

# HOLDING THE BENCH ACCOUNTABLE: JUDGES QUA REPRESENTATIVES

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“The judiciary must not take on the coloration of whatever may be popular at the moment. We are the guardian of rights, and we have to tell people things they often do not like to hear.”<sup>1</sup>

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1. *People v. Diguglielmo*, No. 96-1493, 2008 N.Y. Misc. LEXIS 5621 (Westchester Cnty. J. Ct. Sept. 17, 2008) (quoting former Chief Justice Rose E. Bird of the Supreme Court of California).

## I. INTRODUCTION

The United States is in a “new era of judicial elections. Contributions have skyrocketed; interest groups, political parties, and mass media advertising play an increasingly prominent role; incumbents are facing stiffer competition; salience is at an all-time high. Campaign rhetoric has changed dramatically, becoming more substantive in content and negative in tone.”<sup>2</sup> Recently, the Supreme Court has acknowledged that judicial candidates have a right to speak about their views on legal and political issues that may come before these candidates if they are elected.<sup>3</sup> This invites disaster among the elected judiciary because special interests and political forces now have the opportunity to hold judges electorally accountable for decisions they render.<sup>4</sup> “By tying judicial office to success in elections, many observers fear judges bend to public opinion rather than follow the rule of law.”<sup>5</sup>

There is a fundamental tension that underlies judicial elections—the tension between judicial independence and judicial accountability.<sup>6</sup> How can we expect judges to be independent arbiters of the law who are not influenced by external political forces when we subject these same judges to electoral accountability? The answer to this question remains unseen, but should at least begin with an explicit acknowledgement that to subject judges to elections is to treat them akin to other elected representatives, such as legislators and executive officers. It seems that the most likely answer to the question is that we simply cannot expect all elected judges to

2. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 267 (2008) (internal citations omitted).

3. See generally *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (finding that Minnesota’s “announce clause,” which forbids candidates in judicial elections from announcing their views on legal and political issues, was unconstitutional under the First Amendment).

4. See Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 506 (2007). “[*Republican Party of Minnesota v. White*] unquestionably opened the door, as both a practical and jurisprudential matter, to forces seeking to benefit from highly politicized courts.” *Id.*

5. Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360, 360 (2008).

6. See Pozen, *supra* note 2, at 271. Pozen writes:

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

*Id.* (internal citations omitted).

be independent when they are accountable to the electorate. Even federal courts,<sup>7</sup> including the Supreme Court,<sup>8</sup> have held that judges are representatives in the context of the Voting Rights Act<sup>9</sup>—an express acknowledgement that an elected judiciary is a representative judiciary.<sup>10</sup>

This is not to say that all elected judges are incompetent or that there is no wisdom in holding elected judges accountable.<sup>11</sup> Instead, I merely posit that elected judges are, necessarily, representatives of the citizens and legislators within their jurisdiction. I do not endeavor to reexamine the longstanding controversy<sup>12</sup> over whether appointed judges<sup>13</sup> are

7. *See, e.g.*, *Mallory v. Eyrych*, 839 F.2d 275, 278–81 (6th Cir. 1988) (holding that Section 2 of the Voting Rights Act applies to judicial elections because judges are “representatives” within the meaning of Section 2).

8. *See, e.g.*, *Houston Lawyers’ Ass’n v. Texas Attorney General*, 501 U.S. 419, 425 (1991) (holding that Section 2 of the Voting Rights Act applies to judicial elections because judges are “representatives” within the meaning of Section 2).

9. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 (1988)).

10. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 692 (1995). “Because groups such as blacks and Hispanics are underrepresented in some states’ elective judiciaries, these cases effectively require such states to redesign their judicial selection systems (absent state interests sufficient to justify the existing systems).” *Id.*

11. *See* Pozen, *supra* note 2, at 271–72. “Given that judicial independence and public accountability are both seen as foundational ideals in the American polity, the tension between them makes judicial selection an inherently contestable practice.” *Id.*

12. *See* Herbert Harley, *Taking Judges Out of Politics*, 64 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 184 (1916). Harley writes:

Over a large portion of this country the belief is prevalent that judges, in order to serve the public faithfully, must be chosen by popular vote and hold office for a comparatively brief term. . . . The offspring of an era of dogmatic optimism, it is fitting that this easy doctrine should now be challenged by a principle which reflects the disillusion and skepticism of the present time. The new principle denies the ability of the electorate to make wise selection for a highly technical branch of work. There can be no dispute of the claim that the work of the judge is exceedingly technical. The electorate broadly cannot correctly appraise the relative ability of lawyers, and much less can it estimate with accuracy the fitness of members of the bar to hold judicial office.

*Id.*

13. In a sense, however, even appointed judges are representatives. *See* Barbara A. Perry, *Do Our Judges “Represent” the People?*, 2 INSIGHTS ON L. & SOC’Y 10, 19. Perry writes:

Judges can stand as symbols for people in the sense that they resemble them somehow. This does not mean that they would decide cases in favor of those people. Doing so would be the *active representation* of constituents that we expect and even demand from members of Congress. Rather, judges can *passively represent* parts of the population. For example, a large number of Asian Americans live in California, so a proportionally large number of federal judges of Asian heritage there would reflect this segment of the state’s population.

*Id.*

theoretically preferable<sup>14</sup> to an elected judiciary,<sup>15</sup> however the very fact that elected judges are representatives of the people renders an elected judiciary unsuitable when examined in the broader context of what role judges should play in the American political system.

In Part II I will examine the characteristics of what defines a “representative” in a democratic society with a particular emphasis on the level to which representatives are accountable to the electorate and the extent to which representatives must adopt the public opinion and ideology of their constituents.

In Part III I will explore the role of judges in the American democratic process. Because this Article deals primarily with elected (i.e., non-Article III) judges, the emphasis will be on state judges in terminal courts of appeal—most predominantly state supreme court justices—as these judges have the most direct and final say in the law of their states. However, a brief history of using impeachment as a method for removing politically unpopular appointed Article III judges will precede the central discussion about the role of elected judges as representatives.

Part IV will address *Chisom v. Roemer*, a United States Supreme Court case that determined that the elected justices of the Louisiana Supreme Court were “representatives” within the meaning of the 1982 amendments to Section 2 of the Voting Rights Act. After briefly detailing the factual background of *Chisom* and the majority and dissent’s respective approaches to this question of statutory interpretation, I will explain why the majority came to the right determination that elected judges are “representatives” because they are democratically accountable to the electorate and are not insulated from the public will due to the real-world, pragmatic aspects of electoral politics.

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14. In 1916, Herbert Harley, the Secretary of the American Judicature Society, claimed that “[w]hile recognizing the fact that many elected judges have been satisfactory, and a few ideally qualified to judge, it must be added that the really competent judge has been the exception rather than the type.” *Id.* at 186.

15. For an excellent discussion about the role of judicial elections in American representative democracy, see Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 ARK. L. REV. 249 (2011). Other authors and members of the judiciary have also done commendable work advocating for the abolishment of judicial elections. For example, former Chief Justice James Exum of the Supreme Court of North Carolina has been a longtime advocate of eliminating judicial elections. *Chief Justice Calls for Elimination of Judicial Elections*, WILMINGTON MORNING STAR, Mar. 9, 1989, at 5C, available at <http://goo.gl/m8CT3H>. “The bench is no place for political agendas or crusaders, Exum said.” *Id.* Additionally, Associate Justice Sandra Day O’Connor, after her retirement from the United States Supreme Court, has come out vocally against judicial elections. Mark Cohen, *Justice O’Connor Stumps for Judicial Election Reform*, MINN. LAWYER (Sept. 10, 2010), <http://minnlawyer.com/minnlawyerblog/2010/09/10/justice-oconnor-stumps-for-judicial-election-reform-in-minn/> (last visited July 1, 2013).

Part V will explore recent efforts in various states to decrease the size of state supreme courts or increase the size of state supreme courts in order to change the ideological makeup of the courts. This direct legislative impact on the potential makeup of the courts leads to the conclusion that, at least to a degree, judges are democratically accountable to the people or the people's elected representatives.

Part VI will expand upon the basic ideals of the majority opinion in *Chisom* and will demonstrate an ideal case study of how judges are democratically accountable for their decisions in states that directly elect, or hold retention elections for, state supreme court justices—the 2010 Iowa Supreme Court retention elections where three justices that voted to find bans on same-sex marriage unconstitutional were ousted in retention elections. I will contrast this with the 2012 Iowa Supreme Court retention election, where one of the justices that also voted to find same-sex marriage bans unconstitutional was retained in order to determine whether the 2012 election was an express rejection of the politicization of an elected judiciary. Finally, I will examine what effect these elections have on our understanding of judges qua representatives.

Part VI will examine *Caperton v. A.T. Massey Coal Company* in order to explore the idea that elected judges are not only beholden to the electorate, but are also representatives of the business interests that ensure that the judges have adequate campaign funding to run for judicial office. I intend to demonstrate that elected judges are, indeed, “representatives” of powerful business interests that are essential to filling their campaign coffers.

Finally, in Part VIII, I will conclude that elected judiciaries are incompatible with the constitutional republic form of government that the Framers adopted, and that the only way to ensure that judges are independent of bias in their decision-making is to reject judicial elections as an acceptable way of choosing or retaining judges.

## II. WHAT IS A REPRESENTATIVE?

Black's Law Dictionary provides two definitions for the term “representative”: “(1) One who stands for or acts on behalf of another”; and “(2) A member of a legislature, [especially] of the lower house.”<sup>16</sup>

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16. BLACK'S LAW DICTIONARY 1416–17 (9th ed. 2009). See also *Allied Env'tl. Servs., PLLC v. N.C. Dep't. of Env'tl. & Natural Res.*, 653 S.E.2d 11, 13 (N.C. Ct. App. 2007) (adopting the identical definition of “representative” from the 7th edition of Black's Law Dictionary when interpreting a North Carolina statute).

This definition mirrors the way the term is used in modern parlance and political discourse. In the broadest sense, judges are most certainly representatives because they act on behalf of the polity as a whole by adjudicating cases and interpreting the law. Indeed, judges are supposed to stand on behalf of all of the citizens within their jurisdiction as virtual representatives and ensure that the law is applied fairly and equitably among the citizenry. This, however, sometimes puts them at odds with legislative representatives who may enact legislation that does not comport with the Constitution or fundamental principles of common law. This creates a quandary for many judges. How must they act when standing on behalf of all of society and applying neutral principles of laws leads to the invalidation of legislation enacted by duly elected legislators?

In a review of Professor John Hart Ely's book *Democracy and Distrust: A Theory of Judicial Review*, which in part examines the application of equal protection ideals by judges, Professor Archibald Cox notes that:

Professor Ely makes a convincing case for the proposition that when confined to laws disadvantaging identifiably unpopular classes, active judicial review has served—and can serve hereafter—to enforce the ideal of representative democracy; it functions to invalidate laws that very probably were enacted by legislators consciously or unconsciously seeking no important general goal but only selfish advantage for the groups to which they belong.<sup>17</sup>

According to Professor Cox, this holds true because “Professor Ely is required to incorporate into his definition of representative government the concept of virtual representation, which makes it the duty of elected legislators to measure in good faith the interests of all classes of society and not merely those of themselves and their friends.”<sup>18</sup>

This point underscores the analysis of the elected judiciary as representatives, but not because elected judges act as fair and impartial virtual representatives of all of the classes and people that come before the bench—indeed that is the sacrosanct duty of an independent judiciary. Instead, elected judges who act in this virtual representative capacity are often subject to the confines of recall elections and the influx of money from partisan and issue-oriented groups into the campaign coffers of their

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17. Archibald Cox, Book Review, *Democracy and Distrust: A Theory of Judicial Review*, 94 HARV. L. REV. 700, 705 (1981).

