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> [T]here are particular moments in public affairs when the people . . . [are] misled by the artful misrepresentations of interested men . . . . What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next.[1]

> The republican principle . . . does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.[2]

Why do we have judicial elections? A democracy without elections for the legislature and executive (or, in parliamentary systems, for the executive as the leadership of the elected legislators), would be simply inconceivable. But no one would deny that eleven of our states, or many other nations, are democracies even though they do not elect judges.[3]

It *might* follow from that irrefutable, fundamental difference between elections for judges and for other offices, that judicial elections should not—or more to the point, need not—be conducted the same as other elections. Before we soar into debate, let us lay a foundation with elements of fact: first, the historical facts about why we have judicial elections; second, how well or poorly those facts—that is, the very *purpose* of having judicial elections—have been taken into account by the courts that have stricken efforts to treat judicial elections differently.

I. THE HISTORICAL FACTS

Given that judicial elections are not a *sine qua non* of democracy, it is not surprising that they were chosen not simply to increase popular control, but to free the judiciary from domination by the other branches, and to enhance the

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1. THE FEDERALIST No. 63 (James Madison) (Clinton Rossiter ed., 1961).

2. THE FEDERALIST No. 71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

3. In seven states, no judges face elections (Delaware, Hawaii, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Virginia); in four, probate and/or family court judges are elected (Connecticut, Maine, South Carolina, and Vermont).

caliber of the bench and the profession. However, rather than being controlled by a populist movement at the constitutional conventions, the issue of judicial elections was controlled by moderate lawyer delegates. Their move for judicial elections was *by no means* an effort to make the judiciary like the other branches, but instead, an effort to elevate the judiciary and make it more independent of other branches so that it could better render justice.

To infer from the decision to have elections that with that choice came an abandonment of the role and function of the judiciary is sheer error. The Seventh Circuit has memorably corrected that error:

> Two principles are in conflict and must, to the extent possible, be reconciled. Candidates for public office should be free to express their views on all matters of interest to the electorate. Judges should decide cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others. The roots of both principles lie deep in our constitutional heritage. Justice under law is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted, having been essentially uncontested within the mainstream of the tradition since at least Cicero's time. Whatever their respective pedigrees, only a fanatic would suppose that one of the principles should give way completely to the other—that the principle of freedom of speech should be held to entitle a candidate for judicial office to promise to vote for one side or another in a particular case or class of cases or that the principle of impartial legal justice should be held to prevent a candidate for such office from furnishing any information or opinion to the electorate beyond his name, rank, and serial number. We do not understand the plaintiffs to be arguing that because Illinois has decided to make judicial office mainly elective rather than (as in the federal system) wholly appointive, it has in effect redefined judges as legislators or executive-branch officials.[4]

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4. Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 227-28 (7th Cir. 1993) (holding the Illinois limitation overbroad). Judge Posner went on to note the danger of "bringing the case within the orbit of *Brown v. Hartlage*, 456 U.S. 45 (1982)," *id.* at 228, the ill-fitting case that, as Professor O'Neil stresses in his Paper, so many courts have so unthinkingly applied to judicial election problems. *See generally* Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002).

Posner added this:

> Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech. Further we need not go since the plaintiffs do not argue that the State of Illinois is constitutionally prohibited from placing greater restrictions on the campaign utterances of judicial candidates than on the campaign utterances of candidates for other types of public office.

Buckley, 997 F.2d at 228.

On the history, for brevity I quote directly from the leading source, which has held up unaltered by later treatments.

By 1860, twenty-one of our thirty States elected judges. Since 1846, twenty-one states had constitutional conventions, nineteen of which chose elections, with only Massachusetts and New Hampshire holding out.[5]

Scholars have given two explanations of the move to elections. First, "that emotion prevailed over reason . . . an unthinking 'emotional response' rooted in . . . Jacksonian Democracy. This view assumed that popular election of judges constituted a radical measure intended to break judicial power through an infusion of popular will and majority control."[6] Second, that "[p]olitical 'outs' maneuvered to strip partisan opponents of valuable patronage."[7] But in fact, Hall's research into the constitutional convention histories found that, "delegates from across the ideological spectrum criticized the party-directed distribution of these offices whether by the executive or the legislative branch. . . . Moderates . . . reflected the belief of many . . . writers that partisanship could never be eliminated, [but they believed] it could be controlled."[8]

Hall further explains:

> [Scholars have] ignore[d] the overwhelming role of lawyer-delegates in the conventions. In every convention, lawyers and judges of both parties, for whom the method of judicial selection had personal and professional significance, controlled the committees on the judiciary. They also dominated debate over the issue once it reached the full conventions. . . . In only five conventions did the issue of popular election prove sufficiently controversial to require a roll-call vote before adoption . . . . Moderates . . . promoted consensus within the conventions through innovative arguments that stressed the positive effects of popular election on the exercise of judicial power. At the same time, they calmed conservative fears by developing constitutional devices that blunted the full impact of popular will on the judiciary.
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> Moderates were more than conciliators of ideological opponents. Rather, these lawyer-delegates had a positive agenda . . . . This agenda included a more efficient administration of justice, an increase in the status of the bench and bar, an end to the penetration of partisan politics into the selection process, and increased independence and power for appellate and, to a lesser extent, for trial court judges.
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> A breakdown in the administration of justice in the appellate and inferior courts lent urgency to the constitutional reform movement. . . . In the late 1840s litigants appealing civil cases to the Indiana Supreme Court often suffered delays of four years before the court could hear

5. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary*, 45 THE HISTORIAN 337, 337-38 (1983).

6. *Id.* at 338-39.

7. *Id.* at 339.

8. *Id.* at 346-47.

their suits . . . .

Moderates claimed that popular election complemented proposals to restructure the courts [and would also bring] a centralized judicial structure and reduction in costs of court administration [and] a means of stimulating greater productivity on the bench . . . . Moderates concluded that the profession had nothing to lose and everything to gain by greater openness in the selection process. Popular election would both enhance the prestige of the legal profession and make the bench more receptive to the demands of the legal profession for a simpler scheme of justice. Moderates insisted that popularly elected judges were more likely than appointed judges to implement reforms in pleading and procedure—reforms that moderate lawyers viewed as essential to the future of the profession. As . . . Bishop Perkins of New York explained to his fellow lawyers, appointed judges too frequently were "mere legal monks, always poring over cases and antique tomes of learning." Moderates, therefore, endorsed popular election as a means to an able, respected, and enlightened judiciary. This, in turn, promised wider respect for the legal profession. . . . "The judiciary are so weak," Abner Keyes informed the Massachusetts convention, because "they must depend on the legislative branch for their appointments and to make the laws. Elect your judges," Keyes continued, "and you will energize them, and make them independent, and put them on a par with the other branches of government." Moderates echoed these conclusions in New York, Illinois, Indiana, Kentucky, Ohio, Maryland, and Virginia . . . .

Moderates built consensus among delegates by adopting constitutional devices that limited the potentially disruptive consequences of popular election. They made elected judges ineligible for other offices during the term for which they were elected, required staggered elections of appellate judges, [and] provided that appellate judges be elected in circuits or districts rather than in at-large state elections . . . . By making judges ineligible for other offices, moderates prevented sitting judges from using their decision-making powers to campaign for other posts. Staggered terms, as one Indiana delegate observed, ensured that there could be no "revolution in law based on party feeling." . . . Moderates also resisted radical demands for short terms of office for appeals court judges. They argued successfully that lawyers of ability would resist appellate court service if the terms were too short.[9]

The last note is a major one: the whole goal of judicial selection is to find ways to make it more likely that "lawyers of ability" and, as we would add today, of appropriate temperament, will seek to serve on the bench.

9. *Id.* at 342-47, 350, 352 (citations omitted).

II. "AN ELECTION IS AN ELECTION IS AN ELECTION": THE MANTRA THAT PASSED FOR ANALYSIS IN THE DECISIONS LIMITING CANON PROVISIONS

In *ACLU v. Florida Bar*, the court stated,

> [W]hen a state decides that its trial judges are to be popularly elected, as Florida has done, it must recognize the candidates' right to make campaign speeches *and* the concomitant right of the public to be informed about the judicial candidates.
> . . . [I]n a different yet related context [the only other context this judge noted], many states once imposed a complete ban on attorney advertising . . . To be sure, this case is different from the attorney advertising cases. Nonetheless, the lessons to be learned from those cases can provide some insight here. . . . [H]ere, as in the advertising arena, the state underestimates the ability of the public to place the information in its proper perspective.[10]

The *ACLU v. Florida Bar* judge saw only a single "compelling state interest," which it described as "the maintenance of public confidence in the objectivity of its judiciary."[11]

Four days after that decision (by coincidence), the Ninth Circuit *en banc* held that California could not ban political party endorsements for nonpartisan judicial candidates in a county's official voter pamphlet.[12] Judge Reinhardt, in a separate concurrence joined by Judge Kozinski, said this:

> True, [justices campaigning for retention] could have kept silent—but if the people of the state want elections for judges, they must also want a fair and full debate on the issues. . . . The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate. It cannot forbid speech by persons or groups who wish to make their views, support, or endorsements known. . . . If the people are to be given the right to choose their judges directly, they are free, rightly or wrongly, to consider the political philosophy of the candidates. They are even free, rightly or wrongly, to consider how the candidates may vote on important issues of public concern, such as abortion, capital punishment, affirmative action, gun control, and religious freedom, to name just a few. One would have to be exceedingly naive not to be aware that a judge's judicial philosophy may influence his or her votes on important public issues that come before the court, particularly the state or federal supreme court. Whether a judicial candidate wishes to make his views known on those issues during the electoral process is another matter. So is the question whether it is proper for him to do so. But those are all

10. ACLU v. Fla. Bar, 744 F. Supp. 1094, 1097-99 (D. Fla. 1990) (emphasis in original).
11. *Id.* at 1097.
12. Geary v. Renne, 911 F.2d 280 (9th Cir. 1990).

> problems inherent in California's decision to conduct judicial elections. If California wishes to elect its judges, it must allow free speech to prevail in the election process. . . .
>
> Of course, the citizens of California have a choice. . . . California could, like the federal government, provide for the appointment of judges for life—at some or all levels of its judiciary.[13]

Six months later, the Supreme Court of Kentucky directly followed the ruling from *ACLU* and found that one of its state judicial canons contained unduly broad speech limits.[14]

Four months after Kentucky's *J.C.D.C.* decision, the Ninth Circuit was followed flatly by a federal district court—this time, to strike a limit on campaign advocacy on disputed legal or political issues, including a candidate's "philosophical views on criminal sentencing and the rights of victims of crime [and] how he would apply [the 'reasonable doubt'] standard. . . ."[15] The Third Circuit reversed the lower court's decision, including the following point—notable because it is so unusual: "The fact that a state chooses to select its judges by popular election, while perhaps a decision of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly."[16]

By 1997, Kentucky's canon had been revised and its supreme court revisited the matter in *Summe v. Judicial Retirement and Removal Commission*,[17] dealing with an interesting example of "the artful misrepresentation of interested" people and upholding a finding of misreprentation.[18] The candidate being disciplined had distributed over 5000 copies of the "Kenton County Citizen's Courier," with an "article" about child abuse and a "letter to the editor" noting the candidate's concern about crime.[19] However, the "Citizen's Courier" was a campaign flyer, not a newspaper. The newspaper format was "commonly used in elections in Kenton County"[20]—but unlike the use in *Summe*, was always clearly marked as campaign material, and had not been used in judicial campaigns.

Dissenting from disciplining the candidate, one judge perfectly put forward the simplistic approach:

> [This candidate] entered the rough and tumble world of Kentucky electoral politics and was successful in unseating a recently gubernatorially appointed incumbent circuit judge . . . . She ran a good campaign against a tough opponent and was popularly elected by the

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13. *Id.* at 291-96.

14. J.C.J.D. v. R.J.C.R., 803 S.W.2d 953, 956 (Ky. 1991).

15. Stretton v. Disciplinary Bd. of the Supreme Court, 763 F. Supp. 128, 131 (E.D. Pa.), *rev'd*, 944 F.2d 137 (3d Cir. 1991).

16. Stretton v. Disciplinary Bd., 944 F.2d 137, 142 (3d Cir. 1991).

17. 947 S.W.2d 42 (Ky. 1997).

18. *Id.* at 48.

19. *Id.* at 44.

20. *Id.* at 45.

> Kenton County voters. In Kentucky, both the law and tradition allow judicial candidates, like all other candidates in political elections, to be guided by the rules of the Marquis de Sade as long as they tell the truth. Idealists would restrict judicial candidates to the rules of the Marquis de Queensbury.[21]

Just last year, a Pennsylvania court stated:

> Finally, we believe it is important to point out that the people of Pennsylvania have provided that we shall elect our judges, just as we do our legislators and executives. While it is true that in some circumstances we hold our judges to different—and often more exacting—standards than we do other public officials, we have chosen a method of judicial selection which takes place in the arena in which the First Amendment affords its broadest protection. That a candidate seeks judicial office does not diminish the nature or scope of that protection. Any difference between the offices sought bears only on the nature of the state's interest, in regulating a candidate's speech. To hold otherwise would open the floodgates for the electoral decisions of our citizens to be tarnished . . . .[22]

Finally, earlier this year, Judge Beam, dissenting from the Eighth Circuit's decision in *Republican Party of Minnesota v. Kelly* upholding Minnesota's choice of nonpartisan judicial elections, stated: "[S]ince [it was] first permitted to select its own judiciary, Minnesota has consistently favored electorally-responsive judges."[23] Later in that opinion, the concern for judicial independence, and the recognition that "rightly so, . . . judges fundamentally differ from other elected officials," were both dismissed as "policy notions [sic]" that "cannot trump constitutionally-enshrined rights."[24]

Due process was not mentioned at all. But this is so plainly "a case where constitutionally protected interests lie on both sides of the legal equation," as Justice Breyer recently said.[25] Referring to constitutional "rights," without even mentioning due process, is stunning shallowness.

CONCLUSION

To treat a judicial election the same or essentially the same as other elections, is to ignore a number of vital and important factors.

First, the due process rights of litigants to impartial, open-minded judges, and the public's right to have a judiciary able to render justice is imperative. Second,

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21. *Id.* at 48-49.

22. *In re* Miller, 759 A.2d 455, 470-71 (Pa. Court of Judicial Discipline 2000).

23. Republican Party of Minn. v. Kelly, 247 F.3d 854, 890 (8th Cir.) (Beam, J., dissenting), *cert. granted*, 112 S. Ct. 643 (2001).

24. *Id.* at 891.

25. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

as Robert Bauer brings out,[26] the public has a right to have judges function differently from other elected officials in order to preserve the role of the judiciary in our system of checks and balances. Third, the history of why we chose to have judicial elections did not include any disregard for, let alone readiness to undermine, the core values of a system of checks and balances. Rather, the purpose of having judicial elections was intended to secure independence for the judiciary, to insulate the judiciary from partisan politics and control, to improve the judges' performance and administration, and thus, to elevate the bench, the profession, and public confidence in the judicial system. Those purposes are the reasons for state constitutional provisions unique to the judiciary on length of terms, protection against reduction in pay, limits on running for other offices, how vacancies are filled, and disciplinary processes.

Finally, it is not only the *speech* of judicial candidates that we have, for decades, treated in ways that would be inconceivable in other elections. For example, in all but four of the thirty-nine states with judicial elections, a legally binding canon bars personal fundraising and requires that all fundraising be done by the candidate's campaign committee in order to at least reduce the candidate's involvement in fundraising.[27] Can you imagine similarly limiting candidates in other elections? Likewise, in at least twenty-four states, the law limits the time period during which fundraising is permitted, both before and after the election.[28] Again, such limits would be unimaginable for other elections, except possibly for barring legislators from raising funds during legislature sessions.

Therefore, in almost every state with judicial elections, campaigning has been subject to special treatment for decades.

Our Symposium cannot overlook how easy it is to draw a line to separate the "election-related activities" of judicial candidates from their other activities, compared to trying to draw any such line for, say, legislative candidates.[29]

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26. Robert F. Bauer, *Thoughts on the Democratic Basis for Restrictions on Judicial Campaign Speech*, 35 IND. L. REV. 747 (2002).

27. The four states are California, Idaho, Nevada, and Texas. AMERICAN BAR ASSOCIATION, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER'S POLITICAL CONTRIBUTIONS, PART TWO, at 41 n.73 (1998).

28. The pre-election window is one year in five states and shorter in eleven states, and the post-election window is six months or shorter in nineteen states. *Id.* at 48 n.82. Once again, a Florida federal judge stands alone, striking such a limitation as contrary to the First Amendment rights of candidates to solicit, of supporters to associate, and of voters to receive information. *See* Zeller v. Fla. Bar, 909 F. Supp. 1518 (N.D. Fla. 1995). For a contrary decision which *Zeller* found ill-considered, see *In re Code of Judicial Conduct*, 627 S.W.2d 1 (Ark. 1982). *See also* AMERICAN BAR ASSOCIATION, *supra* note 27, at 48 n.83.

> The Task Force is unanimous that the widespread adoption of timing limits like Canon 5 reflects a sound balancing between the need to mount campaigns and the need to protect public confidence in the courts. We believe that the *Zeller* view enlarges all the worst aspects of judicial campaign fundraising . . . .

Id.

29. *Cf.* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX.

Communication between nonjudicial candidates and the public occurs, *during campaigns and all the rest of the time,* via the same media and messages. Communication to or from judges—except during campaigns—occurs in highly structured and controlled ways—in trials and hearings, via evidence, testimony, arguments, and briefs. True, judges also write articles, give lectures, appear on panels, etc. But judges' communications outside the courtroom—except during campaigns—are almost entirely free of the self-promotion and kinds of advocacy that is garden-variety when other elected officials address the public.

However, *during* campaigns, judges and judicial candidates face the same incentives as other candidates: they want to win. For judges, facing such incentives means departing from the modes of communication with which they are familiar and entering into a new domain—in which many of them feel acute discomfort, and into which they are led more and more often by campaign consultants whose sole incentive is to win.

I urge great care before we cut down the safeguards that have surrounded judicial elections. The safeguards should remain not to reduce accountability or out of paternalism, but to protect the constitutional rights of litigants and—as Robert Bauer adds invaluably—our courts' unique function in our system of checks and balances.[30]

Isn't the danger, indeed the strong probability, that the more judicial elections are like other elections, the more we will lose people who would be excellent judges but who view the need for intense campaigning as a severe hurdle? And isn't the whole purpose of judicial selection getting onto the bench the people most suited to be judges?

L. REV. 1751, 1768 (1999) (examining campaign finance concerns and free speech issues in the context of legislative campaigns).

30. *See* Bauer, *supra* note 26.