Benchmarks: Judges on Trial, Judicial Selection and Election

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In most American states when the citizens go to the polls they will find, along with candidates for state and federal officers, a list of judges they are expected to vote on. In a number of states, such as Texas and West Virginia, these are regular partisan elections—Republicans running against Democrats.\(^1\) In nineteen states, the elections of at least some judges are supposed to be nonpartisan.\(^2\) In another seventeen states, judges run in uncontested elections, where voters are only asked to say yes or no to the candidate—do we keep this judge in office or send him or her to the showers?\(^3\) California holds judicial elections and uses both nonpartisan contested elections and nonpartisan retention elections.\(^4\) In about a dozen states, the judges are appointed or have life tenure. These states are outnumbered by about a margin of three to one. In election states, typically, all judges face some sort of election, from the state supreme court on down. There are forty-one states with intermediate appellate courts; all but seventeen of them hold some sort of election.\(^5\) In addition, in thirty out of fifty states trial court judges also stand for election in some manner.\(^6\)

The American system is unique. To most foreign lawyers, legal scholars, and ordinary citizens, the idea of electing judges is about as strange as electing doctors, nurses, or police officers would be. How is the public supposed to decide whether a person is qualified to be a judge or whether Candidate A is better than Candidate B? Most for-
eigners no doubt would consider the election of sheriffs and district attorneys even weirder than the election of judges.

Where did this notion of electing judges come from? Certainly not from England, mother country of the common law. All British judges are appointed, and no European country elects judges. The elective principle is an American innovation.

Historically, the U.S. system for judicial elections dates from the first half of the nineteenth century. Most people will recall the political storm in the early Republic over the conduct of federal judges—judges who had life tenure appointments. When Thomas Jefferson took office, all the judges were naturally Federalists appointed by George Washington and his successor, John Adams. Jefferson felt he was saddled with these judges with no relief in sight: “Few die and none resign.” These judges, he felt, were partisan and biased—a genuine thorn in his side. The attempt to impeach Samuel Chase, a Justice of the Supreme Court, was the high point—or low point—of the struggle against the Federalist judges. This attempt failed narrowly. But the political elite of Jefferson’s party remained convinced that Federalist judges were not objective decision makers: they were blindly partisan political actors.

Partisanship and prejudice, of course, seem to be bad things. The ideal judge is supposed to be honest and impartial. Judges do in fact make policy. And, arguably, policy making is unavoidable. It is a part of the job and part of the very nature of deciding cases. On the other hand, the United States aspired to be a democracy—an experiment in popular sovereignty. The people were to rule through the ballot box. All policy makers, then, should be ultimately responsive to the people. The judges, however, were not responsive. This must have seemed like a flaw in the system. To guarantee that judges made the kind of policy that the public wanted, to make sure that the will of the people really was sovereign, judges, like other public officials, ought to be subject to the popular will. To be sure, the movement to elect judges was far from simple; a number of strands in American history fed into it. But ultimately, the ideology of popular sovereignty lay behind the movement.

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7. Letter from Thomas Jefferson to Elias Shipman (July 12, 1801), available at http://www.gilderlehrman.org/search/collection_pdfs/00/96/4/00964.pdf (Jefferson’s actual quote, from a letter of 1801, was as follows: “Those by death are few; by resignations, none.”).

8. Id.

The elective system swept across the country. Georgia in 1812 and Indiana in 1816 provided for popular election of some of their judges.\textsuperscript{10} In 1832, Mississippi provided for popular election of all its judges, as did New York in its 1846 constitution.\textsuperscript{11} From then on, virtually every new state provided for election of judges.\textsuperscript{12} The zeal for elections was, in those days, even broader than it is today. In the early nineteenth century, for example, the rank and file in some state militias elected their officers.\textsuperscript{13}

Elections, then, were the distinctive American solution to the problem of judicial power. The European solution was in some ways the opposite. In Europe, the chosen solution was to reduce the judges, as much as possible, to technocrats, to mere civil servants. Judges were bound in theory to follow the rules laid down by the legislature in codes and statutes and were absolutely forbidden to innovate or make policy.\textsuperscript{14} Whether this is the way things actually worked out in civil law countries is, of course, quite a different question.

And what was the actual result of the American system? That too is an open question. It is hard to know how one would measure "success." Did elections make the judges more responsive to the public? And if elections did have this effect, was it good for society or not? There are no real answers to these questions. Does the public even show much of an interest? For most elections the answer is no. Did the voters ever throw judges out of office? Yes, but not that often. In California, between 1850 and 1920, only 14.3% of the judges who left office left because they lost their bid for re-election; another 3.6% "[f]ailed of renomination at [a] convention or party primary."\textsuperscript{15} It is hard to say whether this is a lot or a little or what it meant for the legal system or for society. In any event, the classic period of judicial elections lasted a surprisingly short time. By the end of the nineteenth century, a great deal of skepticism had crept in. This was now an urban, industrial society, millions of immigrants poured into the country, and big city machines dominated the local political landscape in many

\textsuperscript{10} Berkson, supra note 5, at 1.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} See, e.g., N.Y. Const. art IV, § 1 (1821), reprinted in 1 Charles Z. Lincoln, The Constitutional History of New York 202 (1905) ("Captains, subalterns, and non-commissioned officers shall be chosen by written votes of the members of their respective companies.").
places. In some cities, these machines were notoriously corrupt. The elites—leaders of the bar and others—had become deeply suspicious of judicial elections. These elections, they felt, chiefly brought political hacks and machine politicians to the bench. For the elites of the bar, democracy was the problem, not the solution, at least as far as judges were concerned. The result was a long-term movement to reform the elective system—a movement that tended to retain the form but not the substance of these elections. As Kermit Hall explained, this was a shift from "democratic accountability” to “professional accountability.”