18. *Id.* (citation omitted).

challengers.<sup>19</sup> In this sense, judges that measure the interests of all classes of society rather than the political or moneyed interests that contribute to judicial elections are most vulnerable to the same sort of accountability that elected legislators and executive officials face—direct representative accountability to the people. It is this virtual representation that we should hold our elected officials accountable to rather than the prevailing political and social norms of individuals and groups with power and influence.

We must first acknowledge that our elected judges are representative of the people of the country—all social, economic, racial, and other classes that may not achieve independent majoritarian power—but at the same time reject the principle that elected judges should be held directly responsible for representing the rights of those classes in lieu of more moneyed or influential interests that may only help a judge retain his seat rather than benefit society as a whole.<sup>20</sup> In fact, Professor Cox suggests that Professor Ely views courts as virtually representative bodies that are *compelled* to step in to invalidate state laws that violate the equal protection clause when legislators abandon their virtual representative roles to all of their constituents either unconsciously or consciously in favor of a more pragmatic and direct appeal to hegemonic interests with stakes in elections.<sup>21</sup>

### III. JUDGES AND THE DEMOCRATIC PROCESS

The Framers of the Constitution deliberately ensured that federal judges would hold life tenure, and could only be removed from the bench if impeached by the House of Representatives and convicted by the Senate.<sup>22</sup> This singular check on the exercise of power by the federal judiciary was designed not to directly punish the offending jurist, but instead to eliminate that jurist's official political power.<sup>23</sup> Although citizens did not have a direct method to remove counter-majoritarian

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19. *See id.* at 706. “[T]he roots of the principle lie in the aspiration for fairer representation.” *Id.*

20. For a prime example of the conflicting principles of judges acting in a virtual representative capacity and the direct representative accountability of those judges in judicial elections to prevailing political and social norms, see the discussion in Part VI below about the 2010 Iowa Supreme Court retention elections.

21. Cox, *supra* note 17, at 707. “The critical question is to be whether the legislative majority has in fact failed to represent an unpopular minority fairly, by consciously or subconsciously failing to take its interests into account.” *Id.*

22. U.S. CONST. art. I, §§ 2, 3; U.S. CONST. art. II, § 4.

23. Martin Wishnatsky, *Taming the Supreme Court*, 6 LIBERTY U. L. REV. 597, 651 (2012). “[T]he purpose of impeachment is not to secure a criminal conviction against an individual, but rather to prevent the further exercise of official power . . . .” *Id.*

federal judges from the bench,<sup>24</sup> impeachment provided citizens with the power to remove unpopular or unrepresentative judges through the citizens' elected representatives.<sup>25</sup> In fact, Justice Joseph Story commented that impeachment "is a proceeding purely of a political nature."<sup>26</sup> Alexander Hamilton also noted that impeachment provides a "constitutional check" by the legislature against the "danger of judiciary encroachments on the legislative authority . . . ."<sup>27</sup> Thus, under the Hamiltonian view, impeachment would be a remedy for citizens, through their elected legislators, to strip the official power of federal judges who contravene the express will of the people through the people's legislature's action or inaction.<sup>28</sup> In practical terms, "[t]he procedural requirement of a House majority and two-thirds assent in the Senate, however, makes impeachment for political causes unlikely."<sup>29</sup> Even when the United States Supreme Court, or inferior federal courts, issues a controversial decision, the backlash does not typically rise to the level of impeachment.<sup>30</sup> That is not to say that the legislature has not tried to remove unpopular and unrepresentative judges from the bench,<sup>31</sup> although the House of

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24. The federal judiciary is unique in this regard. Although the federal judiciary protects the rights of citizens to speak freely on political issues and debate the merits of various political proposals, the judiciary itself has the power to stifle the citizenry's legislative choice. See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 37 (2001). Amar writes:

The entire Constitution was based on the notion that the American people stood supreme over government officials, who were mere servants of the public, not masters over them. Under first principles of popular-sovereignty theory and principal-agent law (which governs, for example, employer-employee relations), it was improper—not to mention imprudent—for mere public servants in either the federal or the state governments to prohibit their legal masters, the sovereign citizenry, from floating political opinions and weighing political proposals among themselves.

*Id.*

25. Wishnatsky, *supra* note 23, at 652. "The purpose of impeachment is to allow the people as a whole through their representatives to address misconduct that affects the national welfare." *Id.*

26. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 801, at 272 (Fred B. Rothman 1999) (1833).

27. *THE FEDERALIST* NO. 81, at 469 (Alexander Hamilton) (ABA Publishing 2009).

28. *See id.*

29. Wishnatsky, *supra* note 23, at 655–56 (citing U.S. CONST. art. I, §§ 2, 3).

30. *Id.* at 656. "Although the Court's decisions often produce outrage from one side of the divide, they simultaneously draw admiration from the other. Where the soul of the nation is divided, mustering a two-thirds majority to oust judges for ideological reasons seems remote." *Id.* (footnote omitted).

31. See James C. Durham & Judith Johnson, *William O. Douglas*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993*, at 394–95 (Clare Cushman ed., 1993) (noting that Justice William Douglas was twice threatened with impeachment); Clare Cushman, *Abe Fortas*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993*, at 475 (Clare Cushman ed., 1993) (noting that Abe Fortas resigned after unpopular sentiment led to talk of a potential impeachment). For an excellent discussion on the failed nomination of Clement F. Haynesworth to the

Representatives has only impeached one Supreme Court Justice.<sup>32</sup>

Two of the first judicial impeachments in American jurisprudential history shed light on how our earliest citizens and their elected legislators viewed the role of judges as representatives of the people. “In 1800, President Adams used the power to appoint [judges] in order to pack the court [sic]. Thus, the Federalists ‘retreated into the judiciary as a stronghold’ as they lost their grip in Congress.”<sup>33</sup> Following Adams’ Court packing, “Thomas Jefferson and the Jeffersonians embarked on a campaign to remove the Federalists by successfully impeaching U.S. District Judge John Pickering and then attempting to impeach Associate Justice Samuel Chase.”<sup>34</sup>

The first target of Jefferson and the Republicans was John Pickering, a federal district judge in New Hampshire.<sup>35</sup> The Republicans accused Pickering of being “mentally deranged and frequently intoxicated . . . .”<sup>36</sup> Former Chief Justice William H. Rehnquist summarized the impeachment proceedings as follows:

In March, 1803, the House of Representatives impeached Pickering, and almost exactly a year later, the Senate voted to convict him and remove him from office. The Senate vote on Pickering’s impeachment did not augur well for the independence of the judiciary; the vote in the Senate was strictly along party lines, with all of the Republicans voting “guilty” and all of the Federalists voting “not guilty.”<sup>37</sup>

Although “[t]here was no question that Pickering was a disgrace to the judiciary and should have resigned,”<sup>38</sup> the impeachment of John Pickering

United States Supreme Court to fill Abe Fortas’s seat on the bench, see John P. Frank, *Are the Justices Quasi-Legislators Now?*, 84 NW. U. L. REV. 921, 922–23 (1990).

32. Samuel Chase is the only Supreme Court Justice to have been impeached by the House of Representatives. Chase was acquitted by the Senate. See generally WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992) (providing a detailed account of the impeachment of Justice Chase).

33. Tuan Samahon, *Impeachment as Judicial Selection?*, 18 WM. & MARY BILL RTS. J. 595, 604 (2010) (quoting Letter from Thomas Jefferson to Joel Barlow (Mar. 14, 1801), in 9 *THE WRITINGS OF THOMAS JEFFERSON* 223 (Albert Ellery Bergh ed., 1905)).

34. *Id.* at 604–05.

35. William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 583 (2004) [hereinafter Rehnquist, *Judicial Independence*].

36. *Id.*

37. *Id.*

38. *Id.*; see also Lynn W. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 488 (1949). Turner writes:

For five years after his appointment to the federal bench, [Pickering] apparently performed his few duties competently. But, at the turn of the century, the sixty-three-year-old jurist, who

is quite important in examining the confluence of the judiciary and the American democratic process.<sup>39</sup> “In this respect it created a precedent which would have altered profoundly our constitutional history had it been followed with any degree of consistency by future Senates.”<sup>40</sup> One of the most important precedents that resulted from the Pickering impeachment is the early expansion of what actions were impeachable, because “in order to get rid of Pickering, who was certainly neither treasonable, corrupt nor criminal, the strict constructionist Republicans had either brazenly to violate the Constitution or to give the term ‘misdemeanors’ a connotation far more inclusive than its ancient common law meaning.”<sup>41</sup> Theoretically, this expanded rationale for impeachment could have extended to make even appointed, Article III judges representatively accountable for the purported wisdom of their decisions to the citizenry and their elected legislators.<sup>42</sup> The subsequent impeachment proceedings of Justice Chase, however, altered dramatically the course of legislators using impeachment as an accountability measure for federal judges.

“The day after Judge Pickering was convicted and removed, the House voted to impeach Justice Chase. Jeffersonians charged that Justice Chase had breached judicial impartiality by making brazenly partisan statements from the bench. As a result, they attempted his removal by impeachment.”<sup>43</sup> Justice Chase was a Federalist and one of six members of the Supreme Court, having been appointed by President George Washington in 1796.<sup>44</sup> The Republicans’ charges against Justice Chase included his giving a grand jury charge in Baltimore that denounced Republican politics and failing to impartially preside over trials against

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had for some time been increasingly hypochondriac and subject to such eccentricities as an unreasoning fear of water travel, showed evidence of definite mental derangement.

*Id.*

39. See Turner, *supra* note 38, at 486. Turner writes:

This prosecution of the judge of the federal district court at Portsmouth, New Hampshire, was important in our constitutional history for a number of reasons. It was the first impeachment to run its full course under the federal Constitution, and the first of a judicial officer. It was, furthermore, the first and one of the few successful impeachments if the conviction and removal from office of the accused be deemed the criterion of success.

*Id.*

40. *Id.*

41. *Id.* at 487.

42. See *id.* at 486. “The fact that [the House that impeached and Senate that convicted Pickering’s] apparent interpretations of the Constitution were so soon reversed by the failure to convict [Justice Samuel] Chase has made the Pickering case a minor development in the story rather than a historic landmark.” *Id.*

43. Samahon, *supra* note 33, at 605 (citations omitted).

44. Rehnquist, *Judicial Independence*, *supra* note 35, at 584.

certain individuals aligned with Republican politics.<sup>45</sup> “[A] partisan House majority did impeach Chase and a partisan Senate majority did vote in favor of conviction on three of the eight articles.”<sup>46</sup> However, the Senate votes were not sufficient to satisfy the two-thirds required by the Constitution.<sup>47</sup>

According to former Chief Justice Rehnquist, “[i]f Chase were to be removed by the same party line vote as Pickering was, the federal judiciary, and particularly the Supreme Court of the United States, would almost certainly be relegated to junior status among the three branches of the federal government with no real independence at all.”<sup>48</sup> “As the first and last attempt to remove a Supreme Court Justice for his or her political opinions, the Chase impeachment and acquittal is a key step in the development of the impeachment power” as a tool to impose a representative check on the political leanings of Supreme Court Justices.<sup>49</sup> The Senate’s acquittal of Justice Chase caused “the abandonment of what was generally understood to have been the next step in Republican strategy—the impeachment of Chief Justice Marshall. But it also reversed the precedent set by the Pickering case, fortunately for a nation whose governmental philosophy sets a premium upon the independence of the judiciary.”<sup>50</sup>

Although the failed impeachment proceedings of Justice Chase settled the issue of whether Supreme Court Justices could be held representatively responsible for their political musings and partisan leanings,<sup>51</sup> President Richard Nixon attempted to reignite the failed strategy of the Jeffersonian Republicans by impeaching members of the Supreme Court that he did not favor.<sup>52</sup> During the Nixon administration, legislators threatened to impeach

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45. *Id.* at 584–85.

46. Samahon, *supra* note 33, at 605 (citation omitted).

47. See 14 ANNALS OF CONG. 669 (1805) (noting that the votes to convict Chase on articles of impeachment three, four, and eight were 18–16, 18–16, and 19–15, respectively); see also U.S. CONST. art. I, § 3 (“[N]o Person shall be convicted without the Concurrence of two-thirds of the Members [of the Senate] present.”).

48. Rehnquist, *Judicial Independence*, *supra* note 35, at 584.

49. Jeremy D. Bailey, *Constitutionalism, Conflict, and Consent: Jefferson on the Impeachment Power*, 70 REV. POL. 572, 572 (2008).

50. Turner, *supra* note 38, at 506.

51. It is also worth noting, that another representative check, although somewhat impractical, on the judiciary is the power of the people to amend the Constitution to overturn an unfavorable Supreme Court ruling. See U.S. CONST. art. V. Occasional legislative efforts also attempt to shrink the power of the federal judiciary, under Article III, to hear cases involving certain controversial subjects. See, e.g., S. 438, 96th Cong., 1st Sess. (1979) (attempting to strip federal courts of the power to hear cases involving school prayer).

52. Samahon, *supra* note 33, at 605.

Justice Abe Fortas in 1969 and Justice William Douglas in 1970.<sup>53</sup> Although no resolution was introduced calling for Justice Fortas's impeachment, he resigned from the Court, which opened a vacancy for President Nixon to fill.<sup>54</sup> Congressman Gerald Ford led the fight to impeach Justice William Douglas in 1970 for various infirmities, including "his pursuit of serial monogamy and receipt of money from a questionable foundation."<sup>55</sup> The pretext to Nixon and Ford's actions were made quite clear when then-Representative Gerald Ford declared that an "impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office."<sup>56</sup> Democrats eventually "outwitted Republicans procedurally and killed the impeachment effort in the House Judiciary Committee."<sup>57</sup> The lessons learned from these various impeachment efforts—both successful and unsuccessful—are that there are certain factions and individuals who believe that even appointed federal judges should be held accountable to the electorate for policy-making and political actions. Although the legislature has not used such tactics to attempt to unpack the Supreme Court since 1970, the danger remains that the perfect storm of a President and Congress focused on changing the makeup of the Supreme Court could—however slim the possibility may be—use impeachment as a representative check on even appointed federal judges. Some scholars, including Alexander Bickel, have still suggested that even outside of impeachment, constitutional amendment, and shrinking the jurisdiction of federal courts, the federal judiciary is still a fundamentally representative institution.<sup>58</sup>

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53. *Id.* at 605–06.

54. *Id.* at 606.

55. *Id.* at 607 (citation omitted).

56. 116 CONG. REC. H3113-14 (Apr. 15, 1970).

57. Samahon, *supra* note 33, at 607 (citation omitted).

58. *See, e.g.*, Croley, *supra* note 10, at 765–66. Croley writes:

Bickel's own resolution of the [countermajoritarian] difficulty was rooted in the idea that the federal judiciary is, fundamentally, a representative institution. He begins with the distinction between expediency, which implicates the majority's interests, and principle, which implicates its values. The function of the federal judiciary is to protect principle against expediency's attacks. The judiciary, in contradistinction to the other two branches, is to be the pronouncer and guardian of values. As the pronouncer and guardian of the polity's values, the judiciary is a representative institution: [i]t represents the majority.

*Id.* (citation omitted) (internal marks omitted).

However, “most judges are not federal judges, let alone Supreme Court Justices. The vast majority of the judges in this country are state judges, and most of those state judges have to do something that federal judges never have to do: face the voters in order to keep their jobs.”<sup>59</sup> “[S]tate courts typically are democratically accountable. In most states, citizens may register discontent with judicial decisions either by voting judges out of office or by amending the state’s constitution to undo unpopular constitutional interpretation.”<sup>60</sup> As of 2004, approximately ninety percent of state general jurisdiction judges are selected by popular elections or retention elections<sup>61</sup> and “[t]hirty-nine states [currently] subject their state supreme court justices to some form of elections, either retention, partisan or nonpartisan.”<sup>62</sup> Three major forms of judicial elections have emerged: partisan, nonpartisan, and retention elections.<sup>63</sup> The United States is unique in its adherence to an elected judiciary.<sup>64</sup>

An examination of the degree to which state-elected judges are representatives<sup>65</sup> of the political zeitgeist and the practicalities of campaign politics must begin with an understanding that the state judiciary is quite different from the federal judiciary. Indeed, Article III of the United States Constitution creates “an unelected, unrepresentative judiciary in our kind of government,”<sup>66</sup> but “[s]tates are not required to adopt separation of powers, nor as Judge Posner explained, are they required to ‘imitate the separation of powers prescribed for the federal government.’”<sup>67</sup>

59. Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1216–17 (2012) (footnote omitted).

60. Robert F. Utter, *State Constitutional Law, The United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 20 (1989) (footnotes omitted).

61. Pozen, *supra* note 2, at 266 (citing Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1105 (2007)).

62. Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 COLUM. L. REV. SIDEBAR 27, 29 (2011).

63. Melinda Gann Hill, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 315 (2001).

64. See Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 1996 (1988). “To the rest of the world, the American adherence to judicial elections is as incomprehensible as our rejection of the metric system.” *Id.*

65. The most vulnerable to public opinion are judges of the highest state courts who must face election. See, e.g., Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 L. & CONTEMP. PROBS. 79, 79 (1998) (“These are troubled times for constitutional democracy in America. Among our political institutions, none are more troubled than many of our highest state courts.”).

66. *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1179 (D.C. Cir. 1983) (Bork, J., concurring).

67. Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1884 (2001) (quoting *Risser v. Thompson*, 930 F.2d 549, 552 (7th Cir. 1991)).

“In a very simple procedural sense, judges are representatives of the people.’ They are chosen by elected officials on the basis of their values and their political views; they are not chosen by other judges, or by competitive examination, or by a panel of elite law professors.”<sup>68</sup> Simply examining elected judges as direct democratic representatives of the people “invite[s] hostility from both the bench and the bar.”<sup>69</sup> The reason for this conclusion is simple—judges are supposed to be an independent branch within our separation of powers governance.<sup>70</sup> To hold judges accountable to the will of the people and the zeitgeist is anathema both among judges who feel that they should be free to decide cases without external pressures and among lawyers who depend on this independence when bringing cases to court.<sup>71</sup>

As long as states utilize some form of judicial elections, however, there must be recognition that this judiciary is an accountable judiciary—sometimes at the expense of judicial independence. “[A]n ‘accountable

68. Christopher L. Eisgruber, *Dimensions of Democracy*, 71 *FORDHAM L. REV.* 1723, 1732 (2003) (quoting CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF GOVERNMENT* 78 (2001)).

69. Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 *B.C. L. REV.* 95, 97 (1997).

70. Perhaps this is why

[p]roponents of limitations on judicial campaigns view voter participation (at least insofar as the participation is linked to the voters’ views on legal issues) as something to be avoided, lest the judicial candidate feel obligated to decide cases with a view toward the decisions’ likely effects on the election returns.

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 R.* 301, 302–03 (2003).

71. This sentiment is one of the primary reasons that the framers of the Constitution ensured that judges would have immunity from state law defamation claims based on what a judge writes in an opinion or says from the bench. See AMAR, *supra* note 24, at 40. Amar writes:

Much as Ellsworth, Wilson, and Blackstone argued that certain well-settled background principles of the rule of law went without saying, so, too, the Supreme Court has insisted that judicial free speech is an implicit element of the basic Anglo-American system of law. As the Court explained at the turn of the twentieth century, “a series of decisions, uniformly to the same effect, extending from the time of Lord Coke to the present time, established the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice . . . .”

*Id.* (quoting *Spalding v. Vilas*, 161 U.S. 483, 495 (1896)). In an 1868 case from the United Kingdom, the Court of Exchequer wrote:

It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office, if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?

*Scott v. Stansfield*, 3 L.R. Exch. 220, 223 (1868).

judiciary' typically refers to a judiciary that is accountable to the public in a political sense—those judges are representatives of the people. Judges, according to this usage are similar to legislators.<sup>72</sup> Indeed, elected judges face a number of problems akin to those faced by elected legislators—undoubtedly representative positions. For example, elected judges are prone to

the appearance of impropriety caused by judges taking money from those who appear before them, the threat to judicial independence resulting from a judge's dependence on campaign contributions and party support, the reduced perception of impartiality caused by statements of judicial candidates on political or social issues, the elimination of qualified lawyers who would otherwise be willing to serve as jurists, and the loss of public confidence caused by the vile rhetoric of judicial campaigns.<sup>73</sup>

These observations are supported by empirical data of all state supreme court judicial elections between 1980 and 1995.<sup>74</sup> In fact, judicial elections during this time frame were just as competitive as elections for the United States House of Representatives,<sup>75</sup> “which is arguably the most highly accountable American institution by formal design.”<sup>76</sup>

Critics claim that a system of accountable judges invites situations where judges are influenced by prevailing social norms rather than the black letter of the law. “Advocates of an accountable judiciary argue that judges make decisions that affect not merely everyday legal policies, but everyday social life—just like legislators.”<sup>77</sup> Absent this accountability, “judges could turn into renegade legislators, thereby thwarting the will of the people.”<sup>78</sup> “[M]any political scientists support judicial elections, especially partisan judicial elections, especially partisan judicial elections, as a way of achieving electoral accountability by judges.”<sup>79</sup>

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72. Martha W. Barnett, *The 1997–98 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411, 415 (2000) (citations omitted).

73. Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 276 (2002).

74. See generally Hill, *supra* note 63, at 315–30 (examining data from 643 state supreme court elections between 1980 and 1995).

75. See *id.* at 319. “The fact of the matter, however, is that supreme court justices face competition that is, by two of three measures, equivalent if not higher to that for the U.S. House.” *Id.*

76. *Id.*

77. Barnett, *supra* note 72, at 415.

78. *Id.*

79. Anthony Champagne, *Judicial Selection from a Political Science Perspective*, 64 ARK. L. REV. 221, 222 (2011).

Nicole Mansker, a Law Clerk to U.S. District Court Chief Judge Christopher C. Conner and Neal Devins, Goodrich Professor of Law and Government at William & Mary Law School, conducted an empirical study of state supreme court decisions to determine whether state supreme court justices were prone to act in a manner that reflects public opinion and democratic accountability.<sup>80</sup> Mansker and Devins found that “[i]n states with contested elections, state justices, like other politicians, ‘have a tendency to vote in accordance with perceived constituency preferences on visible issues, simply because the failure to do so is politically dangerous.’”<sup>81</sup> Two prominent patterns emerged. First, on high salience issues such as crime, abortion, same-sex marriage, school finance, and gun control, state supreme court justices tended to align with public opinion, especially in states that elect judges via partisan or nonpartisan elections.<sup>82</sup> Second, the authors concluded that:

With respect to the low salience issues, the courts have incentive to turn to business interests and campaign donors, especially given the infusion of money into judicial campaigns in recent years. Empirical evidence and anecdotal evidence indicate that justices are sensitive to the business interests that fund their campaigns (in partisan and nonpartisan election states).<sup>83</sup>

The authors note that even judges acknowledge that these business interests and the necessity of campaign donations can influence decisions on low salience issues.<sup>84</sup>

Other scholars have reached similar conclusions that there is “both a direct and indirect linkage between state judicial decision making and public attitudes.”<sup>85</sup> For example, in the context of state supreme court rulings on the death penalty, Professors Paul Brace and Brent D. Boyea found that “[i]n states that retain their judges electively, a direct effect exists which encourages judges to affirm lower court punishments where

80. Mansker & Devins, *supra* note 62, at 29.

81. *Id.* (quoting Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 29 AM. POL. Q. 485, 489–90 (1995)).

82. *Id.* at 29–30.

83. *Id.* at 30.

84. *Id.*; *see also* Brief for 27 Former Chief Justices and Justices as Amici Curiae Supporting Petitioners at 2-3, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (No. 08-22), 2009 U.S. S. Ct. Briefs LEXIS 7 (“Substantial financial support of a judicial candidate—whether contributions to the judge’s campaign committee or independent expenditures—can influence a judge’s future decisions, both consciously and unconsciously.”).

85. Brace & Boyea, *supra* note 5, at 370.

the public is most supportive of capital punishment.”<sup>86</sup> Professors Brace and Boyea concluded that, “[i]n sum, elections and strong public opinion exert a notable and significant direct influence on judge decision making in these [death penalty] cases . . . .”<sup>87</sup> Perhaps more notably:

[S]trong death penalty public opinion also played a significant role in shaping the ideological character of state supreme courts in states with capital punishment where judges faced election. In those states, strong public support for the death penalty produced significantly more conservative courts than would be predicted by state ideology alone. . . . Hence, while the public may only rarely register strong, cross-cutting opinions on select issues like the death penalty, in the final analysis this may have very broad implications for other areas of law. A single highly salient issue might produce broad shifts in the basic ideological orientation of courts across much less salient issues and have much broader consequences for the interpretation and application of laws.<sup>88</sup>

Ultimately, “[t]he fear is that the quest for office distorts the job of a judge either because of the need to make campaign promises or to seek campaign funds.”<sup>89</sup>

Not all scholars or jurists agree that having public opinion influence judicial decision-making is a negative outcome.<sup>90</sup> Electing judges is fundamentally a democratic principle because in a democratic society, the

86. *Id.* Some scholars have suggested that even the federal court system has also been representative of popular opinion on issues involving the death penalty. *See, e.g.,* Amar, *supra* note 24, at 137. Amar writes:

The [Supreme] Court’s death-penalty jurisprudence offers a suggestive case study. In the late 1960s, actual executions dropped to zero in America. In response to this apparent national consensus, the Court in 1972 seemed to hold the death penalty categorically unconstitutional. Over the next four years, both Congress and some thirty-five states representing an overwhelming majority of the American population pushed back against this ruling with a new round of death-penalty statutes. In response, the Court reconsidered its position and gave its blessing to the penalty when the underlying crime was particularly heinous and strict procedural safeguards were in place. Since then, the Court has imposed additional substantive and procedural limits on capital punishment with a close eye on evolving American practice.

*Id.* (citation omitted).

87. Brace & Boyea, *supra* note 5, at 370.

88. *Id.* at 370–71.

89. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 594 (2005) (citation omitted).

90. *See, e.g.,* Pozen, *supra* note 2, at 273. “The most fundamental argument made on behalf of elective judiciaries is rooted in notions of popular sovereignty and collective self-determination. Its premise is enticingly straightforward: [a]s important officials in our democracy, judges should be selected by those over whom they hold power.” *Id.*

people should be represented in all branches of their government.<sup>91</sup> Electing the judiciary also lends some gravitas and legitimacy to our commitment to the democratic process<sup>92</sup>—even if that process produces undesirable results at times.<sup>93</sup> Perhaps a representative judiciary is the answer to the “counter-majoritarian difficulty” posed by Alexander Bickel—the idea that a judiciary that was not elected by the public or accountable in any way to the public has the power of judicial review over the decisions of democratically elected legislators and executives.<sup>94</sup>

University of Michigan Law School Professor Steven P. Croley notes that “[w]hile democratic values may be advanced by subjecting judges to increased electoral scrutiny, certain constitutionalist values may be compromised at the same time,” leading to what he terms the “majoritarian difficulty.”<sup>95</sup> “The majoritarian difficulty asks not how unelected/unaccountable judges can be justified in a regime committed to democracy, but rather how elected/accountable judges can be justified in a regime committed to constitutionalism.”<sup>96</sup> Adherence to constitutionalism<sup>97</sup> requires protection of individuals and underrepresented classes from the abuse of democratic power by the majority.<sup>98</sup> However, “[w]hen those charged with checking the majority are themselves answerable to, and thus influenced by, the majority, the question arises how individual and minority protection is secured.”<sup>99</sup> Professor Croley comes to the reasonable conclusion, which perhaps foreshadowed events such as the Iowa Supreme Court retention elections of 2010, that “to the extent majoritarian pressures influence judicial decisions because of judges’ electoral calculations, elective judiciaries seem, at least at first glance, irreconcilable with one of the fundamental principles underlying

91. See Resnik, *supra* note 89, at 594. “Given democratic preferences for empowerment of leaders through the popular will, judicial election—used in many states within the United States—also nests easily inside democratic principles.” *Id.*

92. See Pozen, *supra* note 2, at 273. “Indeed, by expressly honoring our commitment to popular sovereignty and public accountability, judicial elections would seem to have a prima facie claim to democratic legitimacy (or at least to democratic legitimation) . . .” *Id.*

93. See *id.* “A system of periodic majoritarian elections may lead to any number of harms, but it is our default means of choosing and constraining those who would speak for us.” *Id.*

94. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale Univ. Press 1986) (1962).

95. Croley, *supra* note 10, at 694.

96. *Id.*

97. See *id.* at 704. “Constitutionalism is rooted, in part, in a fear of the consequences of majoritarian rule. Constitutionalism thus seeks to limit the scope of democratic power, to circumscribe majoritarianism.” *Id.* (footnote omitted).

98. See *id.* at 694.

99. *Id.*

constitutionalism.”<sup>100</sup> Expanding the reach of the majoritarian difficulty to other judicial decision-making aside from constitutional questions, such as general legal positions on less salient issues or judicial favoritism towards financial benefactors, makes the problem “very real indeed.”<sup>101</sup>

The dilemma facing an elected judge is one of significant import to the everyday workings of American state judiciaries. The dilemma reveals two possible potential outcomes—both perhaps democratic in nature,<sup>102</sup> but certainly undesirable in the eyes of constitutionalists and proponents of an independent judiciary. “Unscrupulous judges seeking reelection would have an incentive to compromise the constitutional rights of subsets of their judicial electorate who are unpopular, unorganized, or otherwise outvoted.”<sup>103</sup> On the other hand, scrupulous judges may adhere to their constitutional responsibilities and roles as “virtual representatives” of all those within their purview, yet be replaced during an election for their failure to adhere to the majoritarian pressures unique to democratic politics.<sup>104</sup> It is high time to recognize that state court judges and justices face this dilemma on a daily basis. Many of these cases involve low saliency issues. Of concern, however, is how elected judges will deal with high saliency issues. Will they cede to the popular whim of the day or will they stand steadfast with independence and adherence to the Constitution?

There is, of course, no simple answer to this question. A concluding note on rational thought and the self-commitment of conscious actors serves to best illustrate the dilemma that continuing to elect judges places upon those jurists. Social scientist and political theorist Jon Elster uses an example from Homer’s *The Odyssey* to demonstrate how rational actors commit themselves to a future course of conduct.<sup>105</sup> In Book XII of *The Odyssey*, Ulysses and his crewmembers are preparing to sail past the island of the Sirens.<sup>106</sup> Ulysses knew that if his crewmembers heard the Sirens’ beautiful song, they would be drawn to the island and crash the

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100. *Id.* at 696–97 (emphasis omitted).

101. *Id.* at 697–98 (footnote omitted).

102. *But see* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 202 (1985) (quoting Elbridge Gerry, a delegate to the Philadelphia Convention of 1787: “The evils we experience flow from the excess of democracy.”).

103. Croley, *supra* note 10, at 727.

104. *See id.* “Scrupulous judges, who refuse to respond to majoritarian pressures, may as a result be removed from office and replaced with unscrupulous judges. Over time, this phenomenon would create a systemic bias in favor of judges most responsive to majoritarian pressures.” *Id.* (citation omitted).

105. JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36–37 (1988).

106. HOMER, *THE ODYSSEY* 193 (E. V. Rieu trans., Penguin Books 1946).

ship.<sup>107</sup> Therefore, he tells the sailors to plug their ears with wax.<sup>108</sup> Ulysses, however, wishes to hear the Sirens' song so he instructs his crew to bind him to the ship's mast and not release him from his bonds even if he begs.<sup>109</sup> Elster subsequently "argues that the process of self-commitment—of tying oneself to the mast—is analogous to the establishment of a constitution that binds subsequent political action."<sup>110</sup> "A constitution, Elster argues, is a means by which the political system binds itself to desirable policies so that it can resist the temptation to abandon or compromise those policies in times of crisis."<sup>111</sup>

While there are critics of Elster's analogy,<sup>112</sup> it provides an excellent example of the dilemma faced by elected judges.<sup>113</sup> These judges are required to adhere to the common law, statutory, and constitutional principles that define American jurisprudence—forming the proverbial mast to which they bind themselves. When elections are impending and the judges begin to hear the Sirens' song of public opinion, should the judges stay firm with their preconceived course of conduct—adherence to the letter of the law—or should they yield to the tempting songs? Perhaps society expects them to yield to the temptress of public opinion at democratically convenient times.

107. ELSTER, *supra* note 105, at 36.

108. *Id.*

109. *Id.*

110. Edward Rubin, *Hyperdepoliticization*, 47 WAKE FOREST L. REV. 631, 637 (2012) (citing JON ELSTER, *Ulysses Unbound: Constitutions as Constraints*, in ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 88–174 (2000)).

111. *Id.*

112. *See, e.g., id.* at 638. Rubin writes:

When Elster discusses constitution making *Ulysses Unbound*, however, he implicitly incorporates the idea that a society is committing itself to a course of action. The problem here is that society is not a self, as just defined, but an academic or rhetorical abstraction. A society cannot make decisions and therefore cannot bind itself in the required manner; only individuals or institutions within a society can do so.

*Id.* (citation omitted).

113. The work of economist Thomas C. Schelling also provides a similar analogy involving Captain Ahab losing a leg in *Moby Dick* and instructing his crew to cauterize the wound despite his protests to the contrary during the procedure. *See* Thomas C. Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, 74 AM. ECON. REV. 1, 9 (1984). Schelling writes of the *Moby Dick* episode:

I do feel sure that if I wanted in such circumstances to endure the pain I would have to rely on people who were tough enough in spirit to hold me down, or at least to tie me down. And if any violation of the Captain's express orders constituted mutiny punishable by death, you would have to gag Ahab to keep him from screaming "don't" and thus condemning himself to a fatal infection. (Still, if the Captain himself presides over the trial of the mutineers who held him when he shouted "stop," they will be in no danger of his wrath; so anticipating acquittal with thanks, they may as well hold him down.)

*Id.*

Of course, there is one marked difference in the dilemmas faced by Ulysses and elected judges—Ulysses knew that he was doomed if he gave in to the Sirens’ song.<sup>114</sup> The inverse may hold true for elected judges facing high salience issues, which may result in a decision that leads their ideological opponents to attempt to remove or unseat them. We expect the judges to stand firm in their commitment to the letter of the law, yet we do nothing to ameliorate the calls of the electoral Sirens.<sup>115</sup> It is possible, however, that we may view society, rather than the judge, as being bound to the mast.<sup>116</sup> In this case society may be doomed if elected judges begin to veer off the predestined path of judicial independence.

Perhaps society merely assents to the blind assumption that even an elected judiciary is truly independent and accountable only to the principles of the law—ignorant of this assumption when convenience dictates disagreement. This explanation, however, seems dubious given the United States Supreme Court’s express recognition that judges are “representatives”<sup>117</sup> and recent examples of efforts to “pack” or “unpack” state supreme courts by removing or adding seats to the bench,<sup>118</sup> successful efforts to remove state supreme court justices for making unpopular decisions,<sup>119</sup> and the pervasive influence of campaign donations to judicial candidates by litigants who appear in their courts.<sup>120</sup> Going forward in addressing reform of the judicial election system, we must keep the dilemma faced by Ulysses in mind and ask ourselves whether we want our judges to be faced with the choice to compromise their principles in order to retain their seat, or to face removal for making the principled, though unpopular, decisions that we expect judges to make.

#### IV. *CHISOM v. ROEMER*: THE SUPREME COURT WEIGHS IN

In *Chisom v. Roemer*, the Supreme Court addressed the issue of whether the 1982 amendment to Section 2 of the Voting Rights Act (“Section 2”) protects the right to vote in state judicial elections.<sup>121</sup> The petitioners in the case represented a group of black voters in Orleans

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114. ELSTER, *supra* note 105, at 36.

115. As discussed below in Part VII, we may actually be giving the Sirens megaphones by loosening campaign finance laws.

116. To extend the nautical metaphor further, elected judges could be the rudder of the ship.

117. *See* Part IV below.

118. *See infra* Part V.

119. *See infra* Part VI.

120. *See infra* Part VII.

121. *Chisom v. Roemer*, 501 U.S. 380, 383–84 (1991).

Parish, Louisiana who were challenging the “method of electing justices of the Louisiana Supreme Court from the New Orleans area.”<sup>122</sup> “The Louisiana supreme court consists of seven justices, five of whom are elected from five single-member Supreme Court Districts, and two of whom are elected from one multimember Supreme Court District.”<sup>123</sup> Petitioners claimed that the method of electing these justices diluted the minority voting strength in violation of Section 2.<sup>124</sup> The Court was faced with the narrow question of whether the 1982 amendment of Section 2 covered elected judges when it used the word “representatives.”<sup>125</sup>

The 1982 amendment to Section 2, as quoted in *Chisom*, states that:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.<sup>126</sup>

Congress provided no definition for the term “representatives” when codifying the 1982 amendments to Section 2, and the outcome of *Chisom* rested on how that term was to be interpreted by the courts. The *Chisom* Court reasoned that Congress’s choice to use the word “representatives” instead of “legislators” in Section 2 indicated “at the very least, that Congress intended the amendment to cover more than legislative

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122. *Id.* at 384.

123. *Id.* (citations omitted).

124. *Id.* at 385.

125. *Id.* at 390.

126. *Id.* at 394–95 (quoting 96 Stat. 134 (1982)).

elections.”<sup>127</sup> Rejecting an argument that “representatives” should only apply to legislators and executive officials, the Court adopted the view advocated by the Solicitor General, Kenneth Starr, at oral arguments and held that “the better reading of the word ‘representatives’ describes the winners of representative, popular elections.”<sup>128</sup> “If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered ‘representatives’ simply because they are chosen by popular election, then the same reasoning should apply to elected judges.”<sup>129</sup> Such a reading of Section 2 makes sense because “judges do engage in policymaking at some level.”<sup>130</sup> Indeed, when judges interpret statutes, constitutions, or other textual sources, these judges are, in many cases, guided by “a well-considered judgment of what is best for the community.”<sup>131</sup>

The Court expressly recognized that judges do not need to be elected at all.<sup>132</sup> When, however, a state such as Louisiana chooses that it is in that state’s best interest to elect the judiciary, the Court must not inquire into the wisdom of such a legislative decision.<sup>133</sup> The Court wrote in *Chisom*:

[I]deally public opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment. The Framers of the Constitution had a similar understanding of the judicial role, and as a consequence, they established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection. Indeed, these views were generally shared by the States during the early years of the Republic. Louisiana, however, has chosen a different course. It has decided to elect its judges and to compel judicial candidates to vie for popular support just as other political candidates do.<sup>134</sup>

The Court acknowledged that when a state requires judicial elections, there will be a “fundamental tension” between the idealized vision of a

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127. *Id.* at 398–99.

128. *Id.* at 399.

129. *Id.*

130. *Id.* n.27. “It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature.” *Gregory v. Ashcroft*, 501 U.S. 452, 466–67 (1991).

131. *Gregory*, 501 U.S. at 466.

132. *Chisom*, 501 U.S. at 400.

133. *Id.*

134. *Id.* (citation omitted).

judge as an independent arbiter of the law and the “real world of electoral politics . . . .”<sup>135</sup> This tension necessitates that elected judges cannot be totally indifferent to the popular will.<sup>136</sup>

Chief Justice Rehnquist and Justices Scalia and Kennedy dissented from the majority’s holding that “representative” embodied elected judges.<sup>137</sup> Contrary to the majority’s focus on the purpose of the amendment to Section 2 and the pragmatic necessities of being required to run for public office, the dissent instead focused on a plain meaning reading of the term “representative.”<sup>138</sup> After a brief summary of the history of the 1982 amendments, the dissent criticized the majority’s expedition to find a definition of “representative” that includes elected judges.<sup>139</sup> Justice Scalia stated that:

[O]ur job is not to scavenge the world of English usage to discover whether there is any possible meaning of “representatives” which suits our preconception that the statute includes judges; our job is to determine whether the *ordinary* meaning includes them, and if it does not, to ask whether there is any solid indication in the text or structure of the statute that something other than ordinary meaning was intended.<sup>140</sup>

Justice Scalia stated that finding that “representatives” means those who “are chosen by popular election” would include “the fan-elected members of the baseball all-star teams . . . .”<sup>141</sup> Congress could not have intended such a reading when it amended Section 2. Instead, “the word ‘representative’ connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense—but not in the ordinary sense.”<sup>142</sup> Judges must represent the Law, while prosecutors represent the people.<sup>143</sup> The dissent, however, did not state that a judge could not be a representative if a state so desired, but instead only found that a legislator in 1982 who drafted the amendments to Section 2 would have relied on an ordinary meaning of “representatives” that did not include judges.<sup>144</sup> Therefore, the greatest division between the

135. *Id.*

136. *Id.*

137. *Id.* at 404 (Scalia, J., dissenting).

138. *Id.* (Scalia, J., dissenting).

139. *Id.* at 410 (Scalia, J., dissenting).

140. *Id.* (Scalia, J., dissenting).

141. *Id.* (Scalia, J., dissenting).

142. *Id.* (Scalia, J., dissenting).

143. *Id.* (Scalia, J., dissenting).

144. *Id.* at 411 (Scalia, J., dissenting).

dissent and the majority was not whether judges *could be* representatives in their elective capacities—in other words whether an elected judge is accountable to his constituents—but instead what was intended in the specific context of the 1982 amendments to Section 2.

In light of the discussion in Parts II and III about what role elected judges have in a representative democracy, the majority in *Chisom* came to the proper conclusion that the definition of “representatives” in Section 2 includes elected judges for the primary reason that “judges who have been chosen by the people and are directly accountable to the people are in a very real and practical sense representatives . . . [and] the candidates for a seat on the Louisiana supreme court are involved fully in the political process in the very basic sense of getting themselves elected to public office.”<sup>145</sup> After all, “judges do engage in policymaking at some level.”<sup>146</sup> Therefore, treating elected judges as we would other representatives may not, after all, be such a negative thing<sup>147</sup> if we find it “desirable, as a matter of democratic self governance, for a ‘free people to choose those officials who exercise policy-making authority.’”<sup>148</sup>

#### V. PACKING AND UNPACKING THE COURT: CHANGING THE MAKEUP OF STATE SUPREME COURTS TO ALTER THE IDEOLOGICAL BALANCE

Even in states where judges are appointed or elected by the legislature or other means, there are very real concerns that these appointed judges will be representatives of, and accountable to, the political forces that appoint them to the bench. In recent years, there have been efforts in many states to increase or reduce the size of state supreme courts by self-interested legislators. For example, in South Carolina, a state where the General Assembly elects judges to the family courts,<sup>149</sup> circuit courts,<sup>150</sup> courts of appeals,<sup>151</sup> and supreme court,<sup>152</sup> Michael A. Pitts, a Republican

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145. Oral Argument, *Chisom v. Roemer*, 501 U.S. 380 (1991) (No. 90-757), available at [http://www.oyez.org/cases/1990-1999/1990/1990\\_90\\_757](http://www.oyez.org/cases/1990-1999/1990/1990_90_757) (Kenneth W. Starr on behalf of the United States).

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

147. Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others that Have Been Tried*, 32 N. KY. L. REV. 267, 268 (2005) [hereinafter Dimino, *Worst Way*]. “Democracy may indeed be the worst method of choosing judges . . . except for all the other ones.” *Id.* (ellipsis in original) (footnote omitted).

148. Pozen, *supra* note 2, at 274 (quoting Dimino, *Worst Way*, *supra* note 147, at 268).

149. S.C. CODE ANN. § 2-19-80 (West 2013).

150. S.C. CONST. art. V, § 13.

151. S.C. CONST. art. V, § 8.

152. S.C. CONST. art. V, § 3.

legislator,<sup>153</sup> introduced a bill to increase the size of the South Carolina Supreme Court from five to seven justices.<sup>154</sup> Less candidly, Republican members of the North Carolina Senate Rules committee attempted to expand the breadth of a pending Senate Bill, SB 10, to increase the size of the North Carolina Supreme Court from seven members to nine members.<sup>155</sup> The proposed Senate Bill would have allowed the “newly elected Republican governor to fill the new vacancies.” Similar bills have failed in Arizona,<sup>156</sup> Florida,<sup>157</sup> Iowa,<sup>158</sup> and many other states.<sup>159</sup>

In other states, legislatures have sought to decrease the size of supreme courts in reaction to rulings or in order to influence the policy of the state. Most prominently, there was an effort to shrink the size of the Montana Supreme Court from seven to five in 2011.<sup>160</sup> The author of the bill, Rep. Derek Skees, was quite candid about his motive for passing the legislation.<sup>161</sup> Skees stated that:

All of us want tort reform, well maybe not all of us. I surely want it and a lot of folks I talk to want it. So how do we get tort reform? I would suggest that if we took the Supreme Court from 7 down to 5, they have a higher workload, guess who becomes our ally in tort reform? The Supreme Court.<sup>162</sup>

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153. Representative Michael A. Pitts, S.C. LEGISLATURE, <http://www.scstatehouse.gov/member.php?code=1481533914> (last visited July 1, 2014).

154. H.R.J. Res. 3090, Gen. Assemb., 120th Sess. (S.C. 2013–14).

155. Bill Raftery, *Surprise Effort by NC Senate GOP to Expand Supreme Court Loses After House Balks, Likely to Return*, GAVEL TO GAVEL (Feb. 5, 2013), <http://gaveltogavel.us/site/2013/02/05/surprise-effort-by-nc-senate-gop-to-expand-supreme-court-loses-after-house-balks-likely-to-return/> (last visited July 1, 2014).

156. See S.B. 1481, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (requiring the state supreme court to increase from five to seven justices).

157. H.J.R. Res. 7111, Reg. Sess. (Fla. 2011) (as introduced) (requiring the seven-member supreme court to be divided into two separate five-member civil and criminal supreme courts and the transfer of Democratically appointed justices to the Criminal Supreme Court).

158. H.J.R. 2012 (Iowa 2010) (requiring the supreme court to increase from seven members to nine members following the Iowa Supreme Court’s ruling in favor of same-sex marriage).

159. Bill Raftery, *Over a Dozen Efforts to Alter Number of State Supreme Court Justices, Almost All Related to “Packing” the Courts, in Last Several Years*, GAVEL TO GAVEL (Feb. 5, 2013), <http://gaveltogavel.us/site/2013/02/05/over-a-dozen-efforts-to-alter-number-of-state-supreme-court-justices-almost-all-related-to-packing-the-courts-in-last-several-years/> (last visited July 1, 2014) (discussing Florida, Georgia, Michigan, South Carolina, Alabama, Indiana, Iowa, Nevada, Arizona, Florida, Montana, and North Carolina).

160. Bill Raftery, *Plan to Shrink Montana Supreme Court: Designed to Force the Court into Tort Reform and out of Redistricting Lawsuits?*, GAVEL TO GAVEL (Jan. 18, 2011), <http://gaveltogavel.us/site/2011/01/18/plan-to-shrink-montana-supreme-court-designed-to-force-the-court-into-tort-reform-and-out-of-redistricting-lawsuits/> (last visited July 1, 2014).

161. *Id.*

162. *Id.*

A member of the Republican Party also spoke to Republican members of the Montana House Judiciary Committee, stating:

We have redistricting and we need a tightened down [the] Supreme Court in order to achieve that. So take control of the reins of the Supreme Court, show them who is in charge, and remember that with redistricting, how we (Republicans) have been treated by the Supreme Court in the past.<sup>163</sup>

Similarly in Washington, after the state supreme court there invalidated a state initiative that would have required a two-thirds vote in the legislature to pass any tax increase, state legislators were upset with the state supreme court's 6–3 ruling.<sup>164</sup> Six days after the ruling, Republican senators introduced a bill that would have reduced the Supreme Court from nine to five.<sup>165</sup> The language of the bill made clear that it was initiated in reaction to the ruling—even citing the case by name in the text of the measure.<sup>166</sup> The measure would have, quite absurdly, required the nine justices to “meet in public” and draw straws to decide which five justices could remain on the Supreme Court.<sup>167</sup>

“All of these efforts threaten judicial independence not just because of the motives behind them but because of the message they send to judges, to litigants, and to plain, old ordinary citizens.”<sup>168</sup> This message is clear—if judges render decisions that are unpopular with the people or their elected legislative representatives, the judges are susceptible to losing their jobs or dilution of their influence on the state supreme court by other judges with contrary political views. The fact that most of these efforts to change the makeup of the supreme courts have failed is irrelevant for the determination of whether society expects the judiciary to act as representatives. Clearly, there is some level of accountability to the people, the legislature, or the state executive with all judges who have less than life tenure. The people and the legislature are both free to change the makeup of their state supreme courts subject only to constitutional restraints. Even when a state constitution limits changes to the makeup of the supreme courts, there is still a level of accountability because the

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163. *Id.*

164. Andrew Cohen, *A “Court Unpacking Plan” Threatens Judicial Independence*, BRENNAN CENTER FOR JUST. (Mar. 8, 2013), <http://www.brennancenter.org/analysis/court-unpacking-plan-threatens-judicial-independence> (last visited July 1, 2014) [hereinafter Cohen, *Unpacking*].

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

legislature or the people can amend the state constitution to permit a changed court if they so desire. The inevitable conclusion is that, at least to a degree, these high court judges are representatives—or at the very least, that self-interested legislatures and the public expect judges to act as their representatives lest they be removed from the bench.

#### VI. DIRECT DEMOCRACY: RETENTION ELECTIONS AND THE IOWA SUPREME COURT

In 1977, California Governor Jerry Brown appointed Rose Elizabeth Bird as the first woman Chief Justice on the Supreme Court of California.<sup>169</sup> “For a high court judge, Bird was youthful and inexperienced. She was 40 years old and had entered the profession only twelve years before her appointment to the highest legal office in the state.”<sup>170</sup> The majority of Bird’s work prior to appointment was as a public defender and administrator of the California Agriculture and Services Agency.<sup>171</sup> Though Bird secured her seat on the Supreme Court of California via executive appointment and confirmation by the Commission on Judicial Appointments, she was required to run in the 1978 general retention election.<sup>172</sup> “Bird became the first Justice sitting on her court since the institution of the retention election in 1934 to evoke opposition.”<sup>173</sup> Some of this opposition was related to her administrative style and lack of experience—some criticism even coming from other state judges.<sup>174</sup> Much of the opposition was rooted, however, in partisan and ideological opposition to Chief Justice Bird.<sup>175</sup> Bird was only retained with

169. Carrington, *supra* note 65, at 81.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 82.

174. *Id.*

175. *See id.* Carrington writes:

A conservative state senator raised a campaign fund, much of it from the gun owners’ lobby, to challenge her moral fitness as a judge, alleging that she was soft on crime. He deployed electronic media to make a scurrilous and untruthful personal attack on her of the sort that has become a signature of contemporary American politics. His media *blitzkrieg* called attention to her share in the responsibility for her court’s holding that repeated, forced insertions of a penis into the mouth of a female rape victim does not constitute a crime entailing “great bodily injury,” as the jury in a celebrated case had been instructed. Bird’s separate concurring opinion had emphasized what she denoted as the “plain meaning” of the controlling statute, which she perceived, not unreasonably, to enhance punishment only when a crime victim experienced enduring physical disability. One of the television ads prepared at the direction of her assailant portrayed an apparent rape victim and suggested that her rapist would soon be on the streets again if Bird were retained as Chief Justice.

*Id.* (citations omitted).

a slight majority of votes—receiving only 51.7% of the vote.<sup>176</sup> This, however, is not the end of her storied history with public accountability and judicial independence.

In 1986, Bird was again up for retention,<sup>177</sup> and was defeated, along with two of her colleagues on the Supreme Court of California.<sup>178</sup> “Capital punishment was the chief issue in that election, and the anti-retention campaign was financed with seven million dollars raised mostly in small contributions from individual citizens affronted by Chief Justice Bird’s obstinacy on that issue.”<sup>179</sup> The state senator that organized the earlier effort to recall Chief Justice Bird in 1978 celebrated Bird’s removal, because “[d]isapproval of several reversals of criminal convictions was in his view ample reason to unseat a member of the court.”<sup>180</sup> These events set an early precedent for opponents of judicial opinions—even if those opinions were based on valid and correct legal reasoning. This trend of judicial accountability continues today, and holding elected judges responsible as representatives of the people, rather than as representatives of the law, continues to pose a grave threat to judicial independence. Rational, self-interested jurists appointed to replace ousted judges would very likely at least lend some thought to whether they wanted to expose themselves to the same electoral vulnerabilities by voting in accord with their predecessors.

The most recent example<sup>181</sup> of this threat to judicial independence occurred in Iowa in 2010. The 2010 Iowa Supreme Court retention election provides a clear example of the effect that popular opinion has upon future judicial decision-making. In Iowa, “the Governor appoints judges from a list of candidates put forth by an independent nominating committee. After certain periods of time, the public then votes in retention elections on whether the judges appointed by the Governor should remain

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176. *Id.* at 83.

177. *Id.* There was also an unsuccessful effort to remove her in 1982. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. There have also been other high profile retention elections in recent years. *See, e.g.*, James Sample, *Retention Elections 2.010*, 46 U.S.F. L. REV. 383, 384 (2012). Sample writes:

Illinois Chief Justice Thomas Kilbride faced a well-funded anti-retention effort—this one based on perceived anti-business rulings, but Kilbride aggressively raised more than \$1 million from political parties, unions, and stakeholders before the bench, resulting in what the Chicago Tribune described as “a \$3 million fight over a name most Illinoisans didn’t even see on the ballot.” Kilbride retained his seat.

*Id.* (footnote omitted) (quoting Monique Garcia, *State Supreme Court Justice Wins Retention Battle*, CHI. TRIB. (Nov. 2, 2010), [http://articles.chicagotribune.com/2010-11-02/news/ct-elect-kilbride-20101102\\_1\\_jury-awards-retention-battle-constitutionality-of-state-law](http://articles.chicagotribune.com/2010-11-02/news/ct-elect-kilbride-20101102_1_jury-awards-retention-battle-constitutionality-of-state-law)).

in office.”<sup>182</sup> Typically these retention elections have been uneventful and essentially non-political.<sup>183</sup> But prior to the 2010 Iowa Supreme Court retention elections, the Iowa Supreme Court faced an issue that would divide the electorate—gay marriage.

In *Varnum v. Brien*, the Iowa Supreme Court decided whether a state statute<sup>184</sup> that limited civil marriage to be between a man and a woman was constitutional.<sup>185</sup> In a unanimous opinion, the court found that the Iowa marriage statute violated the equal protection clause of the Iowa Constitution.<sup>186</sup> The court characterized the plaintiffs in the underlying lawsuit as twelve “responsible, caring, and productive individuals” who were only different from most Iowans in one way—“[t]hey are sexually and romantically attracted to members of their own sex.”<sup>187</sup> The Iowa court noted that it had a profound duty to protect the right of individuals and found its responsibility “is to protect constitutional rights of individuals from legislative enactments that have denied those rights, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time.”<sup>188</sup> Applying intermediate scrutiny,<sup>189</sup> the court found that the Iowa marriage statute did not substantially further any of the government’s proffered<sup>190</sup> objectives.<sup>191</sup> Concluding its constitutional analysis, the Iowa Supreme Court reiterated its constitutionally-mandated duty:

We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient

182. J. Alexandra Gonzales, *The Repercussions of Losing the Right to Respond: Why Matching Funds Should Be Constitutional for Judicial Elections Even after Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 10 FIRST AMEND. L. REV. 509, 540 (2012) (citations omitted).

183. *Id.* at 541.

184. IOWA CODE ANN. § 595.2 (West 2012).

185. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

186. *Id.* at 872.

187. *Id.*

188. *Id.* at 876.

189. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.”).

190. The government’s proffered objectives were: (1) to maintain traditional marriage; (2) the promotion of an optimal environment for children; (3) the promotion of procreation; (4) the promotion of stability in heterosexual relationships; and (5) the conservation of resources. *Varnum*, 763 N.W.2d at 898–903.

191. *Id.* at 904.

justification. There is no material fact, genuinely in dispute, that can affect this determination. We have a constitutional duty to ensure equal protection of the law. Faithfulness to that duty requires us to hold that Iowa's marriage statute . . . violates the Iowa Constitution. To decide otherwise would be an abdication of our constitutional duty. If gay and lesbian people must submit to different treatment without an exceedingly persuasive justification, they are deprived of the benefits of the principle of equal protection upon which the rule of law is founded.<sup>192</sup>

Reaction to the Iowa court's decision was mixed. Iowa Senate Majority Leader Mike Gronstal and House Speaker Pat Murphy issued a joint statement saying that "[w]hen all is said and done, we believe the only lasting question about today's events will be why it took us so long."<sup>193</sup> Other Iowa politicians were disappointed with the court's decision. For example, Senate Republican Leader Paul McKinley issued a statement criticizing the court's ruling.<sup>194</sup>

As a result of the Iowa Supreme Court's decision in *Varnum*, the upcoming judicial retention elections took center-stage<sup>195</sup>:

Bob Vander Plaats spearheaded an effort to remove three of the justices who took part in the opinion who were up for retention election the following November. Vander Plaats created an organization called Iowa for Freedom that embodied his evangelical social conservatism. Vander Plaats' anti-retention campaign was successful due to funding his organization received from the American Family Association (AFA).<sup>196</sup>

The AFA and Vander Plaats "used the campaign to flood money into the election as a method to voice [their] opposition to judicial activism: '[s]tate judges would know their jobs would be at stake when they ruled against the values social conservatives cherished.'"<sup>197</sup> Vander Plaats'

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192. *Id.* at 906.

193. Chad Nation, *Iowa Supreme Court: Gay Marriage Ban Illegal*, DAILY NONPAREIL (Apr. 3, 2009), [http://m.nonpareilonline.com/archive/iowa-supreme-court-gay-marriage-ban-illegal/article\\_49a88834-030b-507f-b475-66b62f126083.html](http://m.nonpareilonline.com/archive/iowa-supreme-court-gay-marriage-ban-illegal/article_49a88834-030b-507f-b475-66b62f126083.html) (last visited July 1, 2014).

194. *See id.* ("I believe marriage should only be between one man and one woman, and I am confident the majority of Iowans want traditional marriage to be legally recognized in this state . . .").

195. Gonzales, *supra* note 182, at 541.

196. *Id.* (citations omitted) (internal marks omitted).

197. *Id.* at 541–42 (quoting Patrick Caldwell, *Disorder in the Court*, AM. PROSPECT, Oct. 2011, at 48).

campaign to oust the three Iowa Supreme Court Justices<sup>198</sup> was purely punitive in nature.<sup>199</sup> Vander Plaats and Iowa for Freedom campaigned against the retention of the justices in a typical, grassroots political manner.<sup>200</sup> Many churches and other groups contributed to the cause.<sup>201</sup>

“It became readily apparent that the individual justices were unprepared for an onslaught of such magnitude. They were ill-equipped to fight the efforts directed at their removal.”<sup>202</sup> Former United States Supreme Court Justice Sandra Day O’Connor came to Iowa to assist in preserving judicial independence and several groups were formed (though not by the justices themselves) to support the retention of the justices.<sup>203</sup> Judicial independence, however, did not rule the day. The three justices up for retention “received only about forty-six percent of the vote and were not retained.”<sup>204</sup>

During the 2012 retention election, “[p]residential candidate Rick Santorum and Louisiana Gov. Bobby Jindal stumped in Iowa to defeat Justice David Wiggins, one of the other four members of the court who had signed on to the same-sex marriage decision.”<sup>205</sup> Similar retention opposition has occurred, unsuccessfully, in Florida and Arizona.<sup>206</sup> Individuals and organizations even sought ballot initiatives to water down the merit selection of judges in Arizona, Florida, and Missouri.<sup>207</sup> After a similar failed retention election of Tennessee Supreme Court Justice Penny White,<sup>208</sup> the “governor proclaimed, ‘[s]hould a judge look over his

198. The judges up for retention were Chief Justice Marsha Ternus and Justices Michael Streit and David Baker. Bert Brandenburg & Matt Berg, *The New Storm of Money and Politics around Judicial Retention Elections*, 60 DRAKE L. REV. 703, 708 (2012).

199. *Id.* at 707–08. “The retention election would provide outraged citizens an opportunity to punish the justices by removing them from the bench.” *Id.* (citations omitted).

200. *See id.* at 708. “The group functioned like a typical grassroots political campaign, using mailers, phone calls, door-to-door visits, and even a bus tour. It ran television advertisements that adopted the mantra of ‘activist judges’ and suggested that if the court could take away traditional marriage, other rights and freedoms could come next.” *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 708–09.

204. *Id.* at 709 (citations omitted).

205. Bert Brandenburg, *Beating Back the War on Judges*, 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](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/judicial_elections_in_2012_voters_rejected_the_politicization_of_the_courts.html) (last visited July 1, 2014).

206. *Id.*

207. *See id.* “The result? Bipartisan backlash. The ballot measures were defeated by enormous margins, exceeding 70 percent in Arizona and Missouri, and by almost two-thirds of Floridians.” *Id.*

208. *See* John P. Freeman, *Protecting Judicial Independence*, 6 CHARLESTON L. REV. 511, 522 (2012). Freeman writes:

Similarly, Justice Penny White was removed from Tennessee’s Supreme Court following a negative retention vote, courtesy of a coalition of conservative groups. Justice White’s

shoulder to the next election in determining how to rule on a case? I hope so. I hope so.”<sup>209</sup>

#### VII. MONEY MATTERS: *CAPERTON V. A.T. MASSEY COAL COMPANY*

In *Caperton v. A.T. Massey Coal Company*, the United States Supreme Court addressed an appeal from the Supreme Court of Appeals of West Virginia, which had reversed a trial verdict of \$50 million against A.T. Massey Coal Company.<sup>210</sup> The West Virginia Court’s decision was 3–2, and one of the judges in the majority that voted to reverse the verdict, Justice Brent Benjamin, refused to recuse himself from the case despite receiving a tremendous amount of monetary support in his election campaign from Don Blankenship, the chairman of A.T. Massey Coal Company.<sup>211</sup> After the trial court’s verdict but prior to the appeal in the underlying cases, Blankenship had donated the statutory maximum to Benjamin’s campaign to replace Justice Warren McGraw, who was up for reelection at the time.<sup>212</sup> Blankenship also donated almost \$2.5 million to an organization, “And For The Sake Of The Kids,” which opposed McGraw and supported Benjamin.<sup>213</sup> Finally, Blankenship spent over \$500,000 on independent expenditures in support of Benjamin.<sup>214</sup> All told, Blankenship’s contributions to Benjamin’s campaign “were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin’s own committee.”<sup>215</sup> Despite receiving this enormous financial support from Blankenship, Justice Benjamin refused to recuse himself when A.T. Massey Coal Company appealed the \$50 million verdict of the trial court and voted to overturn the verdict.<sup>216</sup> In a

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removal was payback for having joined other justices in narrowly interpreting standards applied in a single death penalty case. Conservative activists bent on changing the face of the judiciary are not bashful about taking on judges who do not share the groups’ social or political view, as reflected by Justice White’s defeat at their hands.

*Id.* (citations omitted).

209. Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 231 (2009).

210. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009).

211. *Id.* at 873–75.

212. *Id.* at 873.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* After initially reversing the trial court verdict, the Court granted Caperton’s petition for a rehearing and two justices recused themselves from the case—one who had vacationed with Blankenship in the French Riviera while the appeal was pending and another who was critical of Blankenship’s involvement in state supreme court elections. *Id.* at 874–75. Despite this, Benjamin not only refused to recuse himself, but also served in the capacity of acting Chief Justice and chose the two

concurring opinion, Justice Benjamin claimed that he had no “direct, personal, substantial, pecuniary interest” in the case.<sup>217</sup>

Justice Kennedy, writing for a five-member majority of the United States Supreme Court, held that Justice Benjamin should have recused himself from the case as a matter of due process.<sup>218</sup> The Court did not address whether there was actual bias, an inherently subjective and private inquiry, and instead asked “whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudice that the practice must be forbidden . . . .’”<sup>219</sup> Although the Court noted that not every campaign contribution by a litigant or attorney would create a likelihood of absolute bias, the sheer magnitude of Blankenship’s contributions raised a serious objective and reasonable concern that Justice Benjamin would be biased in favor of A.T. Massey Coal Company.<sup>220</sup> Indeed, “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent,” there is a serious risk of actual bias.<sup>221</sup> The situation faced by the Court was so extraordinary, and the risk that Justice Benjamin would represent the interests of A.T. Massey Coal Company was so high, that the Constitution *required* Justice Benjamin to recuse himself from the case.<sup>222</sup>

Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, authored a dissent that rejected the majority’s claim that Blankenship’s donations were so immense that there was an objective and reasonable fear that Justice Benjamin would represent Blankenship’s interests.<sup>223</sup> Roberts emphasized that there is a “presumption of honesty and integrity in those serving as adjudicators.”<sup>224</sup> Roberts noted that the Due Process Clause only required recusal in two situations: (1) when the judge has a “direct, personal, substantial pecuniary interest;”<sup>225</sup> and (2) “when a judge presides over a criminal contempt case that resulted from the defendant’s hostility

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judges to replace the recused justices. *Id.* at 875. The state supreme court again overturned the jury verdict by a vote of 3–2. *Id.*

217. *Id.* at 876 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986)).

218. *Id.* at 872.

219. *Id.* at 883–84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

220. *Id.* at 884.

221. *Id.*

222. *Id.* at 887.

223. *Id.* at 890 (Roberts, C.J., dissenting).

224. *Id.* at 891 (Roberts, C.J., dissenting) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

225. *Id.* (Roberts, C.J., dissenting) (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

towards that judge.”<sup>226</sup> Essentially, Roberts argued that even though recusal may have been wise and there may have been a risk of personal bias, the Constitution did not compel recusal for these reasons.<sup>227</sup> Finally, Roberts claimed that the majority’s standard was unworkable and left a number of questions bearing on the risk of actual prejudice up to the trial courts—in fact listing forty example inquiries that a trial court might make to determine whether there was a risk of the judge representing the views of the litigant or attorney that had financially supported his or her campaign.<sup>228</sup>

Justice Scalia also dissented separately and claimed that the majority’s decision emboldens the “perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, [and] that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.”<sup>229</sup> Scalia stated that the majority continued “its quixotic quest to right all wrongs and repair all imperfections through the Constitution.”<sup>230</sup>

The *Caperton* Court addressed a relatively narrow question of whether the Constitution dictated recusal when there was an appearance of actual bias, but all members of the Court recognized, to a degree, that extensive campaign donations to a judge running for office *do* pose a risk that the judge will then represent the donor’s interests in rendering judicial decisions. Chief Justice Roberts, in dissent, lent some credibility to the claim that judges should be presumptively thought of as honest and unbiased,<sup>231</sup> but the facts of the *Caperton* case raise serious concerns about whether elected judges will engage in “judicial favoritism”—in which the judge has a preference for litigants or attorneys who donated large sums to the judge’s campaign.<sup>232</sup> The bizarre story behind Blankenship’s financing of Justice Benjamin’s campaign and Justice Benjamin’s refusal to recuse himself were so compelling that they became the plot of a John Grisham novel.<sup>233</sup> Although the West Virginia Supreme Court of Appeals again

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226. *Id.* at 892 (Roberts, C.J., dissenting); *see also* *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971).

227. *Id.* at 893 (Roberts, C.J., dissenting).

228. *Id.* at 893–98 (Roberts, C.J., dissenting).

229. *Id.* at 903 (Scalia, J., dissenting).

230. *Id.*

231. *Id.* at 891 (Roberts, C.J., dissenting).

232. Mary A. Celeste, *The Debate Over the Selection and Retention of Judges: How Judges Can Ride the Wave*, 46 CT. REV. 82, 88 (2009), available at <http://aja.ncsc.dni.us/publications/courtrv/cr46-3/CR%2046-3%20Celeste.pdf> (last visited July 1, 2014).

233. Michael A. Behrens, *Citizens United, Tax Policy, and Corporate Governance*, 12 FLA. TAX REV. 589, 610 (2012); JOHN GRISHAM, *THE APPEAL* (2008).

overturned the \$50 million verdict against A.T. Massey Coal Company on remand with Justice Benjamin recusing himself,<sup>234</sup> the case brought the issue of “judicial favoritism” to the forefront of scholarship and the news media.<sup>235</sup> Some states instituted reforms to prevent the appearance of bias from a judge sitting on a case with litigants or attorneys who had financed the judge’s campaign.<sup>236</sup> This fear that elected judges will represent the views of their donors is heightened in the new era of less stringent, post-*Citizens United*<sup>237</sup> campaign finance laws.<sup>238</sup> Perhaps one of the most promising trends in state judicial elections is growing support for public financing of judicial elections.<sup>239</sup> This development would almost certainly eliminate fears that elected judges would represent pervasive moneyed interests because all campaign funds would come from a public fund.

#### VIII. THE ANSWER: ELIMINATE ELECTIONS

It is high time that we revert back to the approaches that the states took to the judiciary during the early years of our Republic. All of the original thirteen colonies employed some form of judicial appointment.<sup>240</sup> “[W]ith the new concept of sovereignty in the populace as a whole, it was

234. *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322 (W. Va. 2009).

235. Scholars had discussed the issue of the pervasive influence that money had on judicial campaigns for many years prior to the *Caperton* decision. *See, e.g.*, Croley, *supra* note 10, at 691–92. Croley writes:

[T]he debate about “getting judges out of politics” emerges almost perennially, fueled in large part by controversies surrounding elected state judges. But that debate (whose participants, incidentally, often are sitting or former state judges or justices themselves) is confined largely to issues such as the propriety of judicial campaigning and the effects of attorney expenditures on judicial objectivity. Some argue, for example, that because contributions to judicial campaigns by individuals who are “repeat players” before a judicial candidate render the institution corrupt, elective judiciaries should be eliminated.

*Id.* (citations omitted).

236. *See* Press Release, Just. at Stake Campaign, Citizens United Called Grave Threat for America’s Courts (Jan. 22, 2010), available at <http://www.justiceatstake.org/newsroom/press-releases-16824/?show=news&newsID=6669> (last visited July 1, 2014) [hereinafter Press Release]. Justice at Stake wrote:

In December[, 2009], Wisconsin became the third state to provide public financing for appellate court races, so that judicial candidates would not have to seek money from those appearing before them in court. That same month, Michigan’s Supreme Court issued new rules making it harder for justices to hear cases involving major campaign supporters.

*Id.*

237. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

238. Press Release, *supra* note 236.

239. *See id.* “[M]omentum is building for public financing of court elections . . .” *Id.*

240. Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966). “Of these original states, seven provided for selection of judges by the legislature, five by governor and council, and one, Delaware, by governor and legislature.” *Id.* (footnotes omitted).

inevitable that someone would propose popular election of judges, since governors and legislators were already being elected. This was not particularly designed to improve justice but was simply another manifestation of the populism movement.”<sup>241</sup> Several states began to institute judicial elections only during the nineteenth century.<sup>242</sup> Georgia first began holding elections for lower court judges in 1812, while Mississippi became the first state to institute universal judicial elections in 1832.<sup>243</sup> These efforts, however, were not entirely successful in many states,<sup>244</sup> and some states soon reverted back to judicial appointment systems.<sup>245</sup> The populist fervor and democratic rationales used by these states in the nineteenth century and proponents of judicial elections today, however, fundamentally ignore the structure of the American political system. “The Constitution did not create a direct democracy; it established a constitutional republic. Its goal was to preserve liberty, not to maximize popular sovereignty.”<sup>246</sup> “An independent judiciary composed of highly qualified judges who conscientiously uphold the rule of law is of first importance to our constitutional republic.”<sup>247</sup>

In order to achieve this independence, we can only allow the judiciary to act as virtual representatives of the citizenry rather than active representatives of influential interest groups. Permitting elected judiciaries injects active representation into judicial decision-making, which in turn discourages judicial review of democratically enacted legislation. Indeed, the very idea of judicial review, rooted in *Marbury v. Madison*,<sup>248</sup> compels judges to act only as virtual representatives<sup>249</sup> of the entire citizenry— independent of public opinion and the pressures of the political process— even when doing so compels the court to invalidate a duly passed

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241. *Id.*

242. *Id.*

243. *Id.*

244. *See id.* at 1083. “In the 1860’s, the Tammany Hall organization in New York City seized control of the elected judiciary and aroused public indignation by ousting able judges and putting in incompetent ones.” *Id.*

245. *Id.*

246. Todd Zywicki & Ilya Somin, *Federalism and Separation of Powers: Ramifications of Repealing the 17th Amendment*, 12 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 88, 88 (2011) (from the portion written by Zywicki entitled *Repeal the 17th Amendment and Restore the Founders’ Design*).

247. Larry D. Thompson & Charles J. Cooper, *The State of the Judiciary: A Corporate Perspective*, 95 GEO. L.J. 1107, 1108 (2007).

248. 5 U.S. 137 (1803).

249. Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1294 (2002). “What makes the representation ‘virtual,’ of course, is precisely that ordinary mechanisms of political accountability are lacking.” *Id.*

legislative enactment or executive pronouncement.<sup>250</sup> This idea has proven to be a powerful tool against discriminatory legislation.<sup>251</sup> Because judicial elections put judges in an untenable position where truly independent judicial review is often not possible, they should be rejected as incompatible with our constitutional republic system of governance.

The Supreme Court's *Chisom* decision reinforces the conclusion that state judiciaries are quite vulnerable to bias and influence from partisan and ideological individuals and groups, moneyed interests, and even self-interested or politically motivated legislators.<sup>252</sup> Yet *Chisom* does not speak to the wisdom of judicial elections; it instead only acknowledges that when a state chooses to elect judges, those judges are active representatives of the voters.<sup>253</sup> This begets the all-important question—is there any way to remove this active representation from judicial elections? I think the answer is clearly no. Elected judges will always be subject to direct or recall elections, and voters may cast their votes in any manner they choose. It would be naïve to assume that voters are constitutionally and politically altruistic, and we must acknowledge that most of the electorate is unfit to gauge whether a judge has properly acted as a virtual

250. This view has deep historical roots in the common law. See 2 THE WORKS OF JOHN ADAMS 522 (Charles Francis Adams ed., 1850) (“As to Acts of Parliament. An act against the Constitution is void; an act against natural equity is void; and if an act of Parliament should be made, in the very words of this petition, it would be void. The executive Courts must pass such acts into disuse.”); see also DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE 23* (2007) (“The Framers found intellectual support for this concept in the work of great lawyers such as Sir Edward Coke as well as philosophers like Locke. It was Coke who said that ‘when an Act of Parliament is against a common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.’ Thus, according to Coke, legislation was subject to overriding mandates rather than merely the political whim of the majority.”) (internal citation omitted).

251. See, e.g., David A. Herman, *Juvenile Curfews and the Breakdown of the Tiered Approach to Equal Protection*, 82 N.Y.U. L. REV. 1857, 1858 (2007). “[T]he Civil Rights Era was characterized by rampant de jure discrimination against African Americans. Such discriminatory legislation required aggressive judicial review to enforce the mandates of the Reconstruction Amendments against reluctant state governments.” *Id.* Chief Justice Salmon Chase noted that courts are not bound to enforce unjust laws, explaining that it “must be a clear case, doubtless, which will warrant a court in pronouncing a law so unjust that it ought not to be enforced; but, in a clear case, the path of duty is plain.” FARBER, *supra* note 250, at 49 (internal citation omitted).

252. See *Chisom v. Roemer*, 501 U.S. 380, 400 (1991). The *Chisom* Court wrote:

[I]deally public opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment. The Framers of the Constitution had a similar understanding of the judicial role, and as a consequence, they established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection. Indeed, these views were generally shared by the States during the early years of the Republic.

*Id.* (citation omitted).

253. See *id.*

representative of *all* of the citizenry. It is far too easy to have tunnel vision in the voting booth.

Though many scholars have suggested that public financing of judicial elections would provide greater protections against threats to judicial independence,<sup>254</sup> judges will still ultimately be accountable to the people in elections and may be tempted to serve as active representatives while ruling on cases in ways that increase their electoral viability. Moreover, the justification for judicial elections—that they are democratic institutions—is undercut by public financing because public financing is a fundamentally undemocratic idea. Public funding favors incumbents and disadvantages new candidates “by denying to challengers the financial resources needed to overcome the advantages of incumbency.”<sup>255</sup> Furthermore, the threat to elected judges cannot be removed by simply taking money out of the equation.<sup>256</sup> Judges should be held accountable to the constitutional, statutory, and common law principles that govern our constitutional republic. Judges should never be put in a situation where they may be tempted to compromise their judicial integrity and independence in order to increase their electoral appeal.

State judiciaries should more closely mirror the federal judiciary, where judges may have predisposed political beliefs, but are, for the most part, free of the political pressure typical of state judges that must face voters at the polls. This would not be a drastic change, and judicial appointments would not allow judges free reign to act however they please. Even an appointed state judiciary would not be unconstrained from ethical standards or political accountability. “Nearly all fifty states have

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254. See, e.g., Lauren Ketchum, *Former NC Governors Back Public Finance for Judicial Elections*, GAVELGRAB (Apr. 17, 2013), <http://www.gavelgrab.org/?p=55774> (last visited July 1, 2014). Ketchum writes:

In order to protect North Carolina’s courts from the ‘corrosive influence’ of special interest money in judicial races, the state needs to support public financing for appellate court candidates. This argument is put forth by former Republican Gov. Jim Holshouser and former Democratic Gov. Jim Hunt in a letter to the editor of *The (Davidson County) Dispatch*. The former governors say that judicial elections may require lead candidates to raise large sums of campaign money from people who may end up before them in court.

*Id.*

255. See Robert A. Levy, *Public Funding for Judicial Elections: Forget It*, CATO INST. (Aug. 13, 2001), <http://www.cato.org/publications/commentary/public-funding-judicial-elections-forget-it> (last visited July 1, 2014). “Public funding favors current office-holders by denying to challengers the financial resources needed to overcome the advantages of incumbency.” *Id.*

256. Additionally, it would be difficult to prevent independent spending in light of the Supreme Court’s ruling in *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

constitutional provisions for removal of state judges by impeachment.”<sup>257</sup> The grounds for impeachment of state court judges—such as “malfeasance,” “misfeasance,” “gross misconduct,” “gross immorality,” “high crimes,” “habitual intemperance,” and “maladministration”<sup>258</sup>—reflect accountability only to the ethical and professional standards that guide the judiciary, not accountability to the prevailing political ideologies of legislators. Reflecting this high standard, “[i]mpeachment is a rarely used method of removing judges.”<sup>259</sup> Only eight state court judges have been involved in impeachment investigations over the last fifteen years, with two judges being impeached and only one convicted.<sup>260</sup> State court judges can also be removed for violating state ethics rules.<sup>261</sup> Some states even have comprehensive statutory schemes that provide for the censure, suspension, or removal of elected judges.<sup>262</sup>

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257. *Methods of Removing State Judges*, AM. JUDICATURE SOC’Y, <http://www.ajs.org/judicial-ethics/impeachment/> (last visited July 1, 2014).

258. *Id.*

259. *Id.*

260. *Id.*

261. *See, e.g.*, Max Rivlin-Nadler, *West Virginia Judge Suspended After 24 Violations of State’s Judicial Ethics Rules*, GAWKER (Mar. 30, 2013, 5:30 PM), <http://gawker.com/5993043/west-virginia-judge-suspended-after-24-violations-states-judicial-ethics-rules> (last visited July 1, 2014). Rivlin-Nadler writes:

Family Court Judge William Watkins III has got a pretty bad temