Their Impact on Judicial Independence*, 137 DAEDALUS 86, 88 (2008).

rial appointment with legislative confirmation,²⁹ and legislative appointment.³⁰ Judges in eight states were appointed by the legislature,³¹ and judges in the remaining five states³² were appointed by one of two forms of gubernatorial appointment with legislative confirmation.³³ The Framers emphasized judicial independence “by placing limits on political retribution by the executive and legislative branches.”³⁴ The federal model adopted was akin to the gubernatorial selection system in which the executive nominated judges, subject to the advice and consent of the senate.³⁵ Once installed, federal judges enjoyed further independence from both the executive and legislative branches via life tenure and salaries protected from diminishment.³⁶ Gubernatorial and legislative appointments marked state judicial selection for several decades³⁷ with states entering the Union between 1776 and 1830 all adopting the selection methods that the original thirteen states enjoyed.³⁸

In the 1830s, populist calls for judicial accountability spurred a third method of judicial selection: partisan elections.³⁹ Populists were skeptical of insular insiders and asserted that judges were too dependent on the governors and legislators who appointed them, often for patronage purposes.⁴⁰ Accordingly, populists concluded that “elected judges who derived their authority from the people would be more independent-minded than handpicked friends of governors, or jurists

29. *Id.* at 87. Gubernatorial appointment with legislative confirmation grants the governor the power to select judges for state court positions as long as said judges are confirmed by the legislature. *Id.*

30. *Id.* at 87–88. Legislative appointments allow for the legislature to directly fill state court judgeship positions. *Id.*

31. SHELDON & MAULE, *supra* note 23, at 3. The eight states that used legislative appointments to appoint judges were Connecticut, Delaware, Georgia, New Jersey, North Carolina, Rhode Island, South Carolina and Virginia. *Id.*

32. *Id.* The five states that used some form of gubernatorial appointments were Maryland, Massachusetts, New Hampshire, New York, and Pennsylvania. *Id.*

33. *Id.* Judges were either appointed by governors with the approval of a special council elected by the legislature, or judges were appointed by governors with the approval of a special council appointed to serve as a check on the governor. *Id.* Currently, only three states use gubernatorial appointments akin to the federal model, and two states choose judges legislatively. See KOWAL, *supra* note 13, at 5.

34. KOWAL, *supra* note 13, at 5.

35. U.S. CONST. art. II, § 2.

36. *Id.*, § 1; see also KOWAL, *supra* note 13, at 5 (stating federal judges could only be removed from office for high crimes and misdemeanors).

37. SHELDON & MAULE, *supra* note 23, at 3.

38. *Id.* Alabama, Illinois, Mississippi, Ohio and Tennessee adopted legislative appointments, while Indiana, Kentucky, Louisiana, Main, Missouri and Vermont adopted the gubernatorial appointment method. *Id.*

39. Geyh, *supra* note 28, at 88.

40. See KOWAL, *supra* note 13, at 5.

subject to the beck and call of legislatures.”⁴¹ To be sure, it is an egregious oversimplification to attribute the shift to a monolithic cause. The shift was spurred by a combination of factors, including the demise of the Federalists,⁴² the rise of Jeffersonian democracy,⁴³ the increased willingness of judges to use judicial review as a tool to negate legislative enactments,⁴⁴ the economic crisis in the late 1830s and 1840s,⁴⁵ and the fear that courts were usurping the law-making powers of the legislature.⁴⁶ In 1832, Mississippi became the first state to elect its supreme court judges; however, no other state followed suit until New York’s Constitutional Convention of 1846.⁴⁷ The Empire State opened the elective floodgates and from 1846 to 1853, twenty states adopted judicial elections.⁴⁸ By 1860, twenty-three out of thirty-one states in the Union elected some or all of their judges.⁴⁹

At the end of the nineteenth century, partisan judicial races were, at least by the standards of the time, perceived to be “hotly [contested] and intensely partisan . . . with special interests taking an active role in party nominations.”⁵⁰ Dissatisfaction with the partisan election system was on the rise.⁵¹ In his famous address to the American Bar Association, Roscoe Pound attributed the dissatisfaction to politicization of judicial elections that resulted from the partisan election system.⁵² In his speech, he stated, “[P]utting courts into politics, and compelling judges to become politicians . . . has almost destroyed the traditional respect for the Bench.”⁵³ For example, “to get on the ballot, judicial candidates often had to curry favor with party bosses who

41. Geyh, *supra* note 28, at 88.

42. SHELDON & MAULE, *supra* note 23, at 3.

43. *Id.*; see also Geyh, *supra* note 28, at 86.

44. Geyh, *supra* note 28, at 90.

45. Shugerman, *supra* note 27, at 1081.

46. SHELDON & MAULE, *supra* note 23, at 4.

47. Shugerman, *supra* note 27, at 1080; see also KOWAL, *supra* note 13, at 6.

48. Shugerman, *supra* note 27, at 1067.

49. *Id.*

[S]upporters of judicial elections understood the principal-agent problem, the gap between the people and their elected officials. They believed the solution was (1) to separate judges from the legislatures and governors that they wanted judges to check; (2) to embolden judges and legitimize judicial review by connecting them directly to “the people”; and (3) to allow “the people” to elect judges who would defend their constitutional rights.

Id. (footnote omitted).

50. See KOWAL, *supra* note 13, at 6 (quoting JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 144 (2012)).

51. See *id.*

52. SHELDON & MAULE, *supra* note 23, at 5.

53. *Id.*

had little interest in selecting the most qualified people for the job.”⁵⁴ Favoritism led to the election of “political hacks to the bench, scandal[s], . . . corruption,”⁵⁵ and allowed for the “capture of the court by special interests.”⁵⁶

The push for reform gained momentum at the dawn of the twentieth century.⁵⁷ The stated goals were to “rationalize judicial administration” and to “remove partisan politics from the selection of judges.”⁵⁸ In 1912, Ohio introduced nonpartisan judicial elections for state judges.⁵⁹ The innovation, if it can be characterized as such, simply meant that judicial candidates appeared on ballots without party affiliation.⁶⁰ The movement spread quickly, and by 1930, twelve states chose their appellate judges using nonpartisan judicial elections.⁶¹ However, “from the outset, critics of the movement saw nonpartisan elections as an insufficient cure for the problems plaguing judicial elections.”⁶² Although direct influence of political parties was minimized, and voters were still able to choose their judges, glaring problems were evident.⁶³ For example, “roll-off” increased with the implementation of nonpartisan judicial elections, which was, in part, due to the lack of information available to voters about the judges they were electing.⁶⁴ Critics feared that special interests would determine close races and that unqualified judges—who would otherwise fail to attract electoral support—would garner a judgeship through “vigorous and deceptive campaigning.”⁶⁵

The next phase in the seriatim efforts in opposition to judicial elections brought about the generously self-labeled merit selection plan.⁶⁶ In a merit selection system, judges are appointed by the governor from a pool of candidates whose qualifications have been reviewed and approved by an independent commission.⁶⁷ Selected judges pro-

54. See KOWAL, *supra* note 13, at 6.

55. SHELDON & MAULE, *supra* note 23, at 5.

56. See KOWAL, *supra* note 13, at 6.

57. SHELDON & MAULE, *supra* note 23, at 5.

58. *Id.*

59. See KOWAL, *supra* note 13, at 6.

60. *Id.*

61. *Id.*

62. *Id.*

63. SHELDON & MAULE, *supra* note 23, at 6.

64. *Id.* Roll-off occurs when a voter casts a vote in other races, but abstains from voting in the judicial race. See Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 19 (2003).

65. *Id.*

66. *Id.*

67. Geyh, *supra* note 28, at 89; see also KOWAL, *supra* note 13, at 6–7; SHELDON & MAULE, *supra* note 23, at 7.

ceed to run unopposed in periodic retention elections, in which, until recently, voters almost invariably reselected the judges for another term.⁶⁸ In 1940, Missouri became the first state to adopt a merit-based appointment plan,⁶⁹ and such systems are frequently referred to as “Missouri Plans.”⁷⁰ Proponents of merit-based appointment assert that it combines the better parts of other selection systems, with an emphasis on separating politics from the bench.⁷¹ Currently, at least twenty-four states use merit-based appointment systems to select some or all of their judges.⁷² However, despite the early and rapid growth, the last state to implement a merit-based appointment system was Rhode Island in 1994, following a series of scandals involving appointed supreme court justices.⁷³ Indeed, in the last three decades there has been a counter-movement against merit selection; voters have rejected merit selection ballot measures in six states.⁷⁴ In other states, merit selection proposals have failed to pass the legislative approval stage, so the proposals never reached the voters.⁷⁵

III. ELECTIONS

A. *Trends in Judicial Elections*

Contemporary lay observers of judicial elections would scarcely recognize the predecessor contests of prior generations that have been colorfully characterized as being as “exciting as a game of checkers . . . played by mail.”⁷⁶ For more than a century the contests were, perhaps blissfully, lacking in flourish.⁷⁷ Campaigning was minimal and incum-

68. Geyh, *supra* note 28, at 88.

69. KOWAL, *supra* note 13, at 6.

70. SHELDON & MAULE, *supra* note 23, at 7.

71. *Id.*

72. See Assisted Appointment, BALLOTPEDIA, [https://ballotpedia.org/Assisted_appointment_\(judicial_selection\)](https://ballotpedia.org/Assisted_appointment_(judicial_selection)) (last visited Jan. 14, 2017) (providing a complete run-down of each states’ judicial selection methods).

73. KOWAL, *supra* note 13, at 7; National Center of State Courts, *Judicial Selection in the States: Rhode Island*, NCSC, http://www.judicialselection.us/judicial_selection/index.cfm?state=RI (last visited Jan. 14, 2017) (“The move to merit selection was prompted by a series of scandals in the late 1980s and early 1990s involving supreme court justices. During this time, two justices resigned under threat of impeachment, and one superior court judge pleaded guilty to soliciting bribes. Additionally, one Rhode Island governor also pleaded guilty to soliciting bribes and was sent to prison. A broad-based coalition known as Right Now! led the reform effort.”).

74. KOWAL, *supra* note 13, at 7 (noting that the states that have rejected merit selection ballots are Florida, Louisiana, Michigan, Ohio, South Dakota, and Nevada).

75. *Id.*

76. Schotland, *supra* note 13, at 1079 (quoting William C. Bayne, *Lynchard’s Candidacy, Ads Putting Spice into Justice Race*, 29 COM. APPEAL, Oct. 29, 2000, at DS1).

77. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266 (2008).

bents usually won these “sleepy” affairs.⁷⁸ Judicial candidates were prohibited via codes of conduct from “announcing their views on controversial topics, criticizing other candidates, or directly soliciting campaign contributions.”⁷⁹ Additionally, the “non-partisan” innovation of Ohio in 1912 prevented candidates in some states from being identified on the ballot with a political party.⁸⁰ Unsurprisingly, constituent apathy was high, resulting in low voter turnouts and substantial roll-off.⁸¹ Further, the constituents who voted did so based on “factors such as the candidates’ ethnicity, gender, or name familiarity.”⁸² David Pozen describes this era of judicial elections as “democratic affairs only in the most superficial, [and] formalistic sense.”⁸³

So how did these “low-key affairs, conducted with civility and dignity”⁸⁴ turn into million dollar races?⁸⁵ The answer is not easily sourced in one pivotal historical event, but rather, is understood to be the product of gradual changes over time or in other words, “a slow-moving pendulum.”⁸⁶ The late, inimitable Roy Schotland identified an early push of the pendulum in a 1978 Los Angeles election.⁸⁷ After deputy district attorneys advertised they would offer support to any person who would run against an unopposed trial judge, numerous candidates entered the fray.⁸⁸ The state of Texas was a vanguard of the modern era of judicial campaigns, with races for that state’s supreme court in the 1980s involving unprecedented amounts of campaign spending.⁸⁹ The pace of change soon accelerated. Whereas in 1988, 33% of nonpartisan elections and 74% of partisan elections were contested, by the year 2000, these numbers increased to 75% and

78. *Id.* (quoting BRIAN Z. TAMANAH, *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.”)).

79. Pozen, *supra* note 77, at 266–67.

80. *Id.* at 267.

81. Baum, *supra* note 64, at 19.

82. Pozen, *supra* note 77, at 267.

83. *Id.*

84. Schotland, *supra* note 13, at 1079 (quoting Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995)).

85. JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTION 2000-2009: DECADE OF CHANGE* 5 (2010), <http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf>.

86. David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOY. L.A. L. REV. 1369, 1373 (2001).

87. Schotland, *supra* note 13, at 513.

88. Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1405 (2003).

89. *Id.*

95% respectively.⁹⁰ Consequently, the easy path to reelection that incumbents historically enjoyed proved more challenging. The loss rate of incumbents in nonpartisan elections nearly doubled between 1980 and 2000 from 4.3% to 8%, and the loss rate in partisan elections from the same period jumped from 26.3% to 45.5%.⁹¹

These trends were also accompanied by surges in campaign spending by both candidates and interest groups.⁹² Campaign fundraising more than doubled over the course of two decades.⁹³ From 1990–1999 to 2000–2009, fundraising rose from \$83.3 million to \$206.9 million.⁹⁴ Also, during 2000–2009, an overwhelming majority of states with contestable supreme court elections (twenty of twenty-two), experienced their most expensive contests ever.⁹⁵

With the increase in the temperature of judicial campaigns, there was a corresponding increase in litigation involving judicial elections. In 2002, the Supreme Court in *Republican Party of Minnesota v. White*, ruled on the First Amendment rights of judicial candidates.⁹⁶ The Court held in a 5-4 decision that Minnesota's announce clause, forbidding candidates from announcing their views on disputed legal and political issues, was unconstitutional.⁹⁷ In 2009, the Court made another major decision affecting judicial elections, *Caperton v. A.T. Massey Coal*.⁹⁸ Grounding its decision in the Due Process Clause of the Fourteenth Amendment, the Court held that a judge is required to recuse himself not only when actual bias has been demonstrated or when the judge has an economic interest in the outcome of the case, but also where "extreme facts" create a "probability of actual bias."⁹⁹ Most recently, in *Williams-Yulee v. Florida Bar*, the Court held that the First Amendment did not prohibit States from barring judges and judicial candidates from personally soliciting funds for their election

90. Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1602 (2009).

91. *Id.* at 1602–03.

92. SAMPLE ET AL., *supra* note 85, at 1.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *see also* James Sample, *Lawyer, Candidate, Beneficiary, and Judge? Role Differentiation in Elected Judiciaries*, 2011 U. CHI. LEGAL F. 279 (2011).

97. *White*, 536 U.S. at 788.

98. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *see also* Sample, *supra* note 97.

99. *Caperton*, 556 U.S. at 886–87. For a more in-depth discussion of *Caperton*, see *infra* Part IV.A.

campaigns, provided the restriction on speech was narrowly tailored to serve a compelling interest.¹⁰⁰

B. *In Praise of Judicial Elections*

Support for judicial elections stems from notions of “popular sovereignty and collective self-determination.”¹⁰¹ Elective proponents argue that, as judges play a critical role in the democratic system, they should be chosen by those who must submit to their authority.¹⁰² They argue, much like those early critics of the clubby nature of appointments, that because judges are responsible for applying and interpreting rules of human behavior, judicial selection ought to entail heightened sensitivity and responsiveness to the “political, economic, social, moral, and ethical views held by a majority of citizens.”¹⁰³ However, illustrative evidence for elective judge’s closeness to the people is, at best, flimsy and conclusory. Claims of candidates’ meaningful interactions with their constituents include examples of candidates riding with law enforcement officers, making rounds with social workers and doctors, and visiting schools and factories.¹⁰⁴ Wisconsin Justice, and previously its Chief Justice, Shirley Abrahamson describes judicial elections as an “educational experience for both the judges and the electorate.”¹⁰⁵ Justice Abrahamson, like many ardent supporters of elections, believes that the requisite degree of accountability needed in the judiciary is achieved only when the judiciary is selected by the people.¹⁰⁶

Regardless of the selection method by which a judge comes to power, she cannot entirely set aside personal beliefs and values when applying legal principles to a particular set of facts.¹⁰⁷ As such, elective proponents see elections as a means through which judges can be held accountable for decisions that “offend a substantial portion of the citizenry.”¹⁰⁸

100. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1673 (2015).

101. *Pozen*, *supra* note 77, at 273.

102. *Id.*

103. Phillip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SMU L. REV. 31, 34 (1986).

104. Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV., 973, 977 (2001).

105. *Id.*; *see also* Geyh, *supra* note 3, at 336–37 (noting that judicial elections increase public awareness and involvement in the justice system because a more competitive race attracts more money which creates more advertising, piques voter interest and ultimately decreasing voter roll-off in the polls).

106. *See* Abrahamson, *supra* note 104, at 973; *see also* Dubois, *supra* note 103, at 34.

107. Dubois, *supra* note 103, at 38.

108. *Id.*; *see also* Geyh, *supra* note 3, at 333 (pointing out that judicial elections work as they were intended because social scientists have revealed that when faced with an upcoming elec-

C. *Efforts to Move Away From Judicial Elections*

Despite withering critiques and near relentless pressure on the part of appointment proponents, judicial elections have proven to be remarkably enduring. Despite New York's adoption of an elective system in 1846,¹⁰⁹ the transition to judicial elections was not effortless. In 1867, one convention after instituting elections, there was still great debate over whether to retain the electoral system or return to appointments.¹¹⁰ In fact, the delegate vote was so close, and the decision so difficult, that the ultimate decision was submitted to the people.¹¹¹ Consequently, the general elections of 1873 asked the people to decide the fate of their judicial selection system, and the voters, by a slim margin, responded in favor of elections.¹¹²

In 1906, judicial elections received another blow when they were addressed in a famous speech by Roscoe Pound, which was aimed at the dissatisfaction with the administration of justice.¹¹³ Judicial elections persisted, although another appeal came from President Taft in 1913 to do away with judicial elections.¹¹⁴ Yet, while he called elections "disgraceful exhibitions of men,"¹¹⁵ Taft was well aware of the uphill battle he was fighting, and believed his appeal may be "hopeless."¹¹⁶ Perhaps, at least on this score, Taft's judgment was impeccable. Thirty-nine states still elect trial or appellate judges, twenty-two states choose supreme court judges by non-partisan or partisan elec-

tion, judges rule differently and consider the policy preferences of his electorate in higher esteem than his own personal "idiosyncratic ideological biases").

109. Russell D. Niles, *The Popular Election of Judges in Historical Perspective*, 21 RECORD OF N.Y.C.B.A. 523, 527-28 (1966) ("The nationwide effect of New York's decision to elect judges is undeniable. Put somewhat extravagantly, Mississippi may have been the first to cast the chances of judicial selection upon the dirty waves of party politics, [but] it was the New York Constitutional Convention which first imparted respectability to the seductive innovation . . .").

110. *Id.* at 529.

111. *Id.*

112. The majority for judicial elections coming in at 200,000 and the losing votes of 115,337 for appointing Court of Appeals and Supreme Court judges, and 110,725 for appointing county and city court judges. *Id.* at 535 n.46.

113. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* 14 <https://law.unl.edu/RoscoePound.pdf> ("Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench.").

114. William H. Taft, *The Selection and Tenure of Judges*, 36 A.B.A. REP. 418-19 (1913).

115. *Id.* at 423.

116. *Id.* at 435 ("In the present attitude of many of the electorate toward the courts it is perhaps hopeless to expect the states, in which judges are elected for short terms, to return to the appointment of judges for life. But it is not in vain to urge its advantages.").

tion, sixteen states employ merit selection, and twelve states appoint supreme court justices.¹¹⁷

Across the country, numerous state and national efforts, varying widely in their levels of resources and direction, have a singular focus: to advocate for abandoning judicial elections. To put it bluntly, hamsters on the wheel have made more progress. The Illinois State Bar Association advocated for nearly two decades to place merit selection on a statewide ballot—they accomplished this goal in 1970.¹¹⁸ Although a majority of voters in isolated counties voted against judicial elections, elections still triumphed statewide by 146,000 votes.¹¹⁹ This result seemingly halted the merit selection movement.¹²⁰ In Louisiana, there has been at least one proposed constitutional amendment calling for merit selection in all but one legislative session since 1978.¹²¹ Every proposal has proven to be unsuccessful.¹²² In North Carolina, the general assembly has considered bills to alter its method of judicial selection in nearly every legislative session since 1971.¹²³ Most of these bills call for merit selection, and despite prominent and vocal support from judges, governors, various organizations, and the senate, they ultimately fail on the house floor. In Ohio, a 1987 ballot initiative was introduced to adopt merit selection for appellate judges.¹²⁴ The initiative lost in eighty of Ohio's eighty-eight counties. In 2010, multiple bills were introduced in Minnesota that would have replaced judicial elections, and while the proposals advanced in senate committees, they were stalled in committee in the house.¹²⁵ In Nevada, proposed constitutional amendments replacing judicial elections were placed before the voters in 1972, 1988, 1995, and 2010.¹²⁶ Each time, these amendments were rejected by the voters, most notably in 2010 where the margin was 58-42 against the amendment.¹²⁷ The 2010 defeat was especially stinging given that, among many other luminaries, Justice Sandra Day O'Connor was among those who devoted

117. Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 932 (2016).

118. *History of Reform Efforts: Unsuccessful Reform Efforts*, NAT'L CTR. FOR STATE CTS., http://www.judicialselection.us/judicial_selection/reform_efforts/failed_reform_efforts.cfm?state= (last visited Nov. 1, 2017).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *History of Reform Efforts*, *supra* note 118.

124. *Id.*

125. *Id.*

126. *Id.*

127. James Sample, *Retention Elections 2.010*, 46 U.S.F. L. REV. 383, 424 (2011).

extensive time to the anti-elections effort.¹²⁸ In 1992, the Florida Senate approved a bill calling for merit selection, but the House did not act. In 2000, a proposal was submitted to voters calling for merit selection, but the measure was overwhelmingly defeated—losing in every county in the state.¹²⁹

If anything, while stasis is the norm, election proponents have had more success than election opponents in generating traction. For example, in Kansas, individual counties that had merit selection have succeeded in abandoning appointments and returning to partisan elections.¹³⁰ In 2004, in the very state of the eponymous “Missouri Plan,” fifty-seven Republicans proposed a constitutional amendment to replace merit selection with judicial elections.¹³¹ All of which is to say, judicial elections are not going away, and may actually be on the rise again.

D. Critique of the Judicial Elections Critics

In the words of Lee Epstein, “the assaulters are under assault.”¹³² This observation of the climate surrounding the judicial selection debate refers to those individuals who analyze and critique the arguments made by critics of judicial elections.¹³³ This approach does not necessarily argue in favor of judicial elections, but rather asserts that the critics of judicial elections undervalue and/or inaccurately assess elections.¹³⁴ These critics of the elections critics include political

128. *Id.*; Bill Mears, *Retired Justice at Center of Nevada Ballot Initiative Controversy*, CNN (Oct. 27, 2010), <http://www.cnn.com/2010/POLITICS/10/27/oconnor.judicial.election/> (detailing the level of involvement O'Connor achieved in the Nevada ballot from being heard on automated telephone calls urging voters to support Nevada's Proposition One that would end judicial elections to being asked to resign from her “senior status” position in the federal judiciary due to her “calculated decision to be a political leader”); Sandra Day O'Connor, *Take Justice Off the Ballot*, N.Y. TIMES (May 22, 2010), <http://www.nytimes.com/2010/05/23/opinion/23oconnor.html> (voicing her opposition to judicial elections and cheering efforts by Nevada to create impartial courts, O'Connor states that “the last thing [a litigant] wants to worry about is whether a judge is more accountable to a campaign contributor or an ideological group than to the law”).

129. *History of Reform Efforts*, *supra* note 118.

130. *Id.*

131. *Id.*

132. Lee Epstein, *Electoral Benefits: The Assault on the Assaulters of Judicial Elections*, 96 JUDICATURE 218, 219 (2013).

133. *Id.*

134. James L. Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (2012), <https://www.princeton.edu/csdp/events/Gibson10112012/Gibson10112012.pdf> (“Most earlier research (and speculation) on the damaging consequences of judicial campaigns for legitimacy fails to recognize the inherent boost provided to courts by elections.”).

scientists focused on attempting to discredit the underlying assumptions relied upon by judicial election naysayers.¹³⁵

Most notable in this line of debate are studies compiled by James Gibson and Melinda Gann Hall.¹³⁶ Gibson styles his study as responsive to those who decry the “impact of campaign activity on the perceived impartiality and hence legitimacy of elected state courts.”¹³⁷ Asserting that critiques of judicial elections have little foundation in empirical data,¹³⁸ Gibson contends that the studies critical of judicial elections are “too fragmentary,” and based on “too little rigorous research on campaign effects to draw credible conclusions.”¹³⁹ Accordingly, Gibson advances what he describes as his “Expectancy Theory.”¹⁴⁰ This theory is premised on the assertion that “citizens most likely hold views of what constitutes appropriate campaign activity.”¹⁴¹ He contends that in the aftermath of decisions such as *Republican Party of Minnesota v. White*, which afforded judges “greater leeway” in their campaign activities, the public’s perception of judicial campaigns is changing.¹⁴² Due to these changing perceptions, he believes “it is crucial to map the expectations people hold and to determine whether those expectations are connected to the willingness to extend legitimacy to judicial institutions.”¹⁴³

At least through the lens of his own self-assessment, Gibson contends that he more properly values the net positive and negative effects of elections on court legitimacy, while elections critics merely consider “whether a particular ad campaign is churlish or even reprehensible.”¹⁴⁴ Drawing on his study of 2006 supreme court contests in Kentucky, Gibson contends that the electorate expects a “politicized judiciary and . . . is not off-put by politicized campaigns”; rather, elections provide a “significant boost to the legitimacy of courts.”¹⁴⁵

135. Melinda Gann Hall, *Partisanship, Interest Groups, and Attack Advertising in the Post-White Era, or Why Nonpartisan Judicial Elections Really Do Stink*, 31 J.L. & POL. 429 (2016).

136. See Gibson, *supra* note 135; MELINDA GANN HALL, *ATTACKING JUDGES HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* (2014).

137. Gibson, *supra* note 134, at 11.

138. *Id.*

139. *Id.* at 8.

140. *Id.*

141. *Id.*

142. Gibson, *supra* note 134, at 9.

143. *Id.* at 10.

144. *Id.* at 32.

145. *Id.* at 31–32. To add another layer to this already layered approach, since Gibson published his study, he has been critiquing the critics of his critique on the critics. James L. Gibson, *Electing Judges: Future Research and the Normative Debate About Judicial Elections*, 96 JUDICATURE 223 (2013). He faced criticism that his study may have found an increase in institutional support not because of the judicial election but due to the “administration of the study.” *Id.* at

This layered debate also addresses the issue of campaign spending. The assertions attacked are ones commonly used by judicial elections critics—too much money is spent in elections, money buys unequal influence and gives some individuals a greater voice than others, or campaigns with exorbitant price tags undermine judicial independence.¹⁴⁶ Like Gibson, Chris Bonneau, disputes the deleterious effects of campaign spending and contends that spending enhances electoral competition and electoral accountability.¹⁴⁷ Bonneau believes the more electoral competition; “the more congruent the behavior of an elected official will be with the electorate.”¹⁴⁸ Though Bonneau looked specifically at the effect of campaign spending on incumbent performance, and Hall took a broader approach to examine the general conditions that affect voters, both come to a similar conclusion: campaign spending is not an ill, but rather “expensive campaigns can strengthen the critical linkage between citizens and the bench and enhance the quality of democracy.”¹⁴⁹

Bonneau contends that his findings show the “antielection reformers [that] the outcomes of these elections are neither random nor unpredictable” but rather the electorate’s choice between incumbent and challenger or even between two challengers can turn to a notable degree on the amount spent on their campaign.¹⁵⁰ Thus, campaign

223. Though Gibson admitted, “with every non-experimental study of change comes the possibility that a multitude of factors account for the change,” he was very doubtful that increased attention on the election would increase the court’s support. *Id.* at 224. Another critique of his study was that the Kentucky elections, the very elections which he studied, were not in fact very “churlish.” *Id.* To this, Gibson answered by saying his study relied on the views of the respondents and what they considered to be churlish. He stated that while his critics are right by pointing out that the respondents did not believe the election to be “extraordinarily churlish,” the evaluations were varied and respondents were found at both ends of the scale. *Id.* In all, Gibson admits that his study aiming to measure the legitimacy of courts in the eyes of constituents is less than perfect and believes its shortcomings should not be simply pointed out, but should serve as a catalyst to “develop more valid and reliable measures of institutional attitudes.” *Id.* at 226.

146. See Chris Bonneau, *The Effects of Campaign Spending in State Supreme Court Elections*, 60 POL. RES. Q. 489, 489–90 (2007); Melinda Gann Hall, *Mobilizing Interest: The Effect of Money on Citizen Participation in the State Supreme Court Elections*, 52 AM. J. POL. SCI. 457, 457–458 (2008); Matthew Streb & Brian Frederick, *When Money Cannot Encourage Participation: Campaign Spending and Rolloff in Low Visibility Judicial Elections*, 33 POL. BEHAV. 665, 665 (2011).

147. Bonneau, *supra* note 146, at 490, 495 (asserting that the rhetoric usually heard about excessive increases in campaign spending was also unsupported by his findings which covered a 14-year period, as spending only went from \$351,000 in 1990 to more than \$630,000 in 2004).

148. *Id.* at 491; *see also* Hall, *supra* note 146, at 458 (specifically Hall wished to show the increase in citizen participation in the recruitment and retention of judges).

149. Hall, *supra* note 146, at 457; *see also* Bonneau, *supra* note 146, at 496–97.

150. Bonneau, *supra* note 146, at 497.

spending assists the electorate in making a more steadfast decision.¹⁵¹ Hall supports this view and asserts that those on the opposite side of the election debate cannot deny that campaign spending and vigorous competition are key components in understanding voter participation because they reduce information costs for voters and increase likelihood of voting.¹⁵² She finds that regardless of whether one looks at the overall spending in an election or spending per capita, “money means voters in the supreme court elections.”¹⁵³

IV. APPOINTMENTS

A. *The Counter-Majoritarian Argument as the Touchstone Favoring Appointments*

The most fundamental of all arguments favoring an appointive system for judges is the counter-majoritarian role of the courts.¹⁵⁴ The gravamen of the theory is that a judiciary independent of majoritarian pressures is emboldened to uphold rights and rule justly even in instances in which doing so means invalidating the popular will or majoritarian perspective.¹⁵⁵ The underlying predicate of the theory is that “contemporary constitutionalism entails a commitment to the protection of individual and group rights from political majorities.”¹⁵⁶

Proponents of appointments also point to the *counter-counter-majoritarian* role of elections, noting that “[t]he majoritarian difficulty asks not how unelected/unaccountable judges can be justified in a regime committed to democracy, but rather how elected/accountable judges can be justified in a regime committed to constitutionalism.”¹⁵⁷ In *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, Steven Croley recognizes the tension that exists between consti-

151. *Id.* at 496–97.

152. Hall, *supra* note 146, at 459.

153. *Id.* at 468; *see also* Melinda Hall, *Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives*, 69 J. POL. 1147, 1157 (2007) (finding that partisan elections may have been abandoned too hastily if solely based on citizen participation because they increase voter willingness to express their preferences in the supreme court elections, and reformers underestimated this influence); Melinda Gann Hall & Chris Bonneau, *Attack Advertising, the “White” Decision, and Voter Participation in State Supreme Court Elections*, 66 POL. RES. Q. 115, 123 (2013) (urging debaters to think more keenly about underlying “facts” because their findings show that the alarm circulated regarding attack ads was unnecessary as the findings did not show any harmful effects of attack ads but rather they are a “mobilizing force” in supreme court elections).

154. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986).

155. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 693 (1995).

156. *Id.* at 699.

157. *Id.* at 694.

tutionalism (which is committed to the rule of law and individual rights), and democracy (which is committed to rule by the majority).¹⁵⁸ Croley critiques the majoritarian perspective and supporters of judicial elections on two interconnected yet distinct grounds: the risk that an elected judiciary poses to the “unpopular minority” and the compromising impact that an elective system may have on the “impartial administration of ‘day-to-day’ justice.”¹⁵⁹ Croley asserts that unscrupulous judges seeking reelection have an incentive to compromise the rights of subsets of their judicial electorate—namely the “unpopular, unorganized, or otherwise outvoted.”¹⁶⁰ Compounding that systemic failure, scrupulous judges who refuse to bend to the will of the masses would be forced off the bench, further eroding the quality of justice.¹⁶¹

While a discussion of the merits of the underlying controversy in the “Stanford Rape Case” is far beyond the scope of this article, a consideration of aspects pertaining to the judicial accountability-independence tension offers a new illustration of Croley’s concerns.¹⁶² Brock Turner, a student-athlete at Stanford, was convicted of three felony counts of sexual assault of an unconscious victim.¹⁶³ Judge Aaron Persky, who was appointed to the Santa Clara County Superior Court by Governor Gray Davis in 2003, faced massive backlash after only sentencing Turner to six months in prison.¹⁶⁴ Soon after the lenient

158. *Id.* at 701–06.

159. *Id.* at 726.

160. Croley, *supra* note 155, at 727.

161. *Id.*; see Niraj Chockshi, *Outrage Follows 60-Day Sentence in Incest Case Against Father of Girl*, 12, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/us/montana-judge-criticized-for-60-day-sentence-for-felony-incest.html>; *Impeach Judge John McKeon*, CHANGE, <https://www.change.org/p/impeach-judge-john-mckeeon> (last visited Feb. 2, 2017); Emanuela Grinberg & Dan Simon, *Brock Turner Judge to No Longer Hear Criminal Cases*, CNN (Aug. 25, 2016), <http://www.cnn.com/2016/08/25/us/brock-turner-aaron-persky-judge-reassigned/>.

162. See Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (Jun. 6, 2016), <https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html?action=click&contentCollection=U.S.&module=relatedCoverage®ion=EndOfArticle&pgtype=article>.

163. *Id.*

164. *Id.* Mr. Turner was also sentenced to three years of probation and must file as a sex offender. In relation to the case, Judge Persky said, “A prison sentence would have a severe impact on him. I think he will not be a danger to others.” *Id.*

Prosecutors sought six years for Turner, while the defense sought a four-month sentence. Probation officials suggested six months. Persky—citing Turner’s age, the fact that he was drunk and thus bore ‘less moral culpability,’ and the lack of ‘significant’ prior legal problems—issued a six-month sentence, which includes three years of probation.

John Bacon, *Judge Under Fire in Stanford Rape Case Gets New Term*, USA TODAY (June 7, 2016), <http://www.usatoday.com/story/news/nation/2016/06/07/judge-stanford-sex-assault-case-draws-outrage/85543204/>.

sentence, recall efforts against the judge were announced after organizers created an online petition, which garnered over 240,000 supporters in a matter of days.¹⁶⁵ The public backlash substantially affected Judge Persky's ability to perform on the bench. In August, Judge Persky recused himself in a child pornography case,¹⁶⁶ and requested to no longer preside over criminal cases.¹⁶⁷ Although efforts to recall Judge Persky from the bench ultimately failed, and despite the California Commission on Judicial Performance clearing him of any wrongdoing, Judge Persky, whose term expires in 2022, has bleak prospects of retaining his seat.¹⁶⁸

Croley's second primary concern with the majoritarian perspective pertains to the administration of day-to-day justice, and how electoral sway may compromise that duty.¹⁶⁹ Croley contends that judicial elections may cause judges to develop a manic sense of hyper awareness that can be dangerous and disruptive to the fair administration of justice. For example, Croley stated:

[A] judge [who is] given discretion by law to sentence convicted criminals by considering such factors as the number and type of past convictions, the severity of the way the particular offense was committed, the character of the convicted, and so on, may exercise that discretion not with reference to those factors alone, but instead to demonstrate her tough posture toward crime and thus to win favor from the majority whose continued favor is a necessary condition for reelection.¹⁷⁰

165. See *Remove Judge Aaron Persky from the Bench for Decision in Brock Turner Rape Case*, CHANGE.ORG, <https://www.change.org/p/california-state-house-impeach-judge-aaron-persky> (last visited Nov. 28, 2017) (as of November 28, 2017, the petition had 1,325,322 supporters).

166. Dan Simon, *Brock Turner Judge Recuses Himself in Child Porn Case*, CNN (Aug. 23, 2016), <http://www.cnn.com/2016/08/23/us/judge-aaron-persky-recuses-brock-turner/> (explaining that the Judge cited media coverage as disruptive and the cause for a "personal family situation" that might affect his ability to be impartial).

167. See Grinberg & Simon, *supra* note 161 ("A source familiar with the judge's thinking said Persky wanted to step aside in part because he didn't want cases before him to receive unfair and unwarranted national attention.").

168. Tracey Kaplan, *Recall Judge Persky Leader Takes Issue with Judicial Commission Finding*, MERCURY NEWS (Jan. 6, 2017), <http://www.mercurynews.com/2017/01/06/recall-judge-persky-leader-takes-issue-with-judicial-commission-finding/> ("Responding in August to complaints from judges and the public about the commission's lack of transparency, the state Legislature ordered an audit of the agency for the first time in the commission's 55-year history."); see also Veronica Rocha, *Judicial Panel Clears California Judge Who Gave Lenient Sentence in Stanford Sexual Assault*, L.A. TIMES (Dec. 19, 2016), <http://www.latimes.com/local/lanow/la-me-ln-judge-aaron-persky-no-judicial-misconduct-20161219-story.html>; Bacon, *supra* note 164 (Judge Persky avoided facing voters because he drew no challengers for his position, however the race took place immediately after the decision, at a point when public outrage and media coverage were at their inception).

169. See Croley, *supra* note 155, at 728.

170. *Id.*

In sentencing Turner, Judge Persky used his discretion to consider factors such as moral culpability, the defendant's state of mind during the assault, previous criminal convictions, the impact of handing down a lengthy sentence, and the defendant's account of the events.¹⁷¹ From a legal and judicial conduct perspective, as well as from a judicial independence perspective, the proper question is not whether Persky's determinations in his multi-factor analysis were correct in this particular case, but rather, whether making those valuation determinations was proper *ex ante*. With the question thus framed, Persky was cleared by an independent commission, which explained, simply: "[T]he commission has concluded that there is not clear and convincing evidence of bias, abuse of authority, or other basis to conclude that Judge Persky engaged in judicial misconduct warranting discipline."¹⁷² However, a lack of discipline and a lack of impact are not synonymous:

Even though the panel won't discipline Judge Persky, his career has still been upended by the decision and the ensuing backlash. Would-be jurors in other trials have refused to work with him, prosecutors had him removed from another sexual assault case, and an online petition calling for his impeachment had reached 1.3 million signatures as of [January 6, 2016].¹⁷³

B. Critiques of Elections in Support of Appointments

The harmful effects of judicial elections are nowhere more evident than in the criminal justice context. It is here where the majoritarian will and corruptive forces meet to trample on individual rights. Judges find themselves most vulnerable when they are characterized as soft on crime "[g]iven the political unpopularity of criminal defendants as a group and the unique salience of crime in the public perception of judicial behavior."¹⁷⁴ Though these vulnerabilities have always existed, to a certain extent within judicial election systems, modern trends in light of *Citizens United* are leading to disastrous and dangerous outcomes for criminal defendants.¹⁷⁵

171. Liam Stack, *Judge Aaron Persky Under Fire for Sentencing in Stanford Rape Case*, N.Y. TIMES (June 7, 2017), <https://www.nytimes.com/2016/06/08/us/judge-in-stanford-rape-case-is-being-threatened-who-is-aaron-persky.html>.

172. Rocha, *supra* note 168; Bacon, *supra* note 164.

173. Daniel Victor, *Judge in Stanford Sexual Assault Case Is Cleared of Misconduct*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/2016/12/19/us/aaron-persky-stanford-rape-case.html>.

174. Pozen, *supra* note 77, at 287.

175. See, Joanna Shepherd & Michael S. Kang, *Citizens United, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases*, SKEWED JUSTICE (2014), <http://skewedjustice.org/> (finding that "Justices in states whose bans on corporate and union spending

Citizens United opened the floodgates for spending in state court races, thus allowing special interest groups to spend exorbitant amounts of money for ads, which are “by far the biggest driver of campaign costs.”¹⁷⁶ Concerns over the content and impact of attack ads against judges and candidates are compounded by the increasingly concentrated, often opaque sources of the funding that pays for those ads. Empirical evidence shows that these ads are becoming increasingly controlling in judicial decision-making and are contributing to the rise in hostility of judges towards criminal defendants.¹⁷⁷ This hostility stems from the fact that most of these ads target a judge’s criminal decisions¹⁷⁸ and vilify judges for casting votes in favor of criminal defendants, thus depicting them as “soft on crime.”¹⁷⁹ Alternatively, threats of future attacks can bias sitting judges into voting against criminal defendants in an effort to preempt future ads.¹⁸⁰ This is, of course, problematic because judges are charged with a countermajoritarian function. Thus, they are expected not to react the same way to the majoritarian will or reelection prospects that other elected officials do.¹⁸¹

Empirical evidence now shows that “as the volume of campaigning in a state’s supreme court elections [increased], judicial decisions appeared to be less sympathetic to criminal defendants by a statistically significant margin even controlling for ideology, party, and other predictors of judicial decision-making.”¹⁸² This is because the only

on elections were struck down by *Citizens United* were less likely to vote in favor of criminal defendants than they were before the decision.”).

176. Sample, *supra* note 127, at 392.

177. Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 *MICH. L. REV.* 929, 930 (2016).

178. See Shepherd & Kang, *supra* note 175 (finding that as the amount of campaign advertising in supreme court races increased, the less likely justices were to vote in favor of the criminal defendants); see also Kang & Shepherd, *supra* note 177, at 943.

179. See Kang & Shepherd, *supra* note 177, at 943; 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 Pennsylvania trial judges impose longer sentences when retention elections were imminent).

180. See Kang & Shepherd, *supra* note 177, at 931; Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 *Q.J. POL. SCI.* 107, 128–31 (2007) (finding that judges were more punitive in partisan elections than in merit election systems, often imposing sentences of a half year more on average than retention election judges who were approaching reelection cycles); Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 *REV. ECON. & STAT.* 741, 748 (2013) (finding that judges become more punitive as elections approach, and less punitive as they begin their new terms).

181. See Kang & Shepherd, *supra* note 177, at 931; see also *Chisom v. Roemer*, 501 U.S. 380, 400 (1991) (stating “public opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment”).

182. Kang & Shepherd, *supra* note 177, at 941–42.

way a judge can insulate herself from the threat of being perceived as “soft on crime” is by being more punitive towards criminal defendants, especially as election day draws nearer.¹⁸³

V. INCREMENTALISM

While the Platonic Form of judicial selection is an interesting, ethereal abstraction, the reality is that there is no “perfect” or even “good” method of judicial selection.¹⁸⁴ Any judgment with respect to the Forms is necessarily sourced in myriad, subjective, debatable valuations of the Forms’ component parts. Further, it is impossible to engage in a comparative analysis divorced of normative perspectives. Although a focus on incremental reforms to improve both elective and appointive systems may be incorrectly perceived as less ambitious, a focus on improving extant judicial selection systems is far more realistic than calls for eliminating or transitioning from a particular system altogether.¹⁸⁵ Incremental measures have seen varying degrees of success¹⁸⁶ and are more likely to gain traction, whereas efforts to transition from one system to another, or even conjure entirely new systems, have been largely unsuccessful. As Roy Schotland aptly expressed, “given the prevalence of judicial elections, and the high likelihood that they will stay with us, incrementalism is the *only* feasible or—at the very least—the most likely way to protect the hard-to-secure balance between judicial independence and judicial accountability.”¹⁸⁷ No matter how a state selects its judges, threats to judicial independence and accountability, as well as diminished public trust, are prevalent.¹⁸⁸ Elective systems must be improved. Appointive systems must be improved.

Whether rich or poor, educated or uneducated, or defined by any number of other characteristics, the litigants in the courtroom appear not before a system of judicial selection, but rather, a judge. It is in such mundane, pedestrian, and utterly generic moments that grand concepts like due process are most critically tested. Devoting more resources to the Forms debate does nothing to improve the administration, perception, and caliber of justice in that mundane moment. Moreover, given zero sum dynamics, it is almost indisputable—though almost never acknowledged—that the resources devoted to the Forms

183. *Id.*

184. *See* Geyh, *supra* note 4, at 1263.

185. Kowal, *supra* note 13, at 14.

186. *Id.* at 15.

187. Schotland, *supra* note 12, at 1103.

188. Kowal, *supra* note 13, at 14.

debate, come at the expense of measures that could marginally improve process, justice, and the perceptions of the same. Endeavors focused instead on incremental measures make “bad systems” better, and while such endeavors are not guaranteed to succeed even if adopted, the system should benefit from an increased devotion of political, academic, and advocacy energies.¹⁸⁹

A. *Strengthening Recusal Procedures*

*Caperton v. A.T. Massey Coal Co.*¹⁹⁰ is demonstrative of two concerns that plague judicial elections: the influence of money¹⁹¹ and flawed recusal procedures. However, *Caperton*'s greatest impact will come in the form of “spurring greater vigilance in recusal, both systematically and among individual jurists.”¹⁹² In *Caperton*, a \$50 million jury verdict was entered against Massey Coal.¹⁹³ Massey Coal's CEO, Don Blankenship, while appealing the verdict, chose to support the candidacy of Brent Benjamin to the very same court that would hear the appeal.¹⁹⁴ Blankenship spent over \$3 million in support of Benjamin's campaign, which amounted to more money than was spent by all of Benjamin's other supporters combined.¹⁹⁵ Benjamin defeated the incumbent and was elected to the court that would hear Blankenship's appeal. Benjamin refused to recuse,¹⁹⁶ and ultimately cast the deciding vote to overturn the verdict against Blankenship in a 3-2 decision.¹⁹⁷ *Caperton* appealed the decision to the United States Supreme Court, arguing Benjamin's failure to recuse violated due process.¹⁹⁸ The Supreme Court, in a 5-4 decision, held that Justice Benjamin's failure to recuse violated this constitutional guarantee.¹⁹⁹

189. Geyh, *supra* note 4, at 1279.

190. 556 U.S. 868 (2009).

191. Of note, is that the *Caperton* decision pre-dated *Citizens United*. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010); *Caperton*, 556 U.S. 868.

192. Sample, *supra* note 10, at 293–94.

193. *Caperton*, 556 U.S. at 872.

194. *Id.* at 873.

195. *Id.*

196. Justice Benjamin denied the motion because he found there was “no objective information . . . to show that [he] has a bias for or against any litigant[,] . . . that [he] has prejudged the matters which comprise this litigation, or that [he] will be anything but fair and impartial.” *Id.* at 874.

197. *Id.*

198. *Caperton*, 556 U.S. at 876.

199. *Id.* at 868. *Caperton* is demonstrative of the intersection of monetary influence and notions of due process. Although in elections, where big spenders are often favored to “win” before the courts, the distinction between spenders—whether big or small—and non-spenders, should be eliminated. It is at the heart of due process to ensure a fair tribunal is afforded to all litigants, not just the ones with deep pockets. But when states inadequately address these concerns, recusal may be the only remedy available to ensure due process. See James Sample, *De-*

In the words of the Court, “[i]t is axiomatic that a ‘fair trial in a fair tribunal is a basic requirement of due process.’”²⁰⁰ This basic requirement was jeopardized by the “serious risk of actual bias—based on objective and reasonable perception.”²⁰¹ The Court found this “serious risk” existed “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”²⁰² In the context of an elected judiciary, there is more than one constitutional interest stake: and maintaining a balance between due process and First Amendment interests is critically important.²⁰³ When that balance is skewed, the perception that justice is for sale severely undermines faith in the rule of law.²⁰⁴

In state courts, where 100 million cases are brought before 30,000 judges each year,²⁰⁵ most judges whose impartiality is being questioned “[are] the initial, and in some cases the sole or final, arbiter[s] of whether [they are] sufficiently impartial to continue presiding over the case.”²⁰⁶ A chief problem that arises from self-disqualification stems from what Melinda Marbes describes as the “bias blind spot.”²⁰⁷ Taking more of a psychological approach to examining recusal procedures, Marbes concluded that the bias blind spot often causes judges to be unaware of how their own objectivity concerning their impartiality is impaired.²⁰⁸ With that being said, it could be argued Justice Benjamin suffered from the bias blind spot when he determined the contributions he was given by Blankenship in support of his successful campaign to the bench did not render him partial to deciding in

mocracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality, 66 N.Y.U. ANN. SURV. AM. L. 727, 774–80 (2011).

200. *Caperton*, 556 U.S. at 876 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

201. *Id.* at 884.

202. *Id.*

203. Sample, *supra* note 199, at 778.

204. *Id.* at 774–75.

205. Bannon, *supra* note 11, at 1.

206. Melinda A. Marbes, *Reshaping Recusal Procedures: Eliminating Decisionmaker Bias and Promoting Public Confidence*, 49 VAL. U. L. REV. 807, 837 (2015); see also Schotland, *supra* note 14, at 520 (“[M]any multi-member courts (especially high courts) have no procedure other than leaving recusal decisions entirely to the judge targeted by a motion.”).

207. See Marbes, *supra* note 206, at 838–48. Other scholars have drawn attention to this “blind spot” as well. See Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again*, 30 REV. LITIG. 671, 708 (2011).

208. See Marbes, *supra* note 206, at 838. Marbes notes that people in general are “blind to the impact of self-enhancement and self-interest biases on them in specific instances” and that although we are “quick” to judge others’ bias in certain circumstances, we are “slow” to make the same acknowledgement when it pertains to ourselves. *Id.* at 840.

Blankenship's favor in *Caperton*. However, when recusal practice is unsuccessful, as was the case in *Caperton*, litigants are often left with little redress. They suffer from not only the cuts they sustain by the opposing party, but from the exacerbation of these wounds by the judge who unequivocally refuses to acknowledge his or her own impartiality.²⁰⁹ That is why instead of performing reconstructive surgery on judicial selection systems, which would require an overhaul, the focus should be on placing a tourniquet on the rule of law as it stands, which culminates with strengthening recusal procedures.

Writing for the majority in *Caperton*, Justice Kennedy left the door for strengthening recusal standards open when he pronounced that “[s]tates may choose to ‘adopt recusal standards more rigorous than due process requires.’”²¹⁰ The due process clause sets the floor for judicial disqualification and states may build upon this floor through codes of judicial conduct, which have the ability to provide more protection than due process requires.²¹¹ Rather than focusing on reforming recusal laws on a substantive basis, this Article recommends amending such laws on a procedural basis.²¹² The following list represents a series of suggested procedural reforms for recusals:

- Independent adjudications of recusal motions.²¹³

209. Hugh Caperton first filed suit against Massey in 1998 when he declared bankruptcy, and his allegations in the case go back as far as 1997. Kris Maher, *Harman Mining Awarded \$4 Million In Massey Energy Case*, WALL ST. J. (May 23, 2014), <http://www.wsj.com/articles/SB10001424052702303749904579580532045755554#livefyre-comment>. It was not until 2009, 11 years later, that Mr. Caperton had his case heard before the United States Supreme Court. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 868 (2009). But that was not the end of litigation pertaining to this matter. In 2014, a jury awarded him \$4 million, thus seemingly ending the seventeen-year long saga. See Kris Maher, *Harman Mining Awarded \$4 Million In Massey Energy Case*, WALL ST. J. (May 23, 2014), <http://www.wsj.com/articles/SB10001424052702303749904579580532045755554#livefyre-comment>.

210. *Caperton*, 556 U.S. at 889 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002)).

211. *Id.* at 889–90; see also James Sample, *Lawyer, Candidate, Beneficiary, AND Judge? Role Differentiation in Elected Judiciaries*, 2011 U. CHI. LEGAL F. 279, 315 (2011) (arguing if the Court had held in the alternative—that the facts in *Caperton* did not fall beneath the floor of due process—actors similar to Blankenship and Benjamin would corrode not only the quality, but the perception of American justice).

212. See Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531 (2005). Even before *Caperton* was decided, Frost advocated against substantive reformation by stating “the lesson learned from the troubled history of judicial disqualification is that better procedures, rather than stricter substantive standards, are needed to govern the law’s application.” *Id.* at 552. She argues that “[i]t is time to stop tinkering with the substantive standard for recusal, and instead to propose reforming the process by which the recusal decision is made.” *Id.* at 535. Similarly, Charles Geyh rails against modifying substantive disqualification rules as well. See Geyh, *supra* note 207, at 719–32.

213. JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, *FAIR COURTS: SETTING RECUSAL STANDARDS* 31 (2008), <http://www.brennancenter.org/sites/default/files/legacy/Democracy/>

- Expand peremptory disqualification.²¹⁴
- Require judges to issue an explanation for the basis of their decision for recusal motions.²¹⁵
- Adopt a de novo standard of review for interlocutory appeals of recusal decisions.²¹⁶
- Adopt a version of the National Football League's Rooney Rule.²¹⁷

B. Public Financing

*This crisis of confidence in the impartiality of the judiciary is real and growing. Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold.*²¹⁸

Recusal%20Paper_FINAL.pdf. One particular method of procedural reformation for disqualification worth discussing, which Professor Geyh advocates for as well, was similarly articulated by Amanda Frost. See Geyh, *supra* note 207, at 719. Frost proposes a “process-oriented approach to judicial recusal” that would subject a jurist, whose impartiality is being questioned, to a process that is similar to that of an archetypal adversarial process. *Id.* (quoting Frost, *supra* note 212, at 531). The solution she offers is “to incorporate into recusal law the core tenets of adjudication,” which would entail parties presenting facts and arguments to an impartial judge, and then having that impartial judge issue a reasoned explanation for their ruling. Frost, *supra* note 212, at 535.

214. SAMPLE ET AL., *supra* note 213, at 26. As Schotland notes, there are states that have “fine, even exemplary” peremptory-strike challenge procedures for trial-court judges. Schotland, *supra* note 13, at 520. Currently, there are nineteen states that allow for the peremptory disqualification of one judge per proceeding. SAMPLE ET AL., *supra* note 213, at 26. Peremptory disqualification essentially grants litigants a “free pass” to secure an impartial judge without having to endure the consequences that stem from disqualification motions, in the event that such a motion were to fail. *Id.*

215. SAMPLE ET AL., *supra* note 213, at 32–33.

216. See *id.* at 33; see also Marbes, *supra* note 206, at 810 (calling for “(1) either eliminating the challenged jurist from the decision-making process or, at a minimum, providing for prompt de novo review of the challenged jurist’s determination; (2) requiring meaningful disclosure by both the jurist and the parties; and (3) mandating that any order denying disqualification be in writing, include reasons, and be published”).

217. Schotland, *supra* note 13, at 520. Under the Rooney Rule, when NFL teams are searching for candidates for head coaching job vacancies, said teams are required to interview at least one candidate from a minority background. *Id.* at 520–21; see Mike Sando, *Rooney Rule In Reverse: Minority Coaching Hires Have Stalled*, ESPN (Jul. 19, 2016), http://www.espn.com/nfl/story/_/id/17101097/staggering-numbers-show-nfl-minority-coaching-failure-rooney-rule-tony-dungy. What the rule requires “is a conversation – a chance to talk and to listen.” Schotland, *supra* note 13, at 521. Applying the Rooney Rule in a judicial context, if courts leave disqualification decisions in the hands of the judge whose impartiality is being questioned, before that very same judge rules on the motion, that judge shall have a conversation, to be kept confidential, “with a panel of three court-appointed ‘wise souls’ (probably retired judges, lawyers, and legal academics with rotating terms of, say, two years).” *Id.* However, such a consultation may prove to be unnecessary if the judge grants the recusal motion outright. *Id.*

218. Sandra Day O’Connor, *Foreword* to SAMPLE ET AL., *supra* note 213, at 3, 9.

The independence of the judiciary is progressively being threatened as a result of the bench becoming “increasingly politicized, polarized, and dominated by special interests.”²¹⁹ The Brennan Center has reported that special interest spending reached “new heights” in the 2016 election cycle, with outside groups spending nearly \$20 million on television ads.²²⁰ A significant percentage of this spending was done by groups who do not disclose the identities of their donors. This dark money is directly attributable to the fallout caused by *Citizens United*, which permitted unlimited spending by corporations and unions.²²¹ This increased spending, especially in judicial races, is incredibly troubling because judges hear cases involving campaign contributors. What is even more troubling is that conflicts of interest cannot even be identified, which “poses a major threat to the integrity of our justice system.”²²² With the election of Donald Trump, it is likely the Supreme Court will regain its conservative majority. In light of Trump’s nomination of Neil Gorsuch,²²³ it is highly unlikely the Court will overturn *Citizens United*— “[t]here is nothing in Judge Gorsuch’s record to suggest that he is hostile to recent Supreme Court money in politics decisions. If anything, there is some evidence that he thinks the Court could go further in rolling back campaign finance restrictions.”²²⁴

Instead of advocating for the Court to reverse *Citizens United* or even encouraging states to eliminate judicial elections, an emphasis should be placed on emboldening states to adopt public financing systems for their judicial races. Currently, only two states have public financing systems in place for judicial elections to their appellate courts.²²⁵ Public financing can be used to combat corruption, improve the public’s confidence and faith in our government, increase voter

219. BANNON, *supra* note 11, at 1.

220. *Spending by Outside Groups in Judicial Races Hits Record High, Secret Money Dominates*, BRENNAN CTR. FOR JUSTICE (Nov. 15, 2016), <https://www.brennancenter.org/press-release/spending-outside-groups-judicial-races-hits-record-high-secret-money-dominates>.

221. *Id.* (“This unprecedented flood of spending from outside interests and secretive donors is undermining faith in the fairness of our courts and the promise of equal justice for all.”).

222. *New Analysis: 2016 Judicial Elections See Secret Money and Heightened Outside Spending*, BRENNAN CTR. FOR JUSTICE (Sept. 14, 2016), <https://www.brennancenter.org/press-release/new-analysis-2016-judicial-elections-see-secret-money-and-heightened-outside-spending>.

223. Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html>.

224. Lawrence Norden, *New Court, Second Look: ‘Citizens United’ Built on Crumbling Base*, HILL (Feb. 1, 2017), <http://thehill.com/blogs/pundits-blog/the-judiciary/317386-new-court-second-look-citizens-united-built-on-crumbling>.

225. BANNON, *supra* note 11, at 9.

participation,²²⁶ decrease a candidate's reliance on money from outside groups, and preserve judicial impartiality and independence.²²⁷ The Supreme Court's decision in *Arizona Free Enterprise v. Bennett*²²⁸ will make crafting an effective and constitutional public financing system difficult, but not necessarily impossible.²²⁹ In *Arizona Free Enterprise*, the Court struck down a component of Arizona's public financing scheme—the triggering matching funds provision.²³⁰ Although the elimination of trigger matching funds eviscerated public financing as a matter of functionalism, by stripping it of political and fiscal viability, *Arizona Free Enterprise* does not denounce public financing as a matter of formalism: “The government ‘may engage in public financing of election campaigns,’ and doing so can further significant governmental interest[s].”²³¹ As Professor Rick Hasen discusses in his book, *Plutocrats United*, a public financing system where nobody is “penalized” for someone else's campaign/policy related activity should survive a challenge.²³² “The worst one can say is that taxpayer money would go to fund speech a taxpayer may not like—an everyday occurrence when you consider all of the speech the federal government directly or indirectly funds.”²³³ There are two different public financing systems states should consider adopting that subvert the crux of *Arizona Free Enterprise's* holding.²³⁴

226. Michael Pernick, *Making Arizona Free Enterprise Kick the Bucket: A New Path Forward for Public Financing*, 40 N.Y.U. REV. L. & SOC. CHANGE 467, 471 (2016).

227. Deborah Goldberg, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts*, BRENNAN CTR. FOR JUSTICE 3 (2002), <http://www.brennancenter.org/sites/default/files/legacy/d/ji3.pdf>. “[P]ublic funding serves to counteract the deleterious effects of contribution limits by relieving candidates from the rigors of fundraising.” Nicholas Bamman, *Campaign Finance: Public Funding After Bennett*, 27 J.L. & POL. 323, 339 (2012).

228. *Ariz. Free Enter. Club's Freedom Club Pac v. Bennett*, 564 U.S. 721, 744. (2011).

229. James Sample, *The Last Rites of Public Campaign Financing*, 92 NEB. L. REV. 349, 402–03 (2013).

230. The triggering matching funds provided a candidate, who opted in to the publicly funded system, funds to match those received by a privately financed candidate if the privately funded candidate exceeded the dollar amount initially allotted to the publicly financed candidate. *Ariz. Free Enter.*, 564 U.S. at 728–30. Chief Justice Roberts, writing for the majority, stated the triggered matching-funds provision “plainly force[d] the privately financed candidate to ‘shoulder a special and potentially significant burden’ when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy.” *Id.* at 737.

231. *Id.* at 754 (citing *Buckley v. Valeo*, 424 U.S. 1, 57 (1976)); see Sample, *supra* note 229, at 352–53.

232. RICHARD HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 90 (2016).

233. *Id.*

234. See *infra* notes 235–250 and accompanying text.

1. *Small-Donor Matching Funds*

Amplifying the role of small donors, through small donor matching-funds systems, has the ability to lessen a candidate's reliance on contributions from interest groups or wealthy individuals.²³⁵ This is because most of a candidate's private donations would likely be received from average Americans and those donations would be amplified through matching public funds. This type of a system "provides publicly financed candidates the flexibility they need given the unpredictable cost of judicial campaigns. Because these funds are not disbursed in reaction to an opponent's expenditures, they cannot be construed as a 'penalty' for speech like the matching funds at issue in [*Arizona Free Enterprise*]."²³⁶

New York City's small-donor matching system is not only been the longest lasting small-donor system in the nation, but has been championed as one of the most successful systems as well.²³⁷ New York City's system empowers small donors by matching the first \$175 of a campaign donation, on a six-to-one basis.²³⁸ For example, if Donor A gives \$100 to Candidate B, A's \$100 donation will be worth \$700 to B. The effects of the system have been wide-ranging, and the system is proving to be successful in multiple regards. Recently, almost 90% of candidates in New York City opted in to participate in the program.²³⁹ The system is appropriating enough funds to candidates to attract participation. Further, the system enhances diversity in the political process²⁴⁰ and incentivizes candidates "to reach out to their own

235. Billy Corriher, *Public Financing of Judicial Races Can Give Small Donors a Decisive Role*, CTR. FOR AM. PROGRESS (Dec. 12, 2012), <https://www.americanprogress.org/issues/courts/reports/2012/12/12/47657/public-financing-of-judicial-races-can-give-small-donors-a-decisive-role/>.

236. *Id.*

237. Sample, *supra* note 229, at 395–99.

238. *Id.* at 395. In order to qualify for New York City's public financing program, candidates must meet the following requirements: (1) collect a minimum number of contributions worth \$10 or more from the area they seek to represent, and raise a minimum amount of contributions that could be matched, which are contributions worth at a maximum \$175; (2) comply with the full provisions set forth in New York City's Campaign Finance Act; and (3) have an opponent on the ballot. *How It Works*, N.Y.C. CAMPAIGN FINANCE BOARD, <http://www.nyccfb.info/program/how-it-works> (last visited Feb. 5, 2017). Once a candidate qualifies, they must agree to spending limits and return leftover public funds to the city after the election ends. *Id.* Further, the amount of public funds a candidate is able to receive under this system is equivalent to 55% of a candidate's spending limit—this cap is meant to encourage candidates to use both private and public funds to finance their campaigns. *Id.*

239. BRENT FERGUSON, BRENNAN CTR. FOR JUSTICE, *STATE OPTIONS FOR REFORM 1* (2015), https://www.brennancenter.org/sites/default/files/publications/State_Options_for_Reform_FINAL.pdf.

240. *How It Works*, *supra* note 238.

constituents rather than focusing all their attention on out-of-district donors.”²⁴¹

[New York City’s public financing] system has allowed candidates “to fuse their fundraising efforts with voter outreach, and has incentivized political engagement by communities that can only afford modest contributions—communities all too often ignored by traditionally funded candidates.” The system has given rise to “house parties”—small political gatherings where ordinary citizens can learn about candidates and make small contributions.²⁴²

This system could prove to be a model for other states seeking to decrease the role of outside interest groups in their judicial elections and amplify the role of small donors.²⁴³

2. *Vouchers*

If states disfavor small-donor matching systems, voucher systems provide another alternative. Not everyone that may want to contribute to a campaign of their choice may have the money to do so, but voucher programs have the ability to “level-up” the participation of voters who are “shut out” of the system and “level-down” the individuals who have “disproportionate . . . capital to exercise greater influence over the political system.”²⁴⁴ If the baseline is the status quo, are small-donor matching systems truly bringing about a sense of neutrality?²⁴⁵ Hasen has long been an advocate of voucher systems. Under his plan, the government would provide every voter with a voucher

241. ELISABETH GENN ET AL. BRENNAN CTR. FOR JUSTICE, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS 4 (2012), http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

242. Corriher, *supra* note 235.

243. Features of NYC’s public financing system have been implemented in other jurisdictions, such as Minnesota and Vermont. Sample, *supra* note 229, at 397.

244. Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 20 (1996) (“[V]oucher plans level-up in the sense that all voters, even those voters who have never made campaign contributions before, are given vouchers to contribute to candidates for federal office. Vouchers facilitate the representation of groups that lack a voice in the current system. But these vouchers also level-down by prohibiting all other sources of campaign money; the rich can no longer exercise greater influence through private contributions and independent expenditures.”). *Id.* at 21.

245. After all, the inequitable distribution of wealth is a natural occurrence in our society. Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 884 (1987). Although “*Buckley*, like *Lochner*, grew out of an understanding that for constitutional purposes, the existing distribution of wealth must be taken as simply ‘there,’ and that efforts to change that distribution are impermissible.” *Id.* However, vouchers are distinguishable from the regulations that were at issue in *Buckley*. Vouchers could promote political equality without “threatening to diminish aggregate levels of political discussion.” Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1413 (1994). This is because voters, and candidates alike, are “quite free to take and give as they choose.” *Id.*

worth \$100 for each bi-annual federal election.²⁴⁶ He would allow the vouchers to be donated directly to candidates, licensed interest groups, and political parties.²⁴⁷ If a candidate opted in to his voucher system, that candidate would have to agree to not receive any other donations—including dinners paid for by lobbyists and all-expenses-paid retreats in Maui.²⁴⁸ Further, the candidate would not be allowed to use private funds.²⁴⁹ Although Hasen's proposal was geared towards federal elections, it could be adopted at the state and local levels as well.

Recently, Seattle implemented a voucher program that is quite similar to the Hasen model.²⁵⁰ In 2017, Seattle voters will each receive four \$25 vouchers to distribute to candidates that are running for City Council seats and the City Attorney's Office.²⁵¹ This system is the "first in the country" and the vouchers will even be provided to people who are not voters as long as they are 18 years old, a U.S. Citizen (or U.S. national or green-card holder), and live in Seattle.²⁵² Although Seattle's system does not provide public funds for judicial races, it is nonetheless a system to keep an eye on in upcoming elections. If successful, Seattle's voucher system could provide the groundwork to be implemented in other jurisdictions, as well as for other types of races, including those for judgeships.

C. Lengthening Terms

Among the best-known quotations of judicial politics is that deciding a controversial case while facing reelection is akin to "finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to

246. Hasen, *supra* note 244, at 21.

247. *Id.* at 22. Although interest groups are dominating in our political world, the purpose of allowing a voter to contribute to licensed interest groups would be to have the group reflect more of the voter's voice and its followers, as opposed to its wealth or ability to organize. *Id.* at 27. The interest groups Professor Hasen discusses could be created by any voter, and the license to create the group would be free. *Id.* at 23.

248. *Id.* at 22.

249. *Id.* at 23.

250. See Daniel Beekman, *Seattle Voters Will Soon Get \$100 in 'Democracy Vouchers' to Donate to Candidates*, SEATTLE TIMES (Dec. 30, 2016), <http://www.seattletimes.com/seattle-news/politics/seattles-democracy-vouchers-going-to-voters-next-week/>.

251. See *id.*

252. *Id.* In order for a candidate to be eligible to receive money from the vouchers, they need to "drum up a baseline number of campaign contributions, agree to take part in multiple public debates, adhere to lower campaign contribution limits and agree to special campaign spending camps." *Id.*

think about much else while you're shaving."²⁵³ Especially when facing reelection, a sitting judge "may understandably, [and] perhaps inescapably, be concerned about being on the wrong side of a hot-button matter."²⁵⁴ "The mere potential of lightning-rod distortions jeopardizes judicial independence and open-mindedness."²⁵⁵ According to evidentiary findings, the judicial independence of judges who face reelection is potentially compromised, especially in the criminal context.²⁵⁶ The closer judges are to facing reelection, the more likely they are to issue harsher criminal sentences, including death sentences;²⁵⁷ the "[p]roximity to re-election makes judges more punitive."²⁵⁸ Lengthening terms can address issues commonly associated with judges whom are seeking reelection.²⁵⁹

Only one state in the country provides its judges (at any level) life tenure—Rhode Island.²⁶⁰ This Article does not suggest that every state should adopt the Rhode Island or federal approach regarding term lengths, but terms of ten years or longer are preferable. Schot-

253. Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

254. Schotland, *supra* note 13, at 515.

255. *Id.*

256. See KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 9 (2015), https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf.

257. See Adam Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*, N.Y. TIMES (Oct. 3, 2016), http://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts.html?rref=collection%2Fbyline%2Fadam-liptak&action=click&contentCollection=undefined®ion=stream&modulestream_unit&version=LAtest&contentPlacement=7&pgtype=collection; see also BERRY, *supra* note 256, at 7–11.

258. BERRY, *supra* note 256, at 13.

259. KOWAL, *supra* note 13, at 18. For example, in Alabama, judges have the authority to override jury recommendations of life sentences in capital cases. See Liptak, *supra* note 257. In election years, "the proportion of death sentences imposed by override is elevated." EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 5 (2011), <http://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf> (stating that 7% of death sentences were imposed by judicial override in a non-election year, meanwhile 30% of death sentences in an election year were imposed by judicial override). The tenure of Alabama's judges is relatively short—they are elected through partisan elections for six-year terms, and are retained through reelection, with subsequent term lengths of six years. *Methods of Judicial Selection*, NAT'L CTR. FOR STATE CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Jan. 22, 2017). This "tough on crime" approach can be attributed to the ever-increasing presence of interest groups, who contribute millions of dollars in state supreme court elections, mostly in the form of issuing attack advertisements by labeling judges as "soft on crime." Shepherd & Kang, *supra* note 175; see also Derek Willis, *Soft on Crime' TV Ads Affect Judges' Decisions, Not Just Elections*, N.Y. TIMES (Oct. 21, 2014), https://www.nytimes.com/2014/10/22/upshot/soft-on-crime-tv-ads-affect-judges-decisions-not-just-elections.html?_r=0&abt=0002&abg=1.

260. Roy Schotland, *The Crocodile in the Bathtub . . . and Other Arguments to Extend Terms for Trial Judges*, CAL. CTS. REV., Fall 2005, at 10.

land describes three motives for lengthening terms: (1) as mentioned above, the “crocodile in [the] bathtub,” or in other words, protecting judicial independence—longer terms give judges “far more ability to decide cases as they see them”; (2) longer terms would incentivize more and better candidates to seek judgeships; and (3) longer terms mean judges will be subjected to reelection on a less frequent basis, thus they will not need to campaign as much.²⁶¹

Decreasing the frequency of judicial reelection through increased term limits is appealing, especially from a campaigning perspective. If we are honest, Chief Justice Roberts’ claim in *Williams-Yulee v. Florida Bar*²⁶² that “[j]udges are not politicians, even when they come to the bench by way of the ballot”²⁶³ is, at best, an articulation of an ideal that no longer exists, and probably never did. Judges are different than other politicians, but they are nonetheless politicians especially when they are accountable to an electoral constituency.

D. Diversifying the Bench

A problem permeating both elective and appointive systems is the lack of diversity among the individuals who are selected to the bench.²⁶⁴ Evidence is contradictory as to which method of selection produces a more diverse bench. Indeed, some studies have found that there is no clear connection between how a judge is selected and the diversity of the members of the bench.²⁶⁵ Irrespective of how a judge is selected, this lack of diversity diminishes “public confidence in the courts and creates a jurisprudence uninformed by a broad range of experiences.”²⁶⁶ Judges that do not accurately reflect the communities they serve will cause the public to doubt the judicial system.²⁶⁷ In both types of selection systems, factors that lead to this misrepresentation are money, old-boys networks, and biases.²⁶⁸

Spiraling fundraising demands are in tension with the goal of increasing diversity on the bench. The threshold campaign war chest

261. *Id.* at 10–11.

262. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

263. *Id.* at 1662.

264. BANNON, *supra* note 11, at 14.

265. *Id.* at 24; Malia Reddick et al., *Racial and Gender Diversity on State Courts*, JUDGES’ J., Summer 2009, at 28.

266. BANNON, *supra* note 11, at 24. In addition to state court benches failing to represent the diversity of the communities they serve, Bannon also notes that state judges do not represent the diversity of the legal community as well since individuals with “prosecutorial and corporate backgrounds dominate state (and federal) courts.” *Id.* at 14.

267. Kat Aaron, *The Power and Prestige of Being a New York Judge*, NPR (Sept. 7, 2016), <http://www.wnyc.org/story/why-be-judge/>.

268. BANNON, *supra* note 11, at 15.

needed to mount a serious campaign not only impacts who wins elective contests, but deters individuals from even deciding to run for a judgeship in the first instance.²⁶⁹ Not only is there a monetary barrier for candidates, but old-boys networks and systems of smoke-filled rooms prevent individuals who lack connections with political parties from running as well.²⁷⁰ Biases, racial and gender, implicit and explicit, can prevent minority candidates from making it to the bench.²⁷¹ “Scholarship suggests that when voters face low-information elections—as judicial elections typically are—they may, consciously or unconsciously, rely on racial and gender stereotypes as ‘shortcuts’ in determining their choice.”²⁷²

[A]s Justice Scalia notes in *Republican Party v. White*, judicial impartiality is not predicated on the empiricist notion of a “tabula rasa.” Judges are not born and reared in isolation. Rather, judges, like the rest of us, are the product of historical circumstance, personal experience, and accidents. As Justice Cardozo wrote, “[t]he great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.” Thus, judicial impartiality is not the absence of experience but rather the presence of human experience coupled with an open mind. Accordingly, in our pursuit to attain an independent and impartial judiciary, we cannot escape the reality—and consequences—that each judge brings to the bench a sum of life experience.²⁷³

A diverse judiciary will render decisions that are not geared towards or dominated by one particular set of values, but will be a by-product of competing values: “[t]here’s just better decision making when dif-

269. *Id.*

270. See Aaron, *supra* note 267. New York’s method of selection for its supreme court, which serves as its major trial court, is unlike any other state’s, and has been described as “archaic.” *Real Judicial Elections*, N.Y. TIMES (Oct. 2, 2007), <http://www.nytimes.com/2007/10/02/opinion/02tue1.html?mcubz=0>. The candidates are nominated by a convention of delegates, and the delegates are “handpicked by party bosses, who vote however the bosses tell them.” *Id.* Unless a party backs an individual, they have virtually no chance to even qualify to get their names on the ballot, never mind win the election. “Independent candidates for judge have virtually no chance of bucking the system.” *Id.* With that being said, at the annual judicial conventions, the party’s nominee is essentially given a “rubber-stamp” and they go on to win a 14-year term. Just because this method of selection was upheld by the United States Supreme Court, does not mean that the system is not deeply flawed. See N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008). There is a lack of competitiveness in judicial races, especially in New York, and the existing law is partially, if not exclusively, responsible for that. See N.Y. ELEC. LAW § 6-124 (McKinney 2017). The law requiring the use of these nominating conventions needs to be changed, and the legislature should adopt a system where judges are chosen in a truly democratic manner and are representative of the people they serve, as opposed to being chosen in smoke-filled rooms. *Id.*

271. BANNON, *supra* note 11, at 15.

272. *Id.* This issue could be mitigated through the use of voter guides. See *infra* Part IV.E.

273. James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 782–83 (2004).

ferent perspectives come together than when you have everyone with the same background and experience.”²⁷⁴ Further, a more diverse judiciary could help rebuild the public’s trust, faith, and confidence in the courts that are designed to protect them, if the bench is composed of members that are truly representative of the public. If the end goal is an impartial and representative judiciary, diversity on the bench is indisputably imperative.²⁷⁵

E. Voter Guides

Judicial candidate voter guides could better inform the electorate about the candidates that appear on their ballots. The National Center for State Courts has reported that fifteen states do not publish an official voter guide for some, if not all, of the judicial candidates who are seeking election to the bench.²⁷⁶ Typical components of a voter guide include the candidate’s education, professional background, community involvement, and a personal statement as to why that candidate is running for a seat on the bench.²⁷⁷ Guides should also include information about the “unique role of judges and how that role affects, or should affect, the way that elections are conducted.”²⁷⁸ Although the cost of producing and mailing voter guides is an oft-cited reason as to why they are not used, states, or other groups, should be encouraged to publish guides on their websites instead.²⁷⁹ If low voter turnout is a consequence of an electorate deciding not to vote because they are uninformed,²⁸⁰ voter guides could provide the electorate the information they need to not only be cognizant of the candidates, but also “offset and correct erroneous information that might surface in an opponent’s false advertisement.”²⁸¹

274. See Aaron, *supra* note 267.

275. Wynn & Mazur, *supra* note 273, at 790.

276. *Judicial Elections and Campaigns: Voter Guides*, NAT’L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/campaigns_and_elections/voter_guides.cfm?state (last visited Feb. 12, 2017). The following eleven states do not publish an official voter guide with information about judicial candidates: Arkansas, Idaho, Louisiana, Mississippi, Montana, Nevada, North Dakota, Oklahoma, Pennsylvania, South Dakota, and West Virginia. *Id.* The following four states do not publish a guide about probate court candidates: Connecticut, Maine, South Carolina, and Vermont. *Id.*

277. Justice Robert L. Brown, *Toxic Judicial Elections: A Proposed Remedy*, ARK. LAW., Fall 2009, at 12, 40.

278. Goldberg, *supra* note 227, at 10.

279. *Id.*; see also Brown, *supra* note 277, at 40. In some states, the Secretary of State publishes voter guides, as do various chapters of the League of Women Voters. *Judicial Elections and Campaigns: Voter Guides*, *supra* note 276. Other states provide evaluations on judges who are standing for retention as prepared by judicial performance review commissions. *Id.*

280. See Goldberg, *supra* note 227, at 10.

281. Brown, *supra* note 277, at 40.

VI. CONCLUSION

This Article asserts that, while the debate as to the optimal form of judicial selection has its place, the high temperatures, perpetual circularity, and chasm of separation from the actual, day-to-day grind of administering justice, renders the debate a luxury we should no longer blindly indulge. Instead of debating which method of judicial selection is “best,” we should ask “how can we improve our current judicial selection systems, whatever they may be?”