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A NEW ERA FOR JUDICIAL RETENTION ELECTIONS: THE RISE OF AND DEFENSE AGAINST UNFAIR POLITICAL ATTACKS

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Abstract

The judicial-merit selection and retention system for appointing judges to the bench was designed to emphasize selection based on the judge's qualifications and to minimize the influence of partisanship and politics in both the selection and retention process. Since 2010, increasingly strident and frequent political attacks on state supreme court justices facing judicial-merit retention elections present real dangers to a fair and impartial judiciary. These attacks are inherently different from the challenges facing the judiciary in states where supreme court justices are selected in contested judicial elections, especially those states that have partisan elections. Recent judicial-merit retention elections of state supreme court justices across the country demonstrate the danger that arises when justices are targeted for defeat based solely on disagreement with a judicial decision. Although only one political attack in recent years has been successful, even the unsuccessful attacks may influence how the public perceives courts and diminish public confidence in the fair and impartial administration of justice. Surveys show that most citizens want fair and impartial judges who will provide equal justice to all. However, the public has limited familiarity with the way judges reach judicial

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decisions and even less familiarity with the purpose of the judicial-merit retention system. Even when survey respondents agree that judges should not promote a political agenda and that every citizen deserves fair and equal treatment under the rule of law, those opinions are soft and shift quickly based on political rhetoric about judges ignoring public opinion or rendering decisions that do not reflect the will of the people.

This Essay examines recent judicial-merit retention elections that became rough-and-tumble political races and highlights the particular vulnerabilities judges face when trying to defend against political attacks. Because state supreme court justices targeted for defeat have limited ability to defend themselves, it is imperative that the legal profession remain at the forefront of defending against politically motivated attacks on a fair and impartial judiciary and proactively engage in informing voters of what is at stake.

INTRODUCTION

Recent experience highlights the sad fact that state court retention elections in which the public casts a yes-or-no vote for a sitting judge or justice have become well-funded, hard-fought, politicized contests featuring increasingly strident partisan and special-interest attacks by

those seeking to shape courts to their liking. Often, those who oppose a judge's retention berate the judge as merely a politician in a black robe who is accountable to no one.[1] Typically, the attacks highlight a few sensational court decisions. They condemn the judge as being "out of step" with public opinion.[2] Last-minute attacks may target a judge's criminal justice "record," using advertisements with grainy footage and scary music, unfairly distorting a decision, or blasting the judge for letting some predator "go free."[3] The commonality of these types of attacks on the judiciary is clear: The attacks ask voters to evaluate a sitting judge as a politician.

Fair comment on an error in legal reasoning or the exercise of judicial discretion plays an important role in the operation of courts and is fundamental to democracy. Those who criticize legally sound, but socially or politically unpopular, decisions for pure political gain ignore the overwhelming evidence that this country's Framers wanted a fair and impartial judiciary.

The Framers sought to achieve that ambition by creating a third branch of government, the judiciary, independent and insulated from the other two branches, the political branches. The Framers based the third branch on the values of independence, impartiality, integrity, professionalism, and competence—values critical to maintaining the public's confidence in the justice system.[4] When courts employ those core values and decide cases based on the rule of law and the Constitution, it is unimportant that a decision is unpopular. Courts are to decide cases uninhibited by partisan politics and undisturbed by public opinion. Therefore, a sitting judge should not be assessed based on whether that judge is out of step with some group's political agenda or with public opinion.

In *Williams-Yulee v. Florida Bar*,[5] Chief Justice John Roberts, writing for a majority of the U.S. Supreme Court and reflecting the Framers' aspiration for an independent judiciary, emphatically declared:

> Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like

1. *See* Bruce Fein & Burt Neuborne, *The Case for Independence: Why Should We Care About Independent and Accountable Judges?*, OR. ST. B. BULL., Apr. 2001, at 9, 10–11.

2. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1674 (2015) (Ginsburg, J., concurring).

3. Billy Corriher, *Merit Selection and Retention Elections Keep Judges out of Politics*, CTR. FOR AM. PROGRESS ACTION FUND (Nov. 1, 2012), https://www.americanprogressaction.org/issues/civil-liberties/report/2012/11/01/43505/merit-selection-and-retention-elections-keep-judges-out-of-politics/.

4. *See* Peter T. Zarella & Thomas A. Bishop, *Judicial Independence at a Crossroads*, 77 CONN. B.J. 21, 23–25 (2003).

5. 135 S. Ct. 1656 (2015).

> campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.[6]

Williams-Yulee upheld a Florida judicial-conduct rule prohibiting judges and judicial candidates from personally soliciting campaign contributions.[7] Chief Justice Roberts's majority opinion reasoned that, "[s]imply put, Florida and most other States have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors."[8]

Justice Ruth Bader Ginsburg's concurrence in *Williams-Yulee*, with which Justice Stephen Breyer joined, noted that in recent years, "issue-oriented organizations and political action committees have spent millions of dollars opposing the reelection of judges whose decisions do not tow a party line or are alleged to be out of step with public opinion."[9]

Justice Ginsburg's concurrence in *Williams-Yulee* echoed concerns she previously expressed in her 2002 dissent in *Republican Party of Minnesota v. White*,[10] where she wrote that judges, "[u]nlike their counterparts in the political branches, . . . are expected to refrain from catering to particular constituencies."[11] She added that judges should "decide 'individual cases and controversies' on individual records," not on perceptions of an electoral mandate or the will of the public.[12]

Attacking judges for being out of step with the public conflates the roles of judges and legislators. Disagreement can exist about the

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6. *Id.* at 1662.

7. *Id.* at 1672.

8. *Id.* at 1666.

9. *Id.* at 1674 (Ginsburg, J., concurring).

10. 536 U.S. 765 (2002). In *Republican Party of Minnesota v. White*, the Court held Minnesota's "announce clause" prohibiting a judge candidate from "announcing their views on disputed legal and political issues" to be an unconstitutional speech restriction. *Id.* at 788 (majority opinion). The Court addressed the state's asserted compelling interest in preserving impartiality but rejected a definition of impartiality that meant "lack of preconception in favor of or against a particular *legal view*," because all judicial candidates could be expected to have such views. *Id.* at 777. The Court reasoned that the announce clause "burden[ed] a category of speech that is 'at the core of First Amendment freedoms'—speech about the qualifications of candidates for public office." *Id.* at 774 (quoting Republican Party of Minn. v. Kelly, 247 F.3d 854, 861 (8th Cir. 2001)). The Court decided that the announce clause was not narrowly tailored to serve the state's compelling interest in judicial impartiality, and thus, the clause failed the strict scrutiny test. *Id.* at 777.

11. *Id.* at 803–04 (Ginsburg, J., dissenting).

12. *Id*. at 804, 806 (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 266 (1995) (Stevens, J., dissenting)) ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943))).

similarity of those roles in some respects, but in all respects judges alone are responsible to the law rather than public opinion.

The rule of law is an enduring shared value in the American form of government. It is the basis for due process and equal protection rights, guaranteeing equality under the law to all citizens and not just to the most vocal, the most powerful, or the most organized. Generations of Americans have resolutely agreed that the best way to uphold the rule of law is to insulate judges from popular will and political intimidation.[13] As former Harvard Law School Dean Roscoe Pound observed at the turn of the twentieth century, "Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."[14]

Of course, the law is not always independent of politics, and some court decisions inherently concern policy.[15] But courts, as an institution, are supposed to arrive at decisions in a manner distinct from ordinary politics. Judges should be nonpartisan, and they are certainly not political in the same sense as a legislator, governor, or other elected official.

Disagreement may exist about the requisites of "good judging," but undoubtedly "good judging" is not serving as the megaphone for the majority. Judges should be expected to issue neutral and impartial rulings based on the rule of law, regardless of how unpopular those decisions may be. The public's confidence in the ability of courts to do their important work rests on that premise.[16]

Of course, while decisions rendered by federal judges are not immune to political attack, Article III federal judges enjoy lifetime appointments.[17] Many state supreme court justices, however, face elections. Twenty-one states use contested elections, with five of those states using partisan elections and the remaining sixteen states using nonpartisan elections.[18] Fourteen states use merit selection and retention

13. Janet Stidman Eveleth, *Preserving Our Judicial Independence*, MD. B.J., July–Aug. 2004, at 58, 62.

14. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 35 F.R.D. 273, 290 (1964) (transcribing an address given in St. Paul, Minnesota in 1906).

15. Corriher, *supra* note 3.

16. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009) ("The power and the prerogative of a court to [resolve disputes] rest[s], in the end, upon the respect accorded to its judgments." (quoting Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring))); *see also* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310 (1997); Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573, 582–83 (2009).

17. U.S. CONST. art. III, § 1.

18. BRENNAN CTR. FOR JUSTICE, JUDICIAL SELECTION: AN INTERACTIVE MAP (last visited Oct. 5, 2016), http://judicialselectionmap.brennancenter.org/?court=Supreme. The Brennan Center's website is an excellent resource that describes each state's systems for appointing or

elections in which an incumbent judge standing for retention is put to a yes-or-no vote.[19]

In a merit selection and retention election system, judges on the ballot are initially appointed to the bench through their state's merit selection system. The state's merit selection system reviews the then-judicial candidate's professional competence, temperament, integrity, and experience, thereby ensuring that judges who eventually stand for a retention election are well-qualified.[20] Voters in a judicial-merit retention election, then, are not tasked with determining whether the judge is qualified to sit on the bench, but rather whether the judge is qualified to *continue* sitting on the bench—for example, whether the judge has compromised his integrity.

In 2010, voters in an Iowa judicial retention election sent shock waves across the country by removing three sitting state supreme court justices based solely on a campaign that attacked the justices for a 2009 decision that struck down Iowa's same-sex marriage ban.[21] Campaign spending against the justices totaled more than $1 million.[22] The 2010 Iowa election highlighted the effectiveness of a well-funded attack accusing a state court judge standing for retention of being out of step with the march of public opinion. [23]

Iowa was not the only state where judges faced some form of opposition in 2010. While some of the campaigns occurred just weeks before the election and were not well-organized, state supreme court justices in Alaska, Colorado, Florida, and Kansas all faced opposition by special-interest groups claiming to seek removal of "activist" judges

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electing judges at each level of court. The interactive map is updated as changes are made in each state. The Brennan Center classifies Virginia as using both nonpartisan elections and legislative appointments for filling seats on the Virginia Supreme Court. *Id.*

19. *Id.* In these states, some trial judges come to the bench through either nonpartisan or partisan elections; however, a merit selection system appoints to the bench all state supreme court justices and appellate judges, and they face some form of nonpartisan retention election after a designated period of time. *See id.*; *see also* Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 ARK. L. REV. 249, 254 (2011) (describing the history and process of a retention election). The remaining states not employing contested elections or merit selection and retention elections employ varying methods of selecting state supreme court justices, such as gubernatorial and legislative appointment. *Id.*

20. *See* MALIA REDDICK & REBECCA LOVE KOURLIS, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CHOOSING JUDGES 1 (2014), http://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf.

21. Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 CT. REV. 118, 118 (2010).

22. *Id.* at 120–21; Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715, 728 (2011).

23. A.G. Sulzberger, *In Iowa, Voters Oust Judges over Marriage Issue*, N.Y. TIMES (Nov. 3, 2010), http://www.nytimes.com/2010/11/03/us/politics/03judges.html?pagewanted=all.

based on opinions they disagreed with rather than on the judges' qualifications.[24] None of the opposition efforts in these states were successful in 2010.[25]

Although only $2 million was spent on advertising in retention elections in the decade leading up to the 2010 midterm elections, $3 million was spent on state judicial-retention election advertising that year alone.[26] Since 2010, the amount of money spent on judicial retention elections has only increased, along with the acerbity of advertisements targeting sitting judges.[27]

This trend of retention elections becoming rough-and-tumble political races is in stark contrast to the often genteel nature of retention elections of years past, which focused on whether to retain the justice or judge based on their judicial qualifications. In today's increasingly polarized political atmosphere, some special-interest groups and political figures have found the value proposition of using unpopular decisions to alter the

24. Alaska Supreme Court Justice Dana Fabe was the only justice on Alaska's ballot for retention in 2010 and faced organized opposition by Christian groups that distributed campaign mailers targeting Justice Fabe for her decisions on abortion, gay marriage, and prisoner rights. Lisa Demer, *Allies Defend Fabe as Justice Fights Campaign to Oust Her*, ALASKA DISPATCH NEWS (Oct. 28, 2010), http://www.adn.com/article/20101028/allies-defend-fabe-justice-fights-campaign-oust-her. As the President of one of the organizations opposing justice Fabe's retention noted, the opposition campaign was based on philosophical differences with the Justice and "really has nothing to do with how intellectual Justice Fabe is. If she's competent to be a judge. If she's had any disciplinary issues. If she's admired by her peers. That's not the issue." *Id.* Colorado justices faced an opposition movement called "Clear the Bench" that claimed the justices up for retention were too partisan because of opinions concerning property taxes, eminent domain, and redistricting. *See* Felisa Cardona, *Three Colorado High Court Justices Face Stiff Retention Opposition*, DENV. POST (Oct. 3, 2010, 1:00 AM), http://www.denverpost.com/campaign/ci_16239280. In Florida, Florida Supreme Court Justices Jorge Labarga and James Perry faced an online stealth campaign that opposed their retention in 2010. Jane Musgrave, *Florida Judges May Be on Political Hot Seat*, PALMBEACHPOST.COM (Nov. 14, 2010, 9:49 AM), http://www.palmbeachpost.com/news/news/state-regional/florida-judges-may-be-on-political-hot-seat/nLmmP/. Both justices kept their jobs but with lower percentages of votes than their colleagues whom the campaign had not targeted. *Id.* An anti-abortion group sought removal of a Kansas Supreme Court justice "because of how the court has handled cases on the issue." Associated Press, *Anti-Abortion Group Plans Effort to Oust Kansas Supreme Court Justice Carol Beier*, LAWRENCE J.-WORLD (Jan. 22, 2010), http://www2.ljworld.com/news/2010/jan/22/anti-abortion-group-plans-effort-oust-kansas-supre/. The efforts were not as well-organized and were certainly not as successful as in Iowa that year, but the efforts in Kansas and Florida were a harbinger for things to come in Florida in 2012 and in Kansas in 2014 and once again in 2016.

25. Press Release, Brennan Ctr. for Justice, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 3, 2010), https://www.brennancenter.org/press-release/2010-judicial-elections-increase-pressure-courts-reform-groups-say.

26. Sulzberger, *supra* note 23.

27. *See* Alison Frankel, *The Problem with Judicial Elections, Illinois Supreme Court Edition*, REUTERS (Nov. 3, 2014), http://blogs.reuters.com/alison-frankel/2014/11/03/the-problem-with-judicial-elections-illinois-supreme-court-edition/.

makeup of a state supreme court too good to pass up. But, as Professor Rachel Caufield argues, "to allege that judges should universally be assessed based on whether they adhere to political agendas and public opinion is anathema to the unique role that we ask judges to play in refereeing these social and political questions."[28]

In the current political climate, one of the greatest challenges for state courts is to remain fair and free. Recent retention elections provide fair warning that political attacks influence the public's perception of courts and diminish confidence in the impartial administration of justice. Surveys show that most voters want fair judges who will provide equal justice to all.[29] But the public has little familiarity with the Constitution and judicial reasoning.[30] And even when survey respondents agree that judges should not promote a political agenda and that every citizen deserves equal treatment under the rule of law, those opinions are soft and can shift quickly based on rhetoric about judges ignoring public opinion or not reflecting the values of the people.[31]

Courts are not equipped to offer a forceful defense when some politician or special-interest group criticizes a particular decision for political gain. A justice is practically unable to defend herself without offending judicial ethics or reinforcing the suggestion she is a politician, thus stripping the justice of the appearance of impartiality, which is critical to the public's acceptance of her authority.[32] Further, if a justice's response to a political attack is silence, the lack of a vigorous defense may reinforce the appearance that the attack is valid.

When the attacks come, courts have no natural constituencies who will defend court decisions and repel unfair criticism. The problem of preserving fair and free courts demands that the legal profession take up the defense. That requires political will. It entails fighting for courts in the political arena. It calls for advocates who will explain court decisions, educate the public about the basics of what courts do, and connect with voters on their commonly held values of fairness, impartiality, and freedom from popular opinion or political pressure. If the legal profession does not fill this role, who will? As the Defense Research Institute's Judicial Task Force aptly concluded in its 2011 white paper concerning the challenges to fair courts, the "fairness of our legal system hangs in the

28. Caufield, *supra* note 16, at 584.

29. *See infra* text accompanying notes 207–09.

30. *See infra* text accompanying note 212.

31. *See infra* text accompanying notes 207–09.

32. *See* Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 711–13 (1997).

balance . . . [and we] must take the steps necessary to address these problems facing the judicial branch."[33]

This Essay highlights recent unfair political attacks on fair courts that threaten the very foundation of American constitutional democracy and the separation of powers. Part I discusses what role the Framers intended courts to play in American democracy. Part II examines recent judicial-merit retention elections across the country where state supreme court justices were attacked by political groups based on legal decisions the justices rendered. In each of these states, it appears that the underlying agenda of the opposition campaigns was to vote justices off the bench to allow appointment of different justices deemed to be closer in line with the opposition group's political philosophy. Finally, Part III discusses the particular vulnerabilities courts face in warding off political attacks during merit retention elections and efforts that can be taken to curb the effectiveness of these types of attacks on courts.

I. THE ROLE OF COURTS IN AMERICAN DEMOCRACY

Before discussing in detail the recent spate of political attacks in merit retention elections across the country, this Part first reviews why the Framers of this democracy established an independent judiciary.

A. *The Framers' Vision for an Independent Judiciary*

The Framers conceived a democracy in which the legislative branch creates the law, which is then enforced by the executive branch. The judicial branch's function is to interpret and apply the legislature's statutes, declare the common law, and preserve and protect the Constitution.

The judicial system the Framers envisioned is based on "[t]he rule of law, which is a foundation of freedom, [and] presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges."[34] They fixed basic rights "as legal principles to be applied by the courts."[35] They equipped courts to administer those principles impartially and in a neutral manner.[36] Thomas Jefferson captured this understanding when he wrote, "When one

33. DEF. RESEARCH INST., WITHOUT FEAR OR FAVOR IN 2011, at 80 (2011), http://www.dri.org/ContentDirectory/Public/WhitePapersReports/DRI%20Judicial%20Task%20Force%20Report%20-%20Without%20Fear%20or%20Favor%20(2011).pdf.

34. N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring). John Adams famously said that we are a "*government of laws, and not of men*." John Adams, *Novanglus*, *in* 4 THE WORKS OF JOHN ADAMS 3, 106 (Charles Francis Adams ed., 1851).

35. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

36. *Id.*

undertakes to administer justice, it must be with an even hand, and by rule; what is done for one must be done for everyone in equal degree."[37]

The law does not always provide a clear answer. Some cases might be decided "either way" because "reasons plausible and fairly persuasive might be found for one conclusion as for another."[38] Recognizing that judges may sometimes err in their interpretation of the law, the Framers created a hierarchical system within the judicial branch allowing review of lower court decisions by higher courts.[39] A system of separated powers assured an extra measure of accountability. The political branches may react to judicial decisions they do not like through the legislative process. This legislative process further acts as an important protection against judicial autocracy or wrongdoing, making political criticism of judicial decisions unnecessary.

The Framers, according to former Justice Sandra Day O'Connor, founded the judiciary on the premise that "there has to be some place where being right is more important than being popular or powerful, and where fairness trumps strength."[40] They removed basic rights from the "vicissitudes of political controversy," placing them "beyond the reach of majorities and officials,"[41] and expected judges to decide cases free from the effects of politics and the changing winds and passions of public opinion.[42] Justice Oliver Wendell Holmes famously explained this "hydraulic pressure" of public opinion:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.[43]

According to Justice Holmes, the judiciary must decide cases that have generated overwhelming public interest as if the question had arisen in a case without any public attention.[44]

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37. W. CLEON SKOUSEN, THE MAKING OF AMERICA 241 (1985).

38. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 165 (1921).

39. *See* U.S. CONST. art. III, § 2.

40. Sandra Day O'Connor, *"Choosing (and Recusing) Our State Court Justices Wisely": Keynote Remarks by Justice O'Connor*, 99 GEO. L.J. 151, 152 (2010).

41. *Barnette*, 319 U.S. at 638.

42. THE FEDERALIST NO. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

43. N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

44. *Id.* at 401.

Courts' counter-majoritarian role as guardians of individuals, minorities, and persons without political power often puts courts in tension with the political branches.[45] This tension is precisely what the Framers expected.

Ensuring that democracy, liberty, and the rule of law were not hollow promises, the Framers created a form of government aimed at avoiding the concentration of power in a single authority. They made the judiciary an institution "not under the thumb of other branches of Government."[46] James Madison, while introducing in Congress the amendments that became the Bill of Rights, eloquently noted that the judiciary "will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[47] Alexander Hamilton argued in Federalist No. 78 that '"there is no liberty, if the power of judging be not separated from the legislative and executive powers.' . . . The complete independence of the courts of justice is . . . essential . . . ."[48] As Hamilton explained, if the legislature judged the validity of its own laws, then its members would substitute their will for the will of the people:

> It is not . . . to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.[49]

It is clear, then, that the Framers called on the judiciary to patrol the Constitution's legal boundaries and preserve the rule of law not because they believed judges to be wiser or smarter than those in the government's other branches; rather, the Framers believed that allowing the other branches to police themselves was too dangerous.[50]

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45. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 116–17 (2002).

46. Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 1 (2006).

47. James Madison, Speech to the House of Representatives (June 8, 1789), *in* THE MIND OF THE FOUNDER 210, 224 (Marvin Meyers ed., 1973).

48. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 42, at 523–24 (quoting 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS bk. XI, ch. 6 (1748)) . Without judicial independence, Hamilton argued, "all the reservations of particular rights or privileges would amount to nothing." *Id.* at 524.

49. *Id.* at 525.

50. The executive, with sole power to decide whether executive orders complied with the Constitution, could become too powerful. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 6–

Judicial review of legislation is a well-known friction point between the judiciary and the political branches. In a recent example of this at the federal level, Chief Justice John Roberts's opinion for the 6–3 majority in *King v. Burwell*,[51] while explaining why the majority was compelled to uphold the Affordable Care Act, addressed the Court's responsibility to interpret the Act as a whole rather than fixate on a few isolated words as textualism would dictate: "In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—'to say what the law is.'"[52] Roberts continued that this role of courts is more easily achieved through some cases than in others, "[b]ut in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan."[53]

Strong courts provide balance in American government. But the judiciary is also the "least dangerous" branch—because it has "no influence over either the sword or the purse . . . [i]t may truly be said to have neither Force nor Will, but merely judgment."[54] Consequently, judicial independence depends in part on the deference of political branches in upholding court judgments.

Jurists, performing their basic role in American democracy, have throughout this country's history required the other branches to take unpopular actions such as desegregating schools or mandating certain minimum standards for prisons. Often politicians have enough respect for courts that they are circumspect in their statements about unpopular decisions.[55] They understand the value to democracy of accepting decisions of the nation's highest courts, even those they think are wrong.

B. *Past Tests of Judicial Independence*

Occasionally, politicians and special-interest groups who have the idea that justices "are a means to an end, and that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit to them in advance"[56] have found the value proposition of criticizing unpopular decisions simply too good to pass up.

8, 215 (2010). The legislature, carrying out the will of the voters, would seldom turn down popular statutes that cross the Constitution's legal boundaries. *Id.*

51. 135 S. Ct. 2480 (2015).

52. *Id.* at 2496 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

53. *Id.*

54. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 42, at 522–23.

55. Bright, *supra* note 16, at 310.

56. Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 910 (2007).

For example, in 1937, President Franklin Roosevelt, stung by U.S. Supreme Court decisions that struck down key pieces of New Deal legislation, and buoyed by his landslide reelection in 1936, unveiled a proposal to expand the Supreme Court to as many as fifteen justices.[57] Critics charged that Roosevelt was trying to "pack" the Court with justices who would support his New Deal.[58]

In sharp contrast, in the wake of the U.S. Supreme Court's then-unpopular decision in *Brown v. Board of Education*,[59] President Dwight Eisenhower was deferential to the Court.[60] The eleven-page decision written by Chief Justice Earl Warren was firm and clear about the end of the separate-but-equal doctrine in American public schools.[61] The decision was unanimous. Public opinion about it was not. As former Justice Sandra Day O'Connor remarked, the decision was "an exercise of accountability to the Rule of Law over the popular will."[62]

The Supreme Court "unlocked the schoolhouse doors," but it could not by the force of its will end segregation.[63] The vagueness about how to enforce the Court's order with "all deliberate speed"[64] gave segregationists and states'-rights activists the opportunity to organize resistance that put judicial independence to the test.[65]

President Eisenhower ultimately had to send federal troops into Little Rock, Arkansas, to enforce a district court's desegregation order.[66] Before removing those troops, Eisenhower sought certain guarantees from Arkansas Governor Orval Faubus about enforcing federal court orders and keeping the peace.[67] Faubus refused to give them.[68] As historian David A. Nichols has noted, "While Eisenhower was a disappointing rhetorical advocate for racial equality, we must balance that

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57. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 169 (1960).

58. *Id.*; Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 23 (1967).

59. 347 U.S. 483 (1954).

60. *See* DAVID A. NICHOLS, A MATTER OF JUSTICE 279 (2007).

61. *Brown*, 347 U.S. at 495.

62. Sandra Day O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 DENV. U. L. REV. 1, 3 (2008).

63. President Barack Obama, Presidential Proclamation—60th Anniversary of Brown v. Board of Education (May 15, 2014), http://www.whitehouse.gov/the-press-office/2014/05/15/presidential-proclamation-60th-anniversary-brown-v-board-education.

64. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (deciding the issue of relief).

65. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 432 (1998).

66. Note, *Riot Control and the Use of Federal Troops*, 81 HARV. L. REV. 638, 648 (1968).

67. The Library of Congress, *Eisenhower and the Little Rock Crisis*, AM.'S STORY FROM AM.'S LIBR., http://www.americaslibrary.gov/aa/eisenhower/aa_eisenhower_littlerock_1.html (last visited Sept. 21, 2016).

68. *Id.*

assessment with his uncompromising defense of the courts."[69] When asked during an October 3, 1957, news conference about the impasse with Faubus, Eisenhower spoke eloquently about the federal judiciary: "These courts are not here merely to enforce integration. These courts are our bulwarks, our shield against autocratic government."[70]

Courts are accountable to the Constitution and the law. Just as sports fans do not want referees to change controversial calls due to the pressure of a shouting crowd, Americans should not want courts to bend to popular opinion and political pressure.[71]

But the Framers likely never imagined the present-day climate of political discourse in which state court judges who wish to remain judges are told by politicians and special-interest groups to bend to political pressure and popular opinion when deciding controversial cases during a retention election. Sometimes the threats are overt.[72] At other times, the threat is implicit in an attack on a previous decision. An attack based on a single highly publicized death penalty case, for example, can draw greater attention in a retention election than judicial qualifications, thousands of non-controversial decisions, or commitment to the Constitution and the rule of law. Such an attack plainly sends the message that a judge's fate is tied to court decisions. Former Florida Supreme Court Justice Ben Overton has noted that it was "never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes."[73]

Public confidence in the impartiality of courts is critical to sustain a judiciary that can resolve disputes and ensure the separation of powers. Every day, judges grapple with controversy as they decide the kinds of issues that regularly come before the appellate courts of every state. Every day, judges decide cases on the facts and the law that are legally sound but "unpopular and surely disliked by at least 50 percent of the litigants who appear before them,"[74] yet their decisions are obeyed and

69. NICHOLS, *supra* note 60, at 278–79.

70. John T. Woolley & Gerhard Peters, *Dwight D. Eisenhower: The President's News Conference, October 3, 1957*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=10920 (last visited Sept. 21, 2016).

71. William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPP. L. REV. 227, 229–30 (1980).

72. For example, in November 2013, while the Kansas Supreme Court was considering a school funding appeal, Kansas's Governor warned that a decision requiring a specific funding increase could lead legislators to consider a constitutional amendment to change the way Kansas Supreme Court justices are selected. Dion Lefler, *Brownback, Wagle: School Finance Ruling Could Trigger Public Fight over Judge Selection*, WICHITA EAGLE (Nov. 7, 2013, 3:18 PM), http://www.kansas.com/news/politics-government/article1127155.html.

73. *Electing Judges Is Poor Policy, Overton Tells Panel*, FLA. B. NEWS, May 1, 1989, at 4, 4.

74. Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting).

enforced. Fair criticism of an error in legal reasoning, facts, or the exercise of judicial discretion is fundamental to democracy. But unfounded political criticism of the judiciary may undermine the public's confidence in the independence of the American justice system. Preserving a high level of public confidence in courts should be, as Justice Anthony Kennedy has noted, "a state interest of the highest order."[75]

C. *The Original Purpose of Retention Elections*

Before explaining the purpose of merit retention elections, it is important to first understand what a merit retention election is and how judges are initially selected to serve on a court in states that employ a merit retention system. A merit retention election is a judicial election in which an incumbent judge standing for retention is put to a yes-or-no vote and does not face a challenger.[76] Typically, the state's governor initially appoints the judge to fill a court vacancy, choosing from a panel of candidates a nonpartisan nominating commission evaluated and determined were qualified.[77] Qualifications typically include a candidate's legal ability, integrity and impartiality, professionalism and temperament, and any other necessary skills for the level or jurisdiction of the court to which the candidate is applying.[78]

Retention elections were intended to give the people a voice in whether a state court judge deserved another term without the bruising characteristics of political attacks, partisan tactics, and competitive contests.[79] These elections sought to evaluate a judge based on his judicial performance—has the judge committed a serious ethical indiscretion, or is the judge incompetent?—not the popularity of a single decision or

75. *Id.* at 793 (Kennedy, J., concurring); *see* Cox v. Louisiana, 379 U.S. 559, 565 (1965) ("A State may . . . properly protect the judicial process from being misjudged in the minds of the public."); *In re* Murchison, 349 U.S. 133, 136 (1955) ("[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" (quoting Offutt v. United States, 348 U.S. 11, 14 (1954))).

76. Mary A. Celeste, *The Debate over the Selection and Retention of Judges: How Judges Can Ride the Wave*, 46 CT. REV. 82, 84 (2010). People often call the merit selection and retention system the "Missouri Plan," in acknowledgement of the state that first adopted this system of selecting and retaining judges. *See* Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 20 (1994).

77. *See* Caufield, *supra* note 19, at 254.

78. AM. BAR ASS'N, JUDICIAL SELECTION 13 (2008), https://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf.

79. *See* Todd E. Pettys, *Judicial Retention Elections, the Rule of Law, and the Rhetorical Weaknesses of Consequentialism*, 60 BUFF. L. REV. 69, 74 (2012).

whether the judge is too "liberal" or "conservative."[80] Merit elections sought to remove partisan politics and special interests from the election process.[81] Most importantly, they sought to insulate judges from shifts in public opinion that can undermine the consistency and fairness in the law. Judicial retention elections, then, were never meant to serve as a tool for judicial intimidation or payback for a particular unpopular, but legally sound, decision.

Certainly, there have been occasional politically motivated attacks, and some have been successful,[82] but state retention elections have generally served their original purposes.[83] Retention elections now are taking on many characteristics of regular competitive elections, with little or no protection for a judge who is accused of being out of step with the march of the public.[84] Some would argue that voters are entitled to know about a judge's "judicial philosophy" and how it can affect decisions about specific types of cases.[85] Certainly, there is some disagreement about what criteria are most appropriate for assessing judges in retention elections. And certainly some believe, as Professor Caufield observes, "that judges' personal backgrounds and experiences *may* have some influence on their behavior on the bench, [but] this does not imply that we must accept the normative position that they *should* be subject to

80. *See id.*; Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 97 (1998).

81. Traciel V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 69 (1999).

82. In 1986, Rose Bird, Chief Justice of the California Supreme Court, and two of her colleagues, were unseated in a retention election after a high profile death penalty decision. Robert Lindsey, *The Elections: The Story in Some Key States; Deukmejian and Cranston Win as 3 Judges Are Ousted*, N.Y. TIMES (Nov. 6, 1986), http://www.nytimes.com/1986/11/06/us/elections-story-some-key-states-deukmejian-cranston-win-3-judges-are-ousted.html. In 1996, Tennessee voters stripped Penny White of her seat on the Tennessee Supreme Court, because of a decision that upheld a conviction for the rape and murder of an elderly woman, but overturned a death sentence in the case. Colman McCarthy, *Injustice Claims a Tennessee Judge*, WASH. POST (Nov. 26, 1996), https://www.washingtonpost.com/archive/lifestyle/1996/11/26/injustice-claims-a-tennessee-judge/f0a28c33-fcb1-4c1b-9471-2d5704d56a88/. In Nebraska in 1996, Justice David Lanphier was defeated because of a unanimous decision striking down Nebraska's term-limits statute. Gerald F. Uelmen, *Judges Hear the Crocodiles Snapping*, L.A. TIMES (Feb. 19, 1997), http://articles.latimes.com/1997-02-19/local/me-30110_1_death-penalty.

83. Carrington, *supra* note 80, at 97.

84. *See* John Gramlich, *Judges' Battles Signal a New Era for Retention Elections*, WASH. POST (Dec. 5, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120400180.html.

85. *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, 349 (2003).

evaluation by the same political criteria as candidates for legislative or executive positions."[86]

Regardless, given the inherent tension between the desire to free judges to be faithful to the rule of law, deciding cases insulated from popular will, and the need for public accountability in retention elections, it is inevitable individuals and groups will challenge a judge as being out of step with public opinion. Professor Caufield argues:

> If we accept the value of accountability *and* we accept the role of elections in maintaining accountability and providing a check against judicial wrongdoing, then we must assess ways to disseminate information to voters in order to enable the voters to participate in a way that will preserve the integrity of the judicial system.[87]

Unfortunately, as the next Part details, recent retention elections in states employing merit selection and retention election systems demonstrate that the task of conveying to voters the appropriate guidepost for judging judges is easier said than done.

II. RECENT RETENTION ELECTIONS

Since the 2010 Iowa retention election, the organized opposition campaigns have become more political and more strident, using television and mass-mail advertising based on issue-oriented attacks in response to decisions touching values sacred to voters. The organized opposition campaigns design the advertisements to tap into voters' moral outrage over the result in a particular court decision, without explaining whether the court was legally wrong. They indict the judge as sitting on an "activist court" that ignores the moral mandate of the voting public. Their goal is to use voters' outrage to overpower the public's traditional deference to courts as fair and impartial arbiters of disputes.

Although incumbent judges in states that have contested elections, especially partisan elections, often face political attacks and special-interest money, judges in uncontested, nonpartisan retention elections are particularly vulnerable. There is no official opponent in such an election that will benefit from politicizing the contest.[88] And because opposition to a judge is not subject to time limits that exist in contested judicial elections, where a challenger must file before the qualifying deadline,

86. Caufield, *supra* note 16, at 585.

87. *Id.* at 588.

88. *See* Dahlia Lithwick, *How to Take Out a Supreme Court Justice: When Politicians Target Elected Judges with Big Money, the Justice System Loses,* SLATE (June 13, 2014, 5:01 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/06/tennessee_supreme_court_justices_gary_wade_cornelia_clark_and_sharon_lee.html.

there is a grave risk of a blindsiding attack by a politician or special-interest group just days before an election.[89] A judge then has little time to launch a campaign, address the attack, or form a campaign committee to raise campaign funds.

Recent retention elections in Iowa, Florida, Tennessee, and Kansas all demonstrate the need for increased public knowledge about the proper role of the judiciary—to provide equal justice under the law without fear of reprisal or favor toward one side—the purpose of judicial-merit selection and retention systems, and the motivations of those who would attack justices based on disagreement with a judicial decision.[90]

A. *Iowa*

In 2010, three Iowa Supreme Court justices lost their seats in retention elections.[91] Iowans supporting the ouster were upset by a unanimous 2009 Iowa Supreme Court ruling overturning the state's prohibition on same-sex marriage.[92]

A television advertisement, sponsored by several special-interest groups, opened with a narrator intoning, "Some in the ruling class say it's wrong for voters to hold Supreme Court judges accountable for their decisions."[93] Images of parents, Boy Scouts, hunters, and flag-saluting children flashed across the screen as the advertisement condemned the same-sex marriage decision.[94] The advertisement asked voters to "hold activist judges accountable, flip your ballot over and vote no on retention of supreme court justices."[95] Buzzword-filled phrases in the advertisements included "ignoring the will of voters," "legislating from the bench," "liberal," and "out of control."[96]

89. Barbara J. Pariente & F. James Robinson, *Preserving a Fair and Impartial Judiciary—the Cornerstone of Our Democracy*, VOIR DIRE, Spring 2015, at 7, 9.

90. *See supra* notes 21, 24, 82 and accompanying text.

91. *Buying Time 2010: Iowa*, BRENNAN CTR. FOR JUSTICE (Sept. 14, 2010), https://www.brennancenter.org/analysis/buying-time-2010-iowa.

92. *Id.*

93. Nation for Marriage, *NOM: Iowans for Freedom against Radical Judges: David A. Baker, Michael J. Streit, Marsha Ternus*, YOUTUBE (Oct. 19, 2010), http://www.youtube.com/watch?v=MIFnBBLX_OE.

94. *Id.*

95. *Id.*

96. Nation for Marriage, *NOM: Liberal Iowa Supreme Court Judges: David A. Baker, Michael J. Streit, Marsha Ternus*, YOUTUBE (Sept. 13, 2010), https://www.youtube.com/watch?v=z0rUi0HEqgk.

In the election, the Iowa justices decided to stay above the political fray.[97] The justices spoke at colleges,[98] rotary clubs,[99] Kiwanis meetings,[100] and other public forums when asked. They talked about the same-sex marriage decision, its consistency with the rule of law, and the importance of fair and impartial judges who make decisions without fear, favor, or hope of reward.[101] However, they did not fundraise or wage active campaigns, or even ask for the citizens to vote "yes" to retain them, fearing doing so would serve only to politicize the retention election.[102] According to one researcher, the justices could have received a five-percent increase in votes had they campaigned, which would have made the election close.[103]

Exit polling showed that fifty-seven percent of Iowa voters opposed same-sex marriage.[104] One of the leaders of the ouster campaign called the vote "a strong message for freedom to the Iowa Supreme Court and to the entire nation that activist judges who seek to write their own law won't be tolerated any longer."[105]

Former Iowa Supreme Court Justice Marsha Ternus, who was unseated in the 2010 retention election, has explained why members of the Iowa Supreme Court did not actively campaign:

> We strongly believed our role as fair and impartial members of the Iowa Supreme Court would have been forever tarnished had we engaged in fundraising and campaigning . . . even though we knew this decision might

97. *See* Lithwick, *supra* note 88.

98. Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System*, A.B.A. J. (Jan. 1, 2011, 6:59 AM), http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system/.

99. Josh Nelson, *Justice Baker Speaks to Waterloo Downtown Rotary on Eve of Election*, COURIER (Nov. 2, 2010), http://wcfcourier.com/news/local/govt-and-politics/justice-baker-speaks-to-waterloo-downtown-rotary-on-eve-of/article_c99458a6-e66c-11df-9291-001cc4c002e0.html.

100. Courtney Blanchard, *Iowa Justice: Activist Rulings Not Just Liberal*, THONLINE.COM (Aug. 10, 2010, 4:59 AM), http://www.thonline.com/news/feature_stories/article_3957624f-3622-5178-85b7-8eb55c1b0c6c.html.

101. *Id.*

102. *See* Curriden, *supra* note 98; Lithwick, *supra* note 88; Pettys, *supra* note 22, at 732–33; *see also* James Sample, *Retention Elections 2.010*, 46 U.S.F. L. REV. 383, 383 (2011).

103. *See* Curriden, *supra* note 98.

104. Krissah Thompson, *Gay Marriage Fight Targeted Iowa Judges, Politicizing Rulings on Issue*, WASH. POST (Nov. 3, 2010, 6:39 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110307058.html.

105. Bert Brandenburg, *Beating Back the War on Judges: Voters Rejected the Crusade to Politicize the Courts*, SLATE (Nov. 12, 2012, 1:06 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/judicial_elections_in_2012_voters_rejected_the_politicization_of_the_courts.html.

> cost us our jobs. Our hope was that the bar association and others would come to our aid. They did, but not with the vigor and money that was required to counteract the emotionally laden and factually inaccurate television ads that ran incessantly for the three months prior to the election.[106]

Two years later, another justice who participated in the same-sex marriage decision faced a similar attack when on the ballot for merit retention.[107] Like the three justices defeated in 2010, this justice did not run an active campaign.[108] In an opinion editorial in the *Des Moines Register*, the justice explained why he chose not to raise money or actively campaign to keep his seat on Iowa's highest court: "Campaigns are political . . . . They require candidates to count votes and appeal to donors. That system has created a big enough mess in Congress. It has no business in the courts. Judges should be beholden only to the constitution and the law."[109]

By February 2012, fifty-six percent of Iowans opposed passing a constitutional amendment banning same-sex marriage.[110] Amid the shifting winds of public opinion, the justice survived retention in 2012 and received fifty-four percent of the vote.[111]

In other words, by the time of the 2012 retention election, only public opinion changed; the legal merits of the court's decision did not. And indeed, it is ironic that by 2015 the U.S. Supreme Court held bans on same-sex marriage to be unconstitutional after a series of similar decisions by federal judges throughout the country.[112] Yet, unlike state court judges, federal judges enjoy the protection of lifetime appointments.

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106. Marsha K. Ternus et al., *The Politicization of Judicial Elections and Its Effect on Judicial Independence*, 60 CLEV. ST. L. REV. 461, 484 (2012).

107. Editorial, *Politics, Principle and an Attack on the Courts*, N.Y. TIMES (Sept. 23, 2012), http://www.nytimes.com/2012/09/24/opinion/politics-principle-and-an-attack-on-the-courts.html?_r=0.

108. *Id.*

109. *Id.*

110. *Iowa Senate Republicans Try Again to Ban Same-Sex Marriage; Gay Rights Advocates Decry 'Shameful' Move*, DES MOINES REG. (Feb. 26, 2013, 12:01 PM), http://blogs.desmoinesregister.com/dmr/index.php/2013/02/26/iowa-senate-republicans-try-again-to-ban-same-sex-marriage-gay-rights-advocates-decry-shameful-move.

111. Lauren Coffey, *Iowa Supreme Court Justice Retention Sparks Discussion,* DAILY IOWAN (Nov. 8, 2012, 6:30 AM), http://www.dailyiowan.com/2012/11/08/Metro/30789.html.

112. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2597, 2604–05 (2015).

B. *Florida*

In 2012, conservative political groups—including Americans for Prosperity, a Tea Party group called "Restore Justice," and the Republican Party of Florida—targeted three justices of the Florida Supreme Court.[113] An advertisement by the "Restore Justice" group asked, "What if we could shake the establishment to its core and take back the last liberal stronghold?"[114] The group argued that judges had unbridled discretion and that some court decisions reflected political choices the judges made. According to the group:

> Throughout our country and our state, judicial activism represents a serious threat to our liberty. Judges play partisan politics and cater to special interests, ignoring the constitution and threatening our protection under the law. Fortunately, here in Florida, we have a recourse. Every judge is periodically reviewed and placed on the ballot for a merit retention vote.[115]

The group criticized the Florida Supreme Court for "undermining property rights, education rights, and fair elections," without any specificity.[116] The group also criticized a decision removing from the 2010 ballot a constitutional amendment challenging the individual mandate in the Affordable Care Act.[117] The only issue before the court was whether the proposed constitutional amendment ballot summary was misleading.[118] However, the group spun the controversy as justices who would deny voters the right to choose their own health insurance.[119]

Americans for Prosperity's campaign against the Florida justices purported to call "attention to the court's decisions that have in fact politicized the bench, allowing their own views to usurp the law and

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113. Michael Peltier, *Conservative Group Launches Ad Attacking Florida Supreme Court*, REUTERS (Sept. 25, 2012, 8:45 PM), http://www.reuters.com/article/florida-court-recall-idUSL1E8KPJ2V20120926.

114. RestoreJustice2012, *Restore Justice 2012 "What If?"*, YOUTUBE (May 7, 2012), https://www.youtube.com/watch?v=Q8cd0zQ-90w.

115. Peter D. Webster, Response, *Judges Are (and Ought to Be) Different*, 64 FLA. L. REV. F. 19, 20–21 (2012).

116. RestoreJustice2012, *Florida Supreme Court: Justices Pariente, Quince and Lewis*, YOUTUBE (Sept. 30, 2012), https://www.youtube.com/watch?v=9dx5uTXRYpg.

117. Press Release, Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law, 2012 Spending on Judicial Advertisements Surpasses $7 Million, with Michigan Leading the Way (Oct. 11, 2012), http://www.brennancenter.org/press-release/2012-spending-judicial-advertisements-surpasses-7-million-michigan-leading-way.

118. *Id.*

119. Americans for Prosperity - Florida, *Shouldn't Florida Courts Protect Our Rights - YouBeTheJudgeFL.com*, YOUTUBE (Sept. 24, 2012), https://www.youtube.com/watch?v=OJgujGDBitE.

separation of powers, by clearly identifying rulings that bear these instances out."[120]

Just two months prior to the election, the Republican Party of Florida attacked the justices for a ten-year-old decision involving a death penalty case.[121] Decisions in criminal cases are particularly vulnerable to distortion. When a court reverses a conviction because the law or the Constitution requires it, it is all too easy for the public to succumb to the mantra that the judge or justice is "soft on crime" or having "sided" with the criminal.[122]

The Florida justices actively educated the voters as to the role of a fair and impartial judiciary. Their challenge was to inform voters about the political motive for the attacks without becoming political themselves. How would voters know the attackers' motive without either the justices or their supporters speaking about it?

The three justices decided to fight the unfair attacks, which they believed struck at the very heart of merit retention.[123] They organized their own individual campaigns.[124] They educated voters on the purposes of merit retention.[125] They visited editorial boards throughout the state.[126] The Florida Bar also organized a public-education campaign to enhance voter understanding about judicial retention elections.[127]

Florida is a success story. In 2012, over sixty-eight percent of the voters chose to retain the justices.[128] The justices' active resistance, along with a strong, unified defense of the court by the organized bar, carried the day.

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120. Pariente & Robinson, *supra* note 89, at 10.

121. Lizette Alvarez, *G.O.P. Aims to Remake Florida Supreme Court*, N.Y. TIMES (Oct. 2, 2012), http://www.nytimes.com/2012/10/03/us/republican-party-aims-to-remake-florida-supreme-court.html.

122. *See, e.g.*, *id.*

123. *See* Mary Ellen Klas, *Florida Supreme Court Justices Fight Back to Retain Seats*, TAMPA BAY TIMES (Oct. 6, 2012, 7:44 PM), http://www.tampabay.com/news/courts/florida-supreme-court-justices-fight-back-to-retain-seats/1255242.

124. *Id.*

125. *Id.*

126. Aaron Deslatte, *Lawyers Fuel Huge Campaign to Retain 3 Justices*, ORLANDO SENTINEL (Oct. 31, 2012, 5:14 PM), http://articles.orlandosentinel.com/2012-10-31/news/os-justices-under-attack-20121030_1_justices-joseph-boyd-barbara-pariente-peggy-quince.

127. *See* Scott G. Hawkins, *Perspective on Judicial Merit Retention in Florida*, 64 FLA. L. REV. 1421, 1431–32 (2012) (explaining the various public education efforts undertaken in the run up to the 2012 merit retention election by the Florida Bar).

128. *Florida Judicial Elections, 2012*, BALLOTPEDIA, https://ballotpedia.org/Florida_judicial_elections,_2012 (last visited Sept. 21, 2016).

C. *Tennessee*

While some hoped the strong showing in Florida in 2012 would discourage politically based attacks in merit retention elections, retention elections that followed quickly dashed those hopes. In August 2014, three justices on the Tennessee Supreme Court faced a retention-election challenge.[129] The state's nine-member Judicial Performance Evaluation Commission, which reviewed the performance of the State's appellate judges, determined that the three justices were qualified to retain their seats. [130]

The state's lieutenant governor led the effort to unseat the justices.[131] He targeted the three jurists as "soft on crime" and "anti-business."[132] His political action committee contributed $400,000 to a group called Tennessee Forum.[133] That group sponsored a television advertisement claiming the justices were "liberal on crime" and "threaten your freedoms."[134]

A television advertisement from the State Government Leadership Foundation singled out the Chief Justice as "liberal on crime, liberal on the Obama agenda."[135] Further, because in Tennessee the Supreme Court chooses the state Attorney General, one group used a radio advertisement and direct mail to criticize the justices for picking a "liberal" Attorney General who decided not to join a multistate lawsuit challenging the Affordable Care Act.[136]

Unlike the Iowa justices—but like the Florida justices—the Tennessee justices fought back. Spending by both sides on television advertisements topped $1.4 million, after no spending in Tennessee's last merit retention election.[137]

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129. *See* Lithwick, *supra* note 88.

130. *Id. See also* TENN. CODE ANN. § 17-4-201 (2014) (repealed 2016). The Judicial Performance Evaluation Commission no longer exists after the Tennessee legislature repealed section 17-4-201.

131. *Id.*

132. *Id.*

133. Brian Haas, *TN Supreme Court Battle Brings National Money, Scrutiny*, TENNESSEAN (Aug. 5, 2014, 6:00 PM), http://www.tennessean.com/story/news/politics/2014/08/04/tn-supreme-court-battle-brings-national-money-scrutiny/13550987/.

134. Laurie Kinney*, Ads Hit Tennessee Airwaves in Judicial Retention Race: Americans for Prosperity Launches Radio Ad*, JUST. STAKE (July 23, 2014), http://www.justiceatstake.org/newsroom/press-releases-16824/?ads_hit_tennessee_airwaves_in_judicial_retention_race_americans_for_prosperity_launches_radio_ad&show=news&newsID=18819.

135. Josh Eidelson, *Big Political Money Now Floods Judges' Races, Too*, BLOOMBERG BUSINESSWEEK (July 31, 2014, 6:10 AM), http://www.businessweek.com/articles/2014-07-31/big-political-money-now-floods-judges-races-too.

136. Kinney, *supra* note 134.

137. Josh Eidelson, *Big-Money Effort to Oust Tennessee Judges Fails*, BLOOMBERG BUSINESSWEEK (Aug. 8, 2014, 1:00 PM), http://www.businessweek.com/articles/2014-08-08/big-money-effort-to-oust-tennessee-judges-fails.

Tennesseans voted to retain the three justices, with each justice receiving more than fifty-six percent of the vote.[138] Even so, those opposing retention of the justices claimed a victory.[139] "Any decision that they make going forward, they know they have conservative groups that will hold them accountable," said Americans for Prosperity's Tennessee director.[140]

The Chief Justice of the Tennessee Supreme Court credited the jurists' success to three things: active campaigns defending the record of the Tennessee Supreme Court; the partisan nature of the effort to take control of the court putting off voters; and strong support from Tennessee attorneys, who "felt that their entire profession was under fire and assault."[141]

D. *Kansas*

In 2010, the anti-abortion group Kansans for Life targeted one of the four Kansas Supreme Court justices standing for retention.[142] The group was upset with decisions written by the justice in 2006 and 2008 about the state's former attorney general's investigation of abortion clinics.[143] All four justices were retained, including the justice who was targeted, garnering about two-thirds of the vote[144] in a quiet election where dueling political action committees launched small campaigns for and against retaining the justices.[145]

Four years later, two Kansas Supreme Court justices stood for retention.[146] A recent study looked at judicial races nationwide, in 2013 through 2014, and chose that race as one of the worst examples of politicians exploiting retention elections for political gain.[147]

In the run-up to the election, the victims' families of a Wichita crime spree formed "Kansans for Justice" to unseat the justices for their role in a decision vacating the death sentences of brothers Reginald and Jonathan

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Fred Mann, *Justices on Ballot Draw Little Noise This Year*, WICHITA EAGLE (Oct. 18, 2010, 12:00 AM), http://www.kansas.com/2010/10/18/1546834/justices-on-ballot-draw-little.html.

143. *Id.*

144. Earl Glynn, *10 Counties Voted Not to Retain Kansas Supreme Court Justices*, KANSASWATCHDOG.ORG (Nov. 10, 2010), http://watchdog.org/36825/ks-10-counties-voted-not-to-retain-kansas-supreme-court-justices/.

145. Mann, *supra* note 142.

146. SCOTT GREYTAK ET AL., BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013–14, at 22–23 (2015), http://newpoliticsreport.org/app/uploads/JAS-NPJE-2013-14.pdf.

147. *Id.*

Carr.[148] The Carr brothers committed unspeakable acts of violence. The district court tried them jointly in Sedgwick County on charges involving four capital murders, one felony murder, one attempted first-degree murder, aggravated kidnappings, aggravated robberies, and sex crimes.[149] The jury found Reginald guilty on fifty counts[150] and Jonathan guilty on forty-three counts.[151] In the penalty phase of the trial, the jury gave Reginald four death sentences, one hard twenty life sentence, and a consecutive total of 570 months' imprisonment.[152] The jury gave Jonathan four death sentences, one hard twenty life sentence, and a consecutive total of 492 months' imprisonment.[153]

The Kansas Supreme Court upheld the convictions of each brother on one count of capital murder, which carried with it a life sentence.[154] The court also upheld Reginald's conviction of thirty-two crimes[155] and Jonathan's conviction of twenty-five crimes.[156] The court, however, vacated the death sentences reasoning that the failure to sever the penalty phase of the defendants' trial violated an Eighth Amendment right to an individualized sentencing determination, and remanded the case to the trial court for new sentencing proceedings.[157] The decision generated controversy, especially and understandably with the victims' families.

The *Carr* decisions were used for political gain in the 2014 gubernatorial election. Coming down to the wire, public polling showed that the 2014 Kansas governor's race appeared to be a dead heat. On October 22, 2014, the incumbent governor's polling firm advised the campaign the race was tied.[158] The firm wrote in a memo to the campaign that, "polling shows that education voters, moral issue voters and economic issue voters are overwhelmingly decided and show very little potential for movement."[159] However, the firm noted the challenger's support for the current Supreme Court Nominating Commission merit process for selecting justices "creates an opportunity for moving a

148. *Id.* at 23.

149. State v. Carr (*Carr I*), 329 P.3d 1195, 1204–05 (Kan. 2014); State v. Carr (*Carr II*), 331 P.3d 544, 573–74 (Kan. 2014).

150. *Carr II*, 331 P.3d at 574.

151. *Carr I*, 329 P.3d at 1204.

152. *Carr II*, 331 P.3d at 574.

153. *Carr I*, 329 P.3d at 1205.

154. *Id.*; *Carr II*, 331 P.3d at 574.

155. *Carr II*, 331 P.3d at 574.

156. *Carr I*, 329 P.3d at 1205.

157. *Id.*; *Carr II*, 331 P.3d at 574. The United States Supreme Court later overturned the Kansas Supreme Court's decision. Kansas v. Carr, 136 S. Ct. 633, 646 (2016).

158. Memorandum from Pat McFerron, President, Cole Hargrave Snodgrass & Assocs., Inc. to Mark Dugan, Campaign Manager, Brownback for Governor, Inc. (Oct. 22, 2014), http://cjonline.com/sites/default/files/Oct%2022%20%20Poll%20Memo.pdf.

159. *Id.*

significant number of voters."[160] The memo concluded that, "polling shows that when voters are informed of [the challenger's] relationships with the supreme court justices and reminded of that court's decision to overthrow the conviction and sentencing of the Carr [b]rothers, they break against [the challenger] by a better than five-to-one ratio."[161]

The Kansas Governor launched a television advertisement mentioning the Carr brothers.[162] Over images of the brothers, the advertisement reminded voters about the brothers' "killing spree" and the death sentences.[163] The narrator said that "liberal judges" overturned the death sentences.[164] The advertisement claimed that the Kansas Governor's challenger was a "liberal defense lawyer" who "supported these judges who let the Carr brothers off the hook."[165] The advertisement promised the Governor would appoint "tough judges" to the Kansas Supreme Court.[166]

The former prosecutor of the Carr brothers condemned the attack. She found it "beyond disgraceful that [the Governor] would exploit this tragedy and make the victims' families relive that horrific crime every time they turn on their television."[167] She called the Governor's use of the case for political gain "reprehensible."[168] The Kansas Bar Association joined with the Kansas League of Women Voters, the Kansas Association of Defense Counsel, and other groups to encourage voters to learn more of the justices' qualifications as well as how to evaluate justices in a retention election.[169]

On November 3, 2014, the Governor received fifty percent of the vote.[170] His challenger received forty-six percent.[171] Fifty-three percent

160. *Id.*

161. *Id.*

162. Sam Brownback, *Carr Brothers*, YOUTUBE (Oct. 21, 2014), https://www.youtube.com/watch?v=wm0FZnUT9hY.

163. *Id.*

164. *Id.*

165. *Id.* "[S]upported these judges" was a veiled reference to efforts in the legislature to abolish merit selection of judges in favor of a federal-type model.

166. *Id.*

167. Dion Lefler, *Former DA Foulston: Brownback's Carr Brothers Ad 'Beyond Disgraceful'*, WICHITA EAGLE (Oct. 22, 2014, 2:39 PM), http://www.kansas.com/news/politics-government/election/article3251657.html#storylink=cpy.

168. *Id.*

169. Press Release, Kan. Bar Ass'n, Leading Groups Urge Voters: Protect Fair Courts, Make Informed Choice in Judicial Election, (Oct. 23, 2014), https://www.ksbar.org/news/199406/Leading-Groups-Urge-Voters-Protect-Fair-Courts-Make-Informed-Choice-in-Judicial-Election.htm.

170. *2014 Election Results: State of Kansas*, WICHITA EAGLE (Nov. 4, 2014, 5:11 PM), http://www.kansas.com/news/politics-government/election/article3560735.html.

171. *Id.*

of voters statewide supported retention of both justices.[172] Interestingly, in Sedgwick County, where the Carr brothers' crimes occurred, one of the justices received forty-five percent of the vote for retention and the other received forty-six percent.[173]

Since the 2014 merit retention elections, the relationship between the political branches and the Kansas Supreme Court has continued to sour as more attacks against the court have followed, including attempts to impeach the justices based on decisions they authored, to threaten court funding, and to change the state's merit selection and retention system. The current tension between the political branches and the Kansas Supreme Court is owed in part to a series of decisions the court handed down concerning the funding of the state's K-12 public school system. The Kansas Governor and the Legislature's response to the court's decisions were an overture of the kind of attacks Kansas's merit retention and selection system faced during the 2016 election season.

In sharply criticizing the Kansas Supreme Court's school funding decisions, Governor Sam Brownback and his political allies proposed their own court packing plans. Republican state legislators proposed legislation that would amend the state constitution to change Kansas's current system for appointing supreme court justices from a nominating-commission retention system to a system where the Governor appoints and the state senate confirms appointments, as well as a resolution that proposed a partisan election system for the state's supreme court justices.[174] Governor Brownback reportedly asked a colleague to go along with the Republicans to change the way judges are selected in order to "get judges who will vote the way [the Republicans] want them to."[175] That comment was directed to then-chairman of the Kansas Senate Judiciary Committee. Ultimately, Governor Brownback unsuccessfully tried to convince the chairman to join the campaign to change selection of state supreme court justices.[176]

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172. *Id.*

173. *November 4th, 2014 General Election Official Results - Sedgwick County*, SEDGWICK COUNTY (Nov. 13, 2014, 11:40 PM), http://www.sedgwickcounty.org/elections/election_results/Gen14/index.html.

174. Lincoln Caplan, *The Political War Against the Kansas Supreme Court*, NEW YORKER (Feb. 5, 2016), http://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court.

175. *See* F. James Robinson Jr., Opinion, *History Repeating in Attempt to Stack Court*, WICHITA EAGLE (Feb. 13, 2016, 6:01 PM), http://www.kansas.com/opinion/opn-columns-blogs/article60141001.html; Tim Carpenter, *Ex-Senator Tim Owens: Ideology Drives Sam Brownback's Push for Judicial Reform*, TOPEKA CAP.-J. (Feb. 9, 2015, 5:35 PM), http://cjonline.com/news/state/2015-02-09/ex-senator-tim-owens-ideology-drives-sam-brownbacks-push-judicial-reform.

176. *Id.*

In November 2013, while the Kansas Supreme Court was considering the school funding case, the Governor told a group in Wichita that "the upcoming session of the Legislature will hinge on how the state Supreme Court rules in a school-finance lawsuit—a decision that could push lawmakers toward trying a constitutional amendment to change the way justices are selected."[177] During the Governor's January 2014 State of the State Address, Governor Brownback referred to the courts as "unaccountable, opaque institutions."[178]

Shortly after the 2014 State of the State address, the Kansas Supreme Court ordered the Kansas legislature to increase funding to the state's poorer school districts.[179] The reaction from Governor Brownback and the Kansas legislature was swift. According to one legal scholar:

> The legislature and the governor's response was to pass and sign a law that stripped the State Supreme Court of administrative power over lower state courts. And then to pass and sign another law that stripped the state's entire court system of funding if any court struck down any part of the previous law.[180]

After the Kansas Supreme Court issued a later decision holding that the Legislature had not gone far enough in its previous efforts to comply with an earlier ruling of the court ordering the Kansas legislature to increase funding to poorer school districts, political conservative groups in the state lodged a public relations campaign designed to pit the public against the court. The Kansas Republican House Campaign Committee launched a social media advertisement using a child's sad face, posting the court's telephone number and urging the public to "call the court" and "ask it to put our kids first."[181] Likewise, the Kansas Club for Growth's Facebook page asked the public to "[t]ell the Kansas Supreme Court to stop threatening our kids' education with political games."[182] Further, some Republican legislative leaders in the state have alleged that the court has attempted to use the school funding litigation to shift voters' attention

177. Lefler, *supra* note 72.

178. *Kansas Governor Sam Brownback's 2014 State of the State Speech*, GOVERNING (Jan. 15, 2014), http://www.governing.com/topics/politics/gov-kansas-sam-brownback-annual-address.html.

179. Gannon v. State, 319 P.3d 1196, 1204 (Kan. 2014).

180. Caplan, *supra* note 174.

181. Jonathan Shorman, *Republicans Urge Public to Call Kansas Supreme Court Over School Funding Dispute*, TOPEKA CAPITAL-J. (June 6, 2015, 12:50 PM), http://cjonline.com/news/2016-06-15/republicans-urge-public-call-kansas-supreme-court-over-school-funding-dispute.

182. Kansas Club for Growth (@KansasClubforGrowth), FACEBOOK (last visited Sept. 21, 2016), https://www.facebook.com/KansasClubforGrowth/photos/a.157868765687063.1073741828.157439980270062 6/157786799568714 0/?type=3&theater.

away from the court's decision in the Carr brothers' cases.[183]

Political criticism of the court did not abate in the run up to the November 2016 judicial retention elections, when five of the state's seven supreme court justices and six of the state's fourteen court of appeals judges were up for retention.[184] By the summer of 2016, the state Republican Party adopted a resolution opposing the retention of four of the five supreme court justices on the ballot (the fifth justice, Caleb Stegall, was appointed in 2014 by Governor Brownback).[185] Other groups also joined in the anti-retention campaign.

Kansans for Justice was the dominant group making the case against the supreme court.[186] The group's retelling of the grim details of the Carr brothers' crimes in television ads, on mailers and through social media grabbed the public's attention.[187] Through these mediums, the group argued that the Kansas Supreme Court opposed the death penalty, and told voters that in recent years the U. S. Supreme Court had overturned the Kansas Supreme Court's decisions in the Carr brothers' cases and in three other Kansas death penalty cases.[188] The group urged voters to "vote No on Kansas Supreme Court" or to vote no on four of the five justices, excepting Governor Brownback's appointee to the court."[189]

Kansans for Life formed a group called "Better Judges for Kansas" that opposed retention of four of the state's supreme court justices and four judges on the Kansas Court of Appeal.[190] That group, along with the

183. Nick Viviani, *Top GOP Lawmakers Say Justices Were Trying to Save Their Jobs with School Funding Decision*, WIBW (June 1, 2016, 3:29 PM), http://www.wibw.com/content/news/Top-GOP-lawmakers-say-Justices-were-trying-to-save-their-jobs-with-school-funding-decision-381561841.html. The Republican Senate Majority leader Terry Bruce stated, "The court appears to be holding Kansas school children hostage in order to distract the public from the fact that its poor judgment has allowed murderers, rapists and other violent offenders like the Carr brothers off the hook." *Id.*

184. Peter Hancock, *The Politics of Courts: Two Cases Will Put Judges in the Crosshairs*, LAWRENCE J.-WORLD (Dec. 6, 2015), http://www.ljworld.com/news/2015/dec/06/politics-courts-two-cases-will-put-courts-crosshai/.

185. *See* Peter Hancock, *Kansas Republicans Elect Delegates but Struggle to Unite Behind Trump*, LAWRENCE J.-WORLD (May 14, 2016), http://www.ljworld.com/news/2016/may/14/kansas-republicans-elect-delegates-struggle-unite-/; Bryan Lowry, *High Stakes in Kansas Supreme Court Retention Vote*, WICHITA EAGLE (Sep. 5, 2016, 5:20 PM), www.kansas.com/news/politics-government/article100083347.html.

186. *See About Us*, KANSANS FOR JUSTICE, http://www.kansansforjustice.com (last visited Nov. 25, 2016).

187. *See* Peter Hancock, *Kansas Judicial Races Drawing Big Money Ad Campaigns*, LAWRENCE J.-WORLD (Oct. 23, 2016), http://www2.ljworld.com/news/2016/oct/23/kansas-judicial-races-drawing-big-money-ad-campaig/.

188. *Other Cases*, KANSANS FOR JUSTICE, http://www.kansansforjustice.com/other-cases (last visited Nov. 25, 2016). The U.S. Supreme Court decided *Kansas v. Gleason,* 135 S. Ct. 2917 (2015) (mem.) with the two Carr brothers' cases. The other two overturned death penalty cases were *Kansas v. Cheever,* 134 S. Ct. 596 (2013) and *Kansas v. Marsh,* 548 U.S. 163 (2006).

189. *See supra* note 186.

190. BETTER JUDGES FOR KANSAS, http://www.betterjudgesforkansas.org (last visited Nov.

Family Policy Alliance of Kansas, was primarily animated by the supreme court's past decisions and a recent court of appeal's decision concerning abortion. Kansans for Life urged voters to vote against "activist judges" and "reject all but Stegall."[191]

The pro-retention campaign relied heavily on the Kansas legal community for political infrastructure, and each of the five justices traveled the state speaking to various groups and the media about the role of fair and impartial courts and the workings of the Kansas Supreme Court.[192] The legal community teamed up with Kansas Values Institute, a 501(c)(4) policy and grassroots advocacy organization, and its initiative, Kansans for Fair Courts.[193]

Kansans for Fair Courts promoted the retention of all five justices of the supreme court and all six judges of the court of appeals. Its messages on television, radio and social media sought to transcend the politicization of the campaign by relying on themes of "fair and impartial courts," and "keeping politicians out of the courts."[194] Four former Kansas governors—Democrats Kathleen Sebelius and John Carlin and Republicans Mike Hayden and Bill Graves—campaigned with Kansans for Fair Courts for retention of the justices.[195] Although not involved in the campaign, the Kansas Informed Voters Project, part of the National Association of Women Judges, dispatched speakers throughout the state to educate voters about retention elections and the role of courts in government.[196] In addition, justices and judges used materials on the

25, 2016). *See also* Better Judges for Justice (@betterjudgesforkansas), FACEBOOK (last visited Nov. 25, 2016), https://www.facebook.com/betterjudgesforkansas/?fref=ts.

191. *See* Kathy Ostrowski, *Kansas Activist Judges Narrowly Survive Pro-life Ouster*, (Nov. 9, 2016), https://kansansforlife.wordpress.com/2016/11/09/kansas-activist-judges-narrowly-survive-pro-life-ouster/.

192. *See, e.g.*, Ashley Cleek, *State Judicial Elections Become Political Battlegrounds*, NPR (Nov. 2, 2016, 4:48 PM), http://www.npr.org/2016/11/02/500351735/state-judicial-elections-become-political-battlegrounds.

193. Jonathan Shorman, *Judicial Retention Campaigns Heat Up; Little Disclosure of Donors and Spending*, TOPEKA CAP.-J. (Aug. 13, 2016, 6:57 PM), http://cjonline.com/news/2016-08-13/judicial-retention-campaigns-heat-little-disclosure-donors-and-spending.

194. *See* Press Release, Kansans for Fair Courts, Former Governors Call for Retention of Supreme Court Justices: "Keep Politicians Out of the Courts" (Sept. 6, 2016) http://www.kansansforfaircourts.org/press_release_former_governors_call_for_retention_of_supreme_court_justices_keep_politicians_out_of_the_courts; *see generally About Us*, KANSANS FOR FAIR COURTS, http://www.kansansforfaircourts.org/about.html (last visited Nov. 25, 2016); Kansans for Fair Courts (@KSFairCourts), FACEBOOK (last visited Nov. 25, 2016), https://www.facebook.com/KSFairCourts/?fref=ts; *see also Radio Actualities*, KANSANS FOR FAIR COURTS, http://www.kansansforfaircourts.org/radio (last visited Nov. 25, 2016).

195. *See* Press Release, *supra* note 194; Steve Kraske, *Four Former Kansas Governors Stand Up to Sam Brownback*, KAN. CITY STAR (Sept. 15, 2016, 4:16 PM), http://www.kansascity.com/news/local/news-columns-blogs/local-columnists/article102074157.html.

196. *See* Kansas Informed Voters Project (@IVPKansas), FACEBOOK (last visited Nov. 25,

Informed Voters Project website in speaking engagements and in interviews before newspaper editorial boards to explain the importance of a fair and impartial judiciary.[197]

The 2016 general election produced the most expensive retention election in Kansas history.[198] Due to the lack of competitive statewide races, the high stakes nature of possibly unseating five of seven justices and six of fourteen judges, and heavy spending by both sides, a traditionally quiet election became the most prominent statewide issue on the November ballot.[199] Ultimately, all five justices and six judges were retained as a result of the November election. Four of the justices received 55 or 56 percent of the vote and Governor Brownback's appointee received 71 percent.[200] Four of the judges received 59 or 60 percent of the vote, and Governor Brownback's two appointees received 72 and 73 percent.[201]

Despite the retention of all judges and justices, Kansans for Life noted that, "[f]or now we can only hope the judges have learned a powerful lesson to stop 'legislating from the bench' . . . especially as they face the most important abortion lawsuit in our state's history."[202] This blatant attempt to influence future judicial decisions suggest that groups that target justices have two agendas: to target justices and judges for removal for political reasons, and to instill fear in the justices and judges of the political consequences their judicial decisions may have.

For the pro-retention forces the stakes in the election transcended their affinity for, and desire to protect, individual justices and judges. Instead, the election was about the political will of the legal profession to fight for fair and impartial courts, insulated from public opinion and political intimidation. But, the hard-fought and costly retention elections in Kansas underscore the concern that if the attempts to use merit retention elections as a political tool to replace judges and justices with those appointed by the sitting governor are successful, the merit selection and retention system as a less political alternative to partisan, contested elections will be further jeopardized.

2016).

197. *See id.*

198. *See* Sam Zeff, *Conservative Effort to Shake Up Kansas Supreme Court Falls Short*, NPR (Nov. 14, 2016, 4:35 PM), http://www.npr.org/2016/11/14/502050962/conservative-effort-to-shake-up-kansas-supreme-court-falls-short.

199. *See* Dave Helling, *Courts, Judges Become Top Political Targets in 2016 Elections*, KAN. CITY STAR (June 17, 2016, 11:06 AM), http://www.kansascity.com/news/politics-government/article84374182.html.

200. KAN. SEC'Y OF STATE, 2016 GENERAL ELECTION OFFICIAL VOTE TOTALS 12 (2016), https://www.sos.ks.gov/elections/16elec/2016_General_Election_Official_Results.pdf.

201. *Id.*

202. Ostrowski, *supra* note 191 (quoting Kansans for Life executive director Mary Kay Culp).

III. DEFENDING FAIR AND IMPARTIAL COURTS FROM UNFAIR POLITICAL ATTACKS

The political genie is out of the bottle. Future retention elections are increasingly less likely to focus simply on a judge's fitness or competence—the original purpose of merit retention. Judicial retention elections in the past were low-budget affairs. In fact, unless the judge or justice faced active opposition, there would be no need to campaign and no reason to raise money. Many state's codes of judicial conduct place additional restrictions on expenditures in merit retention elections unless there is active opposition.[203] However, as discussed in the previous Part, special-interest and political groups, ready to wield the internet's power and to up the ante for spending on advertising, are now using these elections as a means to advance their policies. The risk is that judges and justices will fear removal from office for rendering a decision that is legally sound but politically unpopular.

A. *Public Opinion*

There is no quick fix to counter the spiraling political attacks of politicians and special interests determined to unseat judges. There is too much campaign value in the cynical on-camera sound bite, uttered by a politician on the courthouse steps, that courts have forced government to take unacceptable and unpopular actions. The last-minute attack advertisement, using grainy images of scary criminals and misconceptions about what a court has done, is far too easily deployed to mislead voters about a judge's view on criminal-justice policy.

A common out-of-step attack in state supreme court campaigns is that judges are "soft on crime."[204] Over the years, advertisements have accused supreme court justices in numerous states of coddling terrorists and rapists, of tolerating attacks on women and children, and more. A recent report noted that fifty-six percent of television advertisements in 2013 through 2014, either criticizing or supporting justices, focused on the justice's criminal justice "record."[205] Often, the money behind such advertisements comes from groups that have little to do with criminal justice, suggesting that "criminal justice may be used strategically as a wedge issue."[206]

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203. *See Judicial Campaigns and Elections*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_conduct.cfm?state (last visited Sept. 21, 2016) (listing states' laws regarding judicial campaign conduct in retention elections).

204. GREYTAK ET AL., *supra* note 146, at 3.

205. *Id.*

206. *Id.*

Opponents use the "out of step with public opinion" attack because it works. Recent national surveys of registered voters commissioned by the National Center for State Courts found that sixty percent of the respondents said state courts are fair and impartial.[207] However those "opinions of the courts are soft and can shift quickly based on external factors or high profile media stories."[208]

A September 2015 survey by the Defense Research Institute found that a plurality of respondents, forty percent, believe public opinion has "too little" influence on courts, while twenty-five percent say the public has the right amount of influence, and twenty-five percent say public opinion has too much influence.[209] Only fifteen percent of respondents say that the legislature or the governor has "too little" influence on courts.[210]

B. *Public Knowledge of the Role of Courts*

Judicial retention elections are difficult for voters. They are low information contests. Most voters have little interaction with appellate judges. Unlike contested partisan judicial elections, voters in retention elections lack typical voting cues such as the judge's party affiliation. Voters are often puzzled as to why the judge is on the ballot in the first place since there is no challenger.[211] And, having limited familiarity with the Constitution and judicial reasoning, voters have little understanding of how to assess the judge's performance.[212] All of these things contribute to a high rate of "ballot roll-off," where voters in the voting booth complete a ballot but neglect to vote on retaining judges.[213] Additionally, a voter's lack of knowledge about the proper role of courts makes the voter vulnerable to campaigns aimed at removing judges for partisan purposes.[214]

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207. *See* NAT'L CTR. FOR ST. CTS., THE STATE OF STATE COURTS 10 (2015), http://www.ncsc.org/~/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Presentation.ashx; *see also* Memorandum from GBA Strategies to Nat'l Ctr. for State Courts 1, 5 (Dec. 4, 2014), http://www.ncsc.org/~/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/2014-State-of-State-Courts-Survey-12042014.ashx.

208. Memorandum from GBA Strategies to Nat'l Ctr. for State Courts, *supra* note 207, at 2.

209. DEF. RESEARCH INST., PUBLIC VIEWS OF THE CIVIL COURTS AND ISSUES IN CIVIL JURISPRUDENCE 3 (2015), http://www.dri.org/contentdirectory/public/polls/2015_Survey_Report.pdf.

210. *Id.*

211. *See* Scott G. Hawkins, *Perspective on Judicial Merit Retention in Florida*, 64 FLA. L. REV. 1421, 1422 n.4 (2012) (citing, among other studies, focus group research conducted on behalf of the Florida Bar).

212. *See* Caufield, *supra* note 16, at 574.

213. *Id.* at 586.

214. For example, the Republican State Leadership Committee's Judicial Fairness Initiative welcomes visitors to its website with the following message:

National surveys have consistently revealed disturbing evidence of a lack of knowledge about the judicial branch of government. A 2012 national survey of civic literacy by Xavier University's Center for the Study of the American Dream showed that one in three natural born citizens failed the civics portion of the U.S. Citizenship Test, compared to a 97.5% pass rate for immigrants.[215] Seventy-five percent of respondents were not able to correctly answer, "What does the judiciary branch do?"[216]

A 2014 national survey conducted by the Annenberg Public Policy Center of the University of Pennsylvania found these surprising results:

- While little more than a third of respondents (thirty-six percent) could name all three branches of the U.S. government, just as many (thirty-five percent) could not name a single one.
- Just over a quarter of Americans (twenty-seven percent) know it takes a two-thirds vote of the House and Senate to override a presidential veto.
- One in five Americans (twenty-one percent) incorrectly thinks that a 5–4 Supreme Court decision is sent back to Congress for reconsideration.[217]

In a March through April 2015 Pew Research Center survey, just thirty-three percent of the respondents knew that there are three women

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> The Judicial Fairness Initiative (JFI) is the RSLC's newest program to elect down ballot, state-level conservatives. Through JFI, the RSLC becomes the only national political organization focused on the electoral process of judicial branches at the state level. Too often voters are starved of information about judicial candidates up for election and forced to vote completely in the dark. To address this critically important need, JFI will provide the public with a balanced flow of relevant information to make educated decisions and support common sense conservative judges at the state level.

Republican State Leadership Comm., *Judicial Fairness Initiative*, https://rslc.gop/jfi/ (last visited Sept. 21, 2016).

215. Michael F. Ford, *Civic Illiteracy: A Threat to the American Dream*, XAVIER CTR. FOR STUDY AM. DREAM (Apr. 26, 2012), http://xuamericandream.blogspot.com/2012_04_01_archive.html.

216. *Id.*

217. *Americans Know Surprisingly Little About Their Government, Survey Finds*, ANNENBERG PUB. POL'Y CTR. (Sept. 17, 2014), http://www.annenbergpublicpolicycenter.org/americans-know-surprisingly-little-about-their-government-survey-finds/.

on the U.S. Supreme Court.[218] Fourteen percent thought there was just one woman on the Court.[219]

Attack advertisements are a demonstrated "*mobilizing* force" spurring increased voter participation in state court elections.[220] Repeated negative attacks in a retention election may make up much of the information available to voters. Those attacks may trump voters' generally favorable impressions of courts.[221]

Professor Larry Aspin's study of retention elections from 1964 through 2006 found, "[i]n the typical retention election [where judges are retained], non-judge-specific factors (e.g., political trust) play large roles, whereas judge-specific variables (e.g., a judge's controversial act, organized campaign against retention, negative recommendation from a judicial performance commission) play large roles when judges are defeated."[222]

Judges in retention elections often do not possess the tools to mount an effective defense. Participating in a political discussion about a court decision is improper for judges.[223] Judges are supposed "to be indifferent to popularity."[224] Indeed, the restrictions on judges' political activity protects the courts' legitimacy as fair and impartial arbiters. As one former judge explained, "Putting on a robe, not engaging in politics, not engaging in fundraising—there are a whole range of things that the judge does that are designed to impress upon the judge him- or herself that in their judicial role they are supposed to be impartial."[225]

Usually—and properly so—judges are heard only in court or in their written decisions. These are the conventions within which they operate. But those who lob political attacks at judges exploit this. If a judge publicly responds to the attack or explains the law that required the result in a case, then the judge risks the danger of becoming an active participant in the political process. But if a judge does not respond, some may believe that the criticism is valid.

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218. Meredith Dost, *Dim Public Awareness of Supreme Court as Major Rulings Loom*, PEW RES. CTR. (May 14, 2015), http://www.pewresearch.org/fact-tank/2015/05/14/dim-public-awareness-of-supreme-court-as-major-rulings-loom/; *What the Public Knows — In Pictures, Words, Maps and Graphs*, PEW RES. CTR. (Apr. 28, 2015), http://www.people-press.org/2015/04/28/what-the-public-knows-in-pictures-words-maps-and-graphs/.

219. Dost, *supra* note 218.

220. Melinda Gann Hall & Chris W. Bonneau, *Attack Advertising, the* White *Decision, and Voter Participation in State Supreme Court Elections*, 66 POL. RES. Q. 115, 119, 123 (2013) (emphasis added).

221. *See* Memorandum from GBA Strategies to Nat'l Ctr. for State Courts, *supra* note 207.

222. Larry Aspin, *Judicial Retention Election Trends 1964–2006*, 90 JUDICATURE 208, 210 (2007).

223. Chisom v. Roemer, 501 U.S. 380, 401 n.29 (1990).

224. *Id.*

225. Jack Dickey, *Meet the Other Judges Who Speak Out*, TIME MAGAZINE (July 18, 2016), http://time.com/4408680/meet-the-other-judges-who-speak-out/.

Arguments about the need for fair and impartial courts may lack the rhetorical power to reach voters who are convinced that a judge is out of step with public opinion. Sometimes these arguments "serve only to underscore the very problem that targeted judges' opponents have diagnosed—namely, that those judges regard themselves as free to disregard the will of the sovereign people."[226]

C. *Fighting Back: Efforts to Curb Effectiveness of Political Attacks on Fair Courts*

If retention elections are to serve their intended function, of providing a measure of public accountability while insulating judges from the harmful effects of popular opinion and political pressure, then, as Professor Caufield notes, "voters must be able to participate in a meaningful way apart from individualized campaigns that advance narrow political agendas."[227]

The National Association of Women Judges is doing its part to raise civic literacy and assist voters. Its *Informed Voters—Fair Judges* project is a nonpartisan national project with the purpose of educating the public about the role and importance of fair and impartial courts in American democracy.[228] The project's website is an excellent resource for fair-courts service projects, presentations to civic groups and schools, including community colleges, and Law Day and Constitution Day talks.[229] Posted there are alerts, presentations, talking points, radio and television public-service announcements, and state-specific information, including a public-service announcement featuring retired Justice Sandra Day O'Connor, who remarks that

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226. Pettys, *supra* note 79, at 120.

227. Caufield*, supra* note 16, at 588.

228. *See The Informed Voters, Fair Judges Project*, NAT'L ASS'N WOMEN JUDGES http://www.nawj.org/informedvotersfairjudges.asp (last visited Sept. 21, 2016).

229. The Conference of Chief Justices, an organization comprised of the Chief Justices of each state's supreme court, unanimously endorsed the Informed Voters Project:

> NOW, THEREFORE BE IT RESOLVED that the Conference of Justices expresses its support for the objectives and educational materials prepared by the NAWJ Informed Voter Project and encourages state supreme courts, judicial associations, and all groups dedicated to a fair and impartial judiciary to actively participate in building public awareness of the Informed Voters Project.

CONFERENCE OF CHIEF JUSTICES, RESOLUTION 10: IN SUPPORT OF THE NATIONAL ASSOCIATION OF WOMEN JUDGES' INFORMED VOTERS PROJECT (2014), http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01292014-Support-National-Association-Women-Judges-Informed-Voters-Project.ashx.

> Americans look to their courts for fairness because they trust the judge will handle their case with an even hand, free from the influence of politics and partisanship. When a judge gives every case and every person the same treatment our courts are what they have always been and must always be—fair and free.[230]

Educating voters about political attacks on the judiciary is already a heady task. Those who urge retention in the face of political attack typically argue that voters should never oust judges because of the result of one or more judicial decisions.[231] The argument continues that such an ouster lessens the public's respect for courts as fair and just forums to resolve disputes.[232] Those who oppose retaining a judge often reject this argument as undemocratic rhetoric. They urge voters to reign in judges who are out of step with popular opinion. Beyond explaining the role of courts in American democracy, pro-retention campaigns must preempt would-be attackers by telling voters about the retention election's purpose and any objective information about a judge's qualification to serve.

Professor Todd Pettys argues that voters "cannot peer into the future and definitively see what the consequences of sustained anti-retention activity will be."[233] Professor Pettys predicts voters will take "refuge in whichever set of arguments best suits their preferences at a given moment in time" and will "seek guidance from cultural authorities who share their core values."[234] He concludes, "Regardless of their analytic merits, consequentialist arguments about judicial independence and the need for fair and impartial courts simply lack the rhetorical power necessary to reach voters who are convinced that an unrepentant judge has committed a grave moral transgression."[235]

The solution to preserving fair and free courts cannot be that judges become more accomplished politicians. Instead, persuading voters to set aside their moral outrage about unpopular decisions requires surrogates who can engage the public in a spirited discussion about the merits of controversial decisions. This engagement is critical since restrictions in judicial codes of conduct limit judges in their ability to respond when unfairly attacked. Nationally recognized professional legal associations, such as the American Bar Association and the American Board of Trial Advocates, must continue to lead the way forward and stand up for fair

230. *See* Informed Voters Project, *Fair and Free*, VIMEO, https://vimeo.com/83055771 (last visited Sept. 21, 2016).

231. Pettys, *supra* note 79, at 93–94.

232. *Id.*

233. *Id.* at 138.

234. *Id.*

235. *Id.* at 140.

and impartial courts by debunking the rhetoric that courts exist to validate one political philosophy over another, so the public is fully informed about what is at stake—the integrity of the third branch of government. State bar associations must also remain vigilant. For all who are concerned with preservation of the rule of law, voting off a justice because of the public's unhappiness with a particular decision is a problem that demands that the entire legal community shoulder the defense against an attack.

A robust defense requires political will. It demands fighting for courts in the political arena by refuting any deceptions or distortions, challenging political attacks and efforts at intimidating judges, and exposing the motives behind the attacks. It necessitates financing the campaigns of judges targeted for defeat because of an unpopular decision. It calls for advocates who will explain court decisions, educate the public about the basics of what courts do, and connect with voters on their commonly held values—of fairness, impartiality, and courts free from popular opinion or political pressure. It requires building coalitions of like-minded private citizens, corporate leaders, politicians, attorneys, teachers, media professionals, retired judges, and others. Most importantly, court advocates must always pivot from attacks lodged against fair courts and bring the focus back to the importance of fair and free courts to American democracy.

CONCLUSION

If we doubt the layperson's ability to engage in intelligent discussion of court decisions and legal principles, Professor Pettys argues, "then we are foolish to maintain a system in which voters are asked to decide whether judges should remain in office."[236] In state after state, judicial retention elections designed to be apolitical affairs, focused solely on judicial qualifications and competence, are increasingly becoming as contentious as any contested partisan election. As the Brennan Center for Justice reported days after the November 2016 election, in light of record spending in 2016 by special interest groups in judicial elections, it is apparent that "the state judicial selection process has become more overtly partisan and politicized, threatening the essential role courts play in ensuring fair and impartial justice, accountability, and a democracy free of undue influence."[237] This politicization of the independent merit selection and retention system leaves qualified and competent judges who decide cases based on the law, rather than the changing winds and passions of public opinion, vulnerable in America. These judges need

236. *Id.* at 145.

237. Press Release, Brennan Ctr. for Justice, Spending by Outside Groups in Judicial Races Hits Record High, Secret Money Dominates, (Nov. 15, 2016), http://www.brennancenter.org/press-release/spending-outside-groups-judicial-races-hits-record-high-secret-money-dominates.

champions if our courts are to truly remain independent. Years ago, two U.S. legal scholars, each at different ends of the political spectrum, joined in an essay on the value of fair and free courts. They aptly commented, "It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans."[238]

As the preceding survey of recent state judicial retention elections demonstrate, these recent elections represent "a bell that will never be unrung."[239] The only solution for preserving fair and impartial courts, then, is increased vigilance by the legal community and the public at large. Undoubtedly, attorney organizations, judicial organizations, and civic groups should devote greater resources to improving civic education about the role of the judiciary, to ensure that messages attacking judges on political grounds are critically met by an informed public, skeptical of blatant attacks on the independence inherent in the design of the third branch of government. Preserving fair and impartial courts will depend on the resolve—of law students, lawyers, and leaders in all walks of life who cherish the foundation of American democracy—to be proactive in protecting state judiciaries from unfair political attacks.

238. Fein & Neuborne, *supra* note 1, at 16.
239. Sample, *supra* note 102, at 384.