The attack on popular control of judges achieved a good deal of success. Many states changed their laws about judicial selection. In most of them, the essence of the new system was this: typically, a judge would go on the bench through appointment. For example, the governor might be required to appoint from a list provided by the organized bar, and on the next election day, the new judge would run for re-election without any real opponent. Voters would just vote yes or no. Presumably, they would always vote yes, on the theory that you can't beat somebody with nobody. Unfortunately, every once in a while nobody does in fact beat somebody. But this was not expected to happen very often.

California was one of the states that adopted this general type of plan. In 1911, the legislature established a system of nonpartisan elections for judges. In 1926, a constitutional amendment provided for these elections, and in 1934, voters approved an initiative measure that dealt with the selection of appellate judges. Today, under the constitution, the governor nominates judges of the state supreme court and the courts of appeals, and they are confirmed by the commission on judicial appointments, which consists of the chief justice, the attorney general, and a presiding justice of the courts of appeals. Since 1979, the legislature has required a thorough investigation of the background and qualifications of prospective nominees. A commission on judicial nominees of the state bar conducts the investigation.

16. Id. at 350. "Democratic accountability” refers to the “ability of the public to assert control over . . . judicial policy making.” Id. "Professional accountability” reflects, instead, the view that "the law is a separate authority with its own internal criteria,” responsible to the bar, as the “repository of professional expertise.” Id.


18. Id.

19. Id.

20. Id.
The governor, however, is not bound by the commission's recommendations. Appellate judges, who serve twelve year terms, must stand for retention at the next gubernatorial election after their appointment. Superior court judges are chosen in non-partisan elections for six year terms.

The California governor fills vacancies on the superior court (the basic trial court) by appointment. As with appellate court appointments, the commission on judicial nominees must first investigate prospective nominees. The vast majority of superior court judges initially reach the bench by way of appointment; once on the bench, they rarely lose. In short, California is committed to a system which, in form, gives the people the power to decide. In practice, however, the governor and other elected officials dominate the process of choosing the judges.

The governor's choices and those of the profession are, of course, deeply colored by politics. There is also no hard evidence that merit selection really produces better judges. A judge's quality is something that in essence cannot be measured: studies suggest that the credentials of merit judges are much the same as the credentials of judges selected in some other way.\textsuperscript{21} Still, formally at least, merit selection is a far cry from the system set up in the middle of the nineteenth century. Moreover, in many states where judges are elected, the elections are officially non-partisan. Judges do not carry party labels. How "non-partisan" these elections really are is another question.\textsuperscript{22}

The point was to avoid partisan squabbles. For the most part, the system seemed to work. In most states, judges rarely got in trouble with the voters. A study in 1987, which looked at ten states, found only twenty-two defeats out of 1865 elections (less than one percent).\textsuperscript{23} Other studies, with even larger sample sizes (one with 3912), came to similar conclusions. In 1998, not a single sitting judge was defeated, and between 1964 and 1999, only fifty-two judges out of 4588 were defeated. It is important, however, to distinguish between judicial elections in general and elections for state supreme courts. A study of these courts found that 8.3% of the judges were defeated between 1980 and 1994.\textsuperscript{24} This is not an insignificant number.


\textsuperscript{24} Hall, \textit{supra} note 21, at 319 tbls.4 & 5.
Here the type of election made a difference. In partisan elections, 18.8% of the incumbents lost, in nonpartisan elections, 8.6%, and in retention elections, only 1.7%. In 2000, eight percent of the incumbents in nonpartisan elections for state supreme court were defeated; in retention elections no incumbents lost, and in partisan elections, an astonishing 45.5% of incumbents went down to defeat. After California adopted the retention system of elections in 1934, not a single justice of the supreme court was defeated until 1986. In that year, over eleven million dollars was spent on the campaign to defeat certain judges—successfully, as it turned out. Chief Justice Rose Bird lost her job, and carried two other justices down to defeat. Still, at the time, this election seemed to be a fairly isolated event. Rose Bird was an unusually controversial figure, and since her defeat other attempts to unseat justices in California have not been successful.

But is the tide turning once again? Are elections becoming more partisan, more contested? In recent years, serious campaigns have been mounted to defeat sitting judges in some states. Interest groups have mobilized to fight against judges whose opinions they disliked—opinions on controversial topics such as abortion or the death penalty or, more to the point, on products liability, worker’s compensation, or labor issues in general. These efforts are by no means always successful, but in some egregious cases justices have lost bitterly contested elections—including retention elections. In 2004, state supreme court justices faced opposition in eighteen of the twenty states that had contested elections. In partisan contests, almost a quarter of the sitting judges were thrown out of office, and many of the contests have been rather close. The winners in contested elections have had, on average, about fifty-seven percent of the vote, which is lower than the average for contested seats in the House of Representatives.

25. Id.
26. Id.
28. Id.
30. In 2005, voters in Pennsylvania were extremely angry that the legislature had given itself and the judges a pay raise. Supreme Court Justice Russell Nigro lost his retention election that year. He had nothing to do with the pay raise, but he was up for re-election and bore the brunt of the public anger. Matthew J. Streb, The Study of Judicial Elections, in Running for Judge, supra note 27, at 11.
32. Deborah Goldberg, Craig Holman & Samantha Sanchez, How 2000 Was a Watershed Year for Big Money, Special Interest Pressure, and TV Advertising in State Supreme Court Campaigns,
There is strong evidence that judicial elections all over the country are becoming more contentious. One sure sign of this trend is the amount of money spent on judicial campaigns. At one time, most judges up for re-election posted a filing fee, and then spent almost nothing else on their campaigns. In 2000, however, state supreme court candidates, nationwide, raised a total of $45.6 million for judicial elections, a sixty-one percent increase over the amount raised by candidates in 1998.\textsuperscript{33} Lawyers and business interests accounted for forty-nine percent of all contributions to supreme court candidates.\textsuperscript{34} Those relatively few states that still have partisan judicial elections show the most spending for campaigning; candidates raised an average of $380,724 between 1990 and 2000—as opposed to an average of $107,388 raised by supreme court candidates in nonpartisan elections.\textsuperscript{35} It is a bit unsettling to consider that even “nonpartisan elections” need this much money. A 1995 study of contested elections to the Los Angeles County Superior Court indicated that median spending had risen from $3000 in 1976 to $70,000 in 1994.\textsuperscript{36} During the same period, median spending by incumbents increased from $1000 to $95,000.\textsuperscript{37} The candidates themselves are the largest source of funding for superior court judges. Attorneys and law firms make up the next largest group of contributors, accounting for nearly one fourth of the funds raised by the candidates.\textsuperscript{38}

Trial lawyers and business groups are also spending more on unregulated “issue advertisements” in judicial elections. The Litigation Fairness Campaign, sponsored by the U.S. Chamber of Commerce and the Business Roundtable, hoped to raise twenty-five million dollars, primarily for television advertisements, in at least eight states holding supreme court elections in 2002.\textsuperscript{39} Trial lawyer organizations and unions in “battleground” judicial election states have been spending significant amounts as well. Groups that do not expressly call for the election or defeat of a candidate are not required to disclose what they spend; for this reason, it is impossible to know exactly how much

\textsuperscript{34} Id. at 4.
\textsuperscript{35} Id. at 9 fig.3.
\textsuperscript{36} Id. at 12 fig.6

\textsuperscript{38} Id.
interest groups are spending on these elections. More recent data shows clearly that more and more money is being spent. There are more television ads. And a large number of these ads are negative—attacks on the integrity or judgment of a judicial candidate.

The problem, in other words, is more than money. The problem is what the money is spent for and how it is spent. Also, the problem is the growing nastiness and partisanship. To be sure, most judicial elections are still uneventful, even boring, but the exceptions are troubling. In 2004, Democrat Warren McGraw, a justice of the West Virginia Supreme Court, lost his seat to Republican Brent Benjamin. McGraw had been “targeted by mining executives, business interests and physicians groups.” A single donor, Don Blankenship, chief executive of a coal company, gave $1.7 million to the campaign against McGraw. The anti-McGraw forces ran a series of ads against him. In one ad, he was criticized for being part of the majority decision in a case that granted extended probation to a man convicted of molesting his half-brother. Blankenship got the judge and the decision he wanted; and the issue of whether the decision was fatally tainted is now before the United States Supreme Court.

There are other examples of nasty campaigns. In a 1996 election in Alabama, a television ad “even portrayed a candidate as a skunk,” and a Wisconsin justice was “portrayed as ‘pro-child molester’ by her opponent.” Also, in 2008 Justice Louis Butler of the Supreme Court of Wisconsin lost his seat to Martin Gableman. In this bitter campaign, Gableman’s ads suggested that Butler, an African American, had helped an African American rapist go free. The real force behind the campaign was a local business group, which hated the court’s rul-

40. Id.
44. Id.
45. Id.
47. Morello, supra note 43.
ings in product liability cases and was anxious to replace justices who were considered too liberal.\textsuperscript{48}

If the trend continues, it would represent a historic shift in judicial elections and in American political life. It would be, of course, a return to democratic accountability. This is one way of putting it—a fairly bland and favorable way. But many people and certainly most judges do not think the judicial system \textit{needs} democratic accountability. They feel that injecting raw, partisan politics into this area puts partisan politics in a place where it does not belong. In 2006, although in California the supreme court justices kept their seats, along with all fifty-one court of appeals judges, there was a disturbing development at the level of the superior court. A "bagel shop owner with limited legal experience" defeated a "well-regarded sitting judge" in the primary,\textsuperscript{49} leading Chief Justice George to remark that "the rule of law is in jeopardy" if the "judiciary becomes politicized."\textsuperscript{50}

Of course, the judiciary \textit{is} politicized and always has been. Judges are policy makers, have always been policy makers, and always will be. Men and women who go before the Senate, hoping for a seat on the federal bench, usually insist nowadays that they have never, in a sense, lost their mental virginity; they claim to have no ideas, attitudes, or prejudices, and announce that they will decide cases as they arise, strictly according to law. They disavow any notion that judges make law, make policy, or reach any decisions not strictly dictated by legal logic. But no serious scholar believes them. And more and more members of the public, whatever their normative stance, are acutely aware of the power of judges to make law, make policy, or in any event make a difference. It is probably enough to mention \textit{Roe v. Wade}, or \textit{Bush v. Gore}.\textsuperscript{51}

Making policy is one thing; making policy to suit campaign donors is another. Here the public shows some signs of disquiet. In one poll, seventy-six percent of voters and twenty-six percent of state judges felt that contributions to campaign war chests of judges had an influence on judicial decisions.\textsuperscript{52} Most voters also feel that in the United


\textsuperscript{49} Jessica Garrison, \textit{In Judicial Races, the Status Quo Prevails}, \textsc{L.A. Times}, Nov. 9, 2006, at B4.


\textsuperscript{52} Letter from Stan Greenberg, Chairman and CEO, Greenberg Quinlan Rosner Research, and Linda A. DiVall, President, American Viewpoint, to Geri Palast, Executive Director, Justice at Stake Campaign (February 14, 2002), http://justiceatstake.org/files/pollingsummaryfinal.pdf
States, there is one system of justice for the rich and powerful, and another for the rest of us. Nine out of ten voters, and eight out of ten state judges, said they are quite concerned about special interest groups who buy advertising trying to influence the outcomes of judicial elections. One judge, in an interview, said he had "never felt so much like a hooker down by the bus station," as he did in a judicial race.

The President appoints Justices to the United States Supreme Court. The public knows that a lot depends on who sits on the court. The power to appoint Justices has even been an issue in recent presidential elections. Of course, many people, perhaps even most people, are willing to believe that "activist judges" are a bad thing; that judges should stick to "the law" and refrain from making policy. But ironically, even those people, and perhaps especially those people, seem quite committed to a political process in choosing justices. They tend to vote for candidates who promise to appoint or promote judges who are "strict constructionists." Sometimes they are willing to punish "activists" at the ballot box. Most of the time "activist" is a code word for "liberal." But the very fear of "activist judges," along with horror at the idea that politics has invaded the judicial world, leads to an increase in contested elections. This means more money and more controversy and makes more salient the very problem conservatives say they are trying to avoid.

A regime of hotly contested, feverish judicial elections is dangerous in two ways that distort the role of the judge. The first danger is that judges, facing or fearing opposition, will shy away from decisions that might make trouble at the polls. The second is that the judges are forced to campaign, but campaigning costs money and money corrupts. Even judges who are not in much danger feel they have to raise money for a "pre-emptive strike," as Chief Justice George of California put it in 1998. The chief justice was afraid that a controversial decision he joined would lead to a campaign against him. Judges, then, feel they must beg for money from donors. What do the donors get in return? A study of Wisconsin claimed to find that one group of

[hereinafter Letter from Stan Greenberg & Lynda A. Divall to Geri Palast]. In another poll, an overwhelming majority (more than eighty percent) thought that "the partisan background of judges influences court decisions either some or a lot." Keith J. Bybee, Introduction: Two Faces of Judicial Power, in BENCH PRESS, supra note 42, at 1, 3.

53. Letter from Stan Greenberg & Lynda A. Divall to Geri Palast, supra note 52.
55. Chang, supra note 50.
56. Id.
contributors (lawyers) essentially got nothing: lawyers who donated money were no more likely to win cases than lawyers who did not. But this was a single study of a single state. Other studies point in a different direction. A 2006 study conducted by the New York Times claimed that justices of the Ohio Supreme Court voted overwhelmingly in favor of donors in cases that came before them. One justice voted on the side of contributors ninety-one percent of the time. The Ohio justices insisted that the money made no difference. This is certainly possible. After all, the judges can claim, perhaps plausibly, that they simply tended to agree ideologically with their donors. But is this really the case? A more recent study, in Louisiana, compared cases involving donors to similar cases that involved no donation. The study concluded that the money was crucial: it was "the donation, not the underlying philosophical orientation," that accounted for the outcomes of cases. And, of course, some are troubled by the very possibility that in the future some judges will bend and twist the decision-making process.

There is no doubt that judicial elections, or at least some of them, are getting more expensive and more strident. Attacks on sitting judges, as we have seen, are at times quite unfair. Justice McGraw in West Virginia was essentially accused of being soft toward child molesters. This was bad enough in itself. The groups mounting the campaign, moreover, probably cared very little about what happened to child molesters. Rather, they hated McGraw's pro-labor, liberal decisions. The same was true of the Wisconsin campaign that cost Justice Butler his job. And Justice Rose Bird no doubt lost her seat because the public was told, over and over again, how she thwarted the will of the people in death penalty cases. Millions were spent to defeat her, but the death penalty is not an issue that loosens the purse strings of big business groups.

57. Damon M. Cann, Campaign Contributions and Judicial Behavior, 23 AM. REV. POL. 261 (2002). There was some suggestion in this study that "justices are sensitive to the sources of their campaign funds" and might tend to recuse themselves. Id. at 270. 58. Liptak & Roberts, supra note 54. 59. Id. 60. Adam Liptak, Looking Anew at Campaign Cash and Elected Judges, N.Y. TIMES, Jan. 29, 2008, at A14. 61. Id. 62. Id. 63. To be sure, police groups did contribute to the defeat of Justice Rose Bird. See Greg Braxton, Burbank Police Group Donates $1,000 to Drive to Unseat Bird, L.A. TIMES, Feb. 27, 1986, at G10. The police called her "soft on criminals," and with "no apparent compassion for the victims of crime." Id. But the big money came from business groups and they were behind the campaign in the first place.
Most examples of nasty and negative campaigns come from conservative groups. In theory, the left can play the smear game as well. In fact, this happens once in a while. In an Illinois race, in 2004, ads attacking Lloyd Karmeier claimed that "[m]ulti-national corporations, HMOs and the insurance industry are spending millions to buy Lloyd Karmeier a seat on the Supreme Court. . . . They know Lloyd Karmeier will continue to support them as they outsource American jobs and eliminate healthcare for workers and retirees."64 In any event, two wrongs do not make a right. And the overwhelming majority of attacks come from conservatives. In 2006, eighty-five percent of the "special interest television advertisements" in state supreme court races "were sponsored by groups on the political right."65 In the long run, it is unhealthy for judicial campaigns to be as dirty and expensive as campaigns for seats in Congress, and it is unhealthy for them to be so biased in one direction. Business groups and other groups on the right are pouring millions of dollars into judicial campaigns in order to get judges on the bench who see things their way. Perhaps the single biggest issue for these groups is "tort reform." They want judges who will be more pro-business in cases of product liability and the like.66

II. THE SUPREME COURT CHIMES IN

Traditionally, canons of judicial ethics were designed to prevent the most blatant types of campaigning. Judges were not supposed to make campaign promises. But lately, these canons have come under attack. The issue came before the Supreme Court in Republican Party of Minnesota v. White.67 The Court's deeply divided response—a five to four decision—did little to clarify the situation.

Minnesota has an elected judiciary, and elections are supposed to be nonpartisan. The Minnesota Supreme Court's Code of Judicial Conduct states that a "candidate for a judicial office" may not "announce his or her views on disputed legal or political issues."68 Gregory Wersal ran for associate justice of the Minnesota Supreme Court. He "distributed literature criticizing several Minnesota Supreme Court decisions" on various issues.69 There were complaints, and he withdrew from the race. In 1998, he ran again, and this time he re-

65. Sample, Jones & Weiss, supra note 41, at 1.
68. Id. at 768.
69. Id.
quested an advisory opinion on the constitutionality of what had come to be known as the “announce” clause. A bare majority of the Supreme Court voted to strike down the clause, finding that it violated the First Amendment rights of candidates running for judicial office.⁷⁰

As is often true, what the case actually decided is not entirely clear. Was this a fairly narrow holding about a specific rule in one particular state? Or was the Supreme Court signaling a broad attack on most rules that limited campaign speech in judicial elections? Lower courts and state courts in recent decisions have tended to read the case rather broadly. They may even be edging toward a fairly drastic position: essentially, that no limit on campaign speech is allowable.⁷¹ In *Weaver v. Bonner*, George Weaver ran for election to the Georgia Supreme Court. He was defeated by an incumbent, Leah Sears.⁷² Bonner had distributed a brochure criticizing Sears; he said that she wanted the state “to license same-sex marriages,” that she “called the electric chair ‘silly,’” and that she did not accept “traditional moral standards,” but found them “pathetic and disgraceful.”⁷³ Another television ad claimed that Sears had “questioned the constitutionality of laws prohibiting sex with children under fourteen.”⁷⁴ A Special Committee of the bar moved to discipline Weaver.⁷⁵ He hit back by filing suit, arguing that the relevant canons and rules in Georgia were unconstitutional.⁷⁶ The Eleventh Circuit basically agreed with him.⁷⁷ The court said, in fact, that “the distinction between judicial elections and other types of elections has been greatly exaggerated.”⁷⁸ The court read the *White* case to suggest that “the standard for judicial

⁷⁰. Id. at 787–88.
⁷². Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).
⁷³. Id. at 1316 (internal quotation marks omitted).
⁷⁴. Id. at 1317.
⁷⁵. Id.
⁷⁶. Id.
⁷⁷. Id. at 1315. Most of the discussion turned on Canon 7 (B)(1)(d), which provided that candidates for judicial office were not to use “any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.” Id. (quoting GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d)).
⁷⁸. Weaver, 309 F.3d at 1321.
elections should be the same as the standard for legislative and executive elections."

White is a fairly recent case, and nobody can be certain where lower courts—and the Supreme Court itself—will take it. Decisions like Weaver suggest a sweeping reading. But courts could also decide on a narrower reading. This, at the moment, does not seem likely. And, in any event, state judicial bodies have reacted in various ways to the decision; some have interpreted it broadly, some narrowly. There have been, apparently, some differences in the tone of campaigns in various states. Whatever the flow of doctrine in the future, it seems unlikely that courts will allow any real control over campaign speech. This means that campaigns can continue to be raw, dirty, and negative and that groups can continue to pour money into them.

The cases, indeed, are not encouraging to those who want greater control over judicial campaigns. The facts of some of them are ominous. In Alaska Right to Life v. Feldman, a right-to-life group had circulated a questionnaire to Alaska judges running for re-election. It was a retention-type election, so the judges had no opponents. The questionnaire asked the judges for their views on such things as abortion and assisted suicide. The judges refused to answer, citing local canons on judicial ethics. At this point, the plaintiffs attacked the canons as unconstitutional. The district court agreed with plaintiffs. The appeals court reversed, but on the grounds that the challenges were not "ripe." Kansas Judicial Watch v. Stout also involved a questionnaire that asked about such things as gay marriage, rights of unborn children, and the death penalty; but the questionnaire also in-

79. Id. This means, then, that only knowingly false or recklessly made false statements could be subject to discipline. Cf. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (addressing the conditions under which public officials could be sued for defamation).

80. See Michael R. Dimino, Pay No Attention to that Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians, 21 YALE L. & POL'Y. REV. 301, 318, 327 (2003); see also Richard L. Hasen, First Amendment Limits on Regulating Judicial Campaigns, in RUNNING FOR JUDGE, supra note 27, at 29-30 ("The Supreme Court was careful not to declare that judicial election campaigns must be treated the same as other elections ... White is leading states in that direction.").


83. 504 F.3d at 843.

84. Id.

85. Id.

86. Id.

87. Id.

88. Id. at 844.
quired whether the candidate thought that the Kansas Supreme Court had "violated the . . . State Constitution" in decisions that mandated "specified spending levels for Kansas education funding."\(^9\)

An even more alarming questionnaire was sent out in Kentucky by the Family Trust Foundation of Kentucky.\(^9\) The questionnaire asked judges which former president "best represents your political philosophy," Kennedy, Carter, Reagan, or Bush; which of the Rehnquist Justices "most reflects your judicial philosophy"; and whether the judge was a "strict constructionist" or believed in the "living document approach."\(^9\) There were also questions about human cloning, displaying the Ten Commandments in public buildings, and same-sex marriage.\(^9\) When candidates refused to answer, citing the local canon on judicial ethics, the plaintiffs went to court in 2004—and won.\(^9\) Of course, no candidate is forced to respond to any such questionnaires, canon or no canon, but the groups that prepare these questionnaires can tell the public that the judge refused to answer and let people draw any conclusions they want from that silence.\(^9\)

The groups that draft these questionnaires can argue, plausibly, that they have a perfect right to know where the judges stand. This, after all, is the democratic way. If you elect judges at all, you ought to be able to make sure they have the right views; otherwise why bother electing them? On the other hand, there is an argument for keeping some distance between the election of members of Congress, or the state legislature, and the election of justices for the state supreme court.

For those who see a problem, is there an obvious solution? Would it help to change the type of selection or election? Is the problem most severe in partisan states and less severe in non-partisan states? In a study published in 1978, Henry Glick concluded that "selection systems themselves have little impact in guaranteeing that selection procedures will be free from partisan or interest group politics."\(^9\) But even if this was true in the 1970s, it is quite another question whether it is still true or will be true in the future. Judicial elections seem to be attracting more attention, as judges seem to be more and more in the

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91. Id.
92. Id.
93. Id.
94. Id.
limelight. They are deciding more and more high profile cases. There
have always been high profile cases in this country. But their numbers
seem to be increasing. Judicial review was a judicial power rarely ex-
ercised in the mid-nineteenth century, but is extremely common to-
day. Modern media and modern election techniques may make a
difference, too. Then, there is the question of money. Common sense
suggests that judges who take campaign money from lawyers or busi-
ness interests are likely to bend in the direction of the donors, perhaps
unconsciously. The research already mentioned hints that the danger
is real. If partisan elections become more partisan, and non-partisan
elections become more contested, will money make an even greater
impact?

And what about the quality of the campaigning? Is there any way
to prevent elections and selections from becoming dirtier and more
strident? It is one thing to criticize a judge as too liberal in tort cases
or death penalty cases; it is quite another to smear the judge with vi-
cious attack ads. Certainly, elections for Congress and the Presidency
are dirty, partisan, and strident. Are judicial elections going down the
same low road?

III. Public Support and the Courts

A good deal of research has explored the relationship between the
Supreme Court and public opinion. Much less work has been done on
state supreme courts and on lower courts, federal and state. The Su-
preme Court scholarship is interesting and important; but of course,
research findings about the Supreme Court do not necessarily carry
over to other courts, particularly courts with elected judges.

Scholars who study the United States Supreme Court feel that the
court’s decisions “by and large correspond with public opinion.”96 On
the issues, the Justices are rarely way out in front of the general public
or way behind. And this is no surprise, because the Justices are, after
all, appointed by presidents who won popular elections. Moreover,
the Justices live in this society and breathe the same normative air as
everybody else. Hence public opinion, in the broadest sense, is a criti-
cal factor in understanding the work of the Court. The Supreme
Court in the late nineteenth century embraced racial segregation. In
the 1950s, the Court rejected it. The reasons are complex, but obvi-
ously reflect deep social changes in society, which in turn account for
changes in the work and the mindset of the Justices.

96. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUIONAL
MODEL REVISED 424 (2002).
In the narrower sense, does public opinion actually influence the Court's decisions, in particular cases? Does it push the Justices in a direction they might not want to go, for fear of offending the public or damaging the Court's reputation? These are not easy questions to answer. Opinions are opaque and written for the most part in thick legal jargon. They are hardly mirrors of what the Justices actually think. Moreover, the Justices of the Supreme Court have life tenure and are about as independent of the government and the electorate as judges can possibly be. It is easy to show that the Justices, and other judges, tend to move in the same direction as public opinion. But this is almost always because something, some social force, some development, which moves public opinion, is also at the same time moving the Court. The decisions on race are one obvious example.

Research, however, also confirms what seems clear to all court-watchers: from time to time, the Court does defy public opinion. Justices can sometimes afford to be bold, because adverse public opinion, in most cases, has no way of impacting decisions. In the first place, the Court is, in many ways, the most secretive and obscure branch of government. The Justices hold no press conferences. They never run after publicity. They deliberate in secret. In short, much of what they do goes on beneath the radar screen.

To be sure, only important cases get to the United States Supreme Court. But important is not the same as newsworthy. A number of studies have explored the relationship between the Court and the media. The Supreme Court, for the most part, operates without huge media noise. Most decisions never get reported in the newspapers, and never make the TV evening news. For most cases, then, the Supreme Court can do just about whatever it wants, without the risk of an explosive public reaction. Mostly, then, there is no overt public opinion at all, either positive or negative.

But people do know about a small cluster of cases—the cases that make headlines; the school segregation cases, for example, or *Roe v. Wade* or *Bush v. Gore*. Each of these was wildly controversial and wildly unpopular in some circles. Yet survey evidence suggests that people hold the Supreme Court in high esteem, whatever it decides. The Court, in other words, enjoys a high level of support. Much of

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97. *Id.* at 427–28.
98. *Id.*
100. 531 U.S. 98 (2000).
this is what political scientists call "diffuse" support: this means support for the institution in general, rather than for what it does in any particular case. Apparently, millions of people, even those who might disapprove of the Court's general direction, still value the Court as an institution. The Court's decisions might even move some people to change their minds on this or that subject.  

Bush v. Gore is a particularly interesting instance. The Supreme Court decided this case in 2000 in the feverish context of a disputed election. The decision heavily favored George Bush and, arguably, made him the President. It was decided by a five to four vote—five conservatives for Bush, four liberals for Gore. Many people found the decision outrageous, and its legal basis flimsy. Yet one study conducted by a group of political scientists found, somewhat surprisingly, that the decision had no impact whatsoever on peoples' views of the Supreme Court and no effect on the Court's legitimacy—its firm basis of support. Whether this is generally true of controversial opinions is unclear. Another study found, to the contrary, that disagreement with the Court on two high-profile cases tended to erode public confidence in the Court.

The study of Bush v. Gore does, however, seem somewhat plausible. Most people may support the Court, no matter what it decides in particular cases. It is not that people agreed with the decision in Bush v. Gore. Some did and some did not. But people support the institution. There is nothing unique about this situation. More than two-thirds of the public during the last year of his Presidency thought that George W. Bush was doing a rotten job. But would they want to

102. Id. The authors asked two groups questions about certain policy issues, for example, "Do you favor or oppose allowing a doctor to end the patient's life?" One group was simply asked the question. The second group was told what the Supreme Court view of the subject was. There was a small but definite tendency on most issues, but not all, for the second group to tilt toward the Supreme Court's view. For example, on the question of ending a patient's life, thirty-two percent of the first group were opposed to giving the doctor this power. Id. fig.2. When told that the Supreme Court was opposed, thirty-eight percent in the second group expressed opposition. Id.

103. 531 U.S. 98 (2000).


change the form of government? Obviously not. They did not sup-
port this particular President, but they supported the idea and the in-
stitution of the Presidency. Furthermore, people who are upset about
police brutality, behavior, or corruption do not want to get rid of po-
lice. They want change and reform.

One might recall the famous Court-packing plan, which Franklin D.
Roosevelt hatched in 1937.107 Roosevelt was at the height of his pop-
ularity. He had just won re-election in a landslide. His policies were
popular. The decisions of the Supreme Court were not. Yet his plan
to pack the Court failed miserably, and his own party deserted him on
this issue. It was one of Roosevelt's rare political defeats. Yes, the
Court was making mistakes and wrong decisions. This was
deplorable, but an attack on the Court was an attack on something
holy and fundamental. It was an attack on an institution that, right or
wrong, enjoyed a high degree of legitimacy.

Is this because of the common belief, or myth, that judges do not
make policy and that they simply decide according to the law? Cer-
tainly, anyone who wants a federal judgeship and goes before a Senate
Committee has to pretend that this is more or less the case, as we
pointed out. Judges running for office also often insist that judges
should stick to the law and that they should never legislate. Yet, no
political scientist and no serious legal scholar really believes in the
myth. Some scholars, including some political scientists, back off a
little from the "attitudinal model"; they are convinced that prece-
dents, law, and legal doctrines do at least constrain the judges. Do the
judges themselves believe in the myth? Many of them say they do,
but one wonders.108 And, in fact, how constrained are Justices and
judges in reality? Common sense suggests that there must be some
level of constraint. But there is very little evidence to support this
common sense notion, or, for that matter, to refute it.109 What re-
search makes clear and what seems obvious simply from reading the
newspapers is that, at least in difficult, borderline cases, high court
judges react to facts according to their values and ideologies. Other-


108. See Lawrence M. Friedman, Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act, in Norms and the Law 139, 139-60 (John N. Drobak ed., 2006). Of course, trial court and intermediate appellate judges are particularly likely to think they are simply applying the law—and perhaps in many cases they are. See John T. Wold, Going Through the Motions: The Monotony of Appellate Court Decision Making, 62 Judicature 59, 62 (1978).

wise it would make no sense to talk about liberal and conservative justices.

And what about the public? Survey research suggests that people buy into the myth of a technocratic judiciary, at least to a certain extent. But they are also aware that ideology and political party have an impact on decisions. Is the myth a necessary pillar of the court’s legitimacy and a source of its strength? There is a strong argument that it is, but one wonders. Millions of people surely suspect that Democrats and Republicans are different on the bench and that liberals and conservatives arrive at different decisions. They have seen money poured into judicial campaigns, and many people think that money talks. The campaigns in the states stress policy, ideology, values, right versus left. Policy is why the judiciary (the Supreme Court, basically) is an issue in presidential elections. The battle over nominations of men like Clarence Thomas underscores the point. But if it is so important to know where a judge stands, and if, in the states, campaigns get more and more expensive and strident—and more explicit about policy choices—what does this do to the prevailing myth?

Of course, people can be—and are—inconsistent. Perhaps many people who realize perfectly well that courts make policy draw a sharp line between “policy,” which is good (or at least unavoidable), and “politics,” which they dislike. “Politics” refers to the raw, hateful partisanship of campaigns and elected officials. It is associated with wheeling and dealing, and with the pandering and lying that is often a feature of electoral politics. The Supreme Court, then, can and does make “policy” but ideally it does so free from the taint of “politics.” This is a plausible way to look at public support for the Supreme Court. In any event, the Court has at its command a rich store of legitimacy. Even when confidence in the Court is “shaken by controversial rulings,” in time, perhaps, “just as a river cleanses itself,” the lost support gets “regenerated.”

But even if all this is true of the Supreme Court, how far can we generalize to other courts? The Supreme Court is the highest and most visible court in the land, and it is not an elected body. How much can we extrapolate from the Supreme Court to state supreme courts—or to trial courts?

State courts and lower courts have much less of that rich reservoir of diffuse support. These judges do not enjoy life tenure. In most

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states they are elected and re-elected. And, as we have seen, there is
danger that these courts are slowly sinking into a swamp of partisanship. Changes in election habits are convincing more and more people that judges are for sale. And perhaps, in a sense, they are. As we saw, there is some evidence that money contributions made a difference, at least in one state. More subtly, raw public opinion may bend the behavior of judges. One study found that in states with elected judges, where the public strongly supported the death penalty, appellate judges were much "less likely to reverse the death penalty" than in states with "less support for capital punishment" or in courts with appointed judges.\footnote{112. Paul Brace & Brent D. Boyea, Judicial Selection Methods and Capital Punishment in the American States, in Running for Judge, supra note 27, at 199.}

So far, many judges in many states have seemed able to avoid these pitfalls and stay clear of the swamp of partisanship. But the trends are not encouraging. Judicial elections are bound to get more expensive. All elections are becoming more expensive and, perhaps, more heated. This is the age of television: an age of images. Swing voters shift from this party to that, and not so much on the basis of ideology or policy, as on the basis of whether they like the candidate, whether the candidate has "charisma," whether the candidate is religious, whether he or she has a nice family life, and so forth. This puts enormous weight on how the candidates project themselves. Policy too is reduced to soundbites and images: soft on crime or not soft, conservative or liberal activist or strict constructionist. But images, especially on television, are dramatically expensive. The money has to come from somewhere. It often has strings attached. Money, after all, buys influence. It can work its mischief in subtle ways.

Trends in elections—in congressional elections, senatorial elections, presidential elections—are likely to affect judicial elections as well. More and more money, more TV ads, more internet blogging, more ruckus, more heat, more partisanship. This trend is arguably destructive with regard to all elections. For judges, it has special dangers. Partisanship could put the legitimacy of the courts at risk. Even more seriously, it could put justice itself at risk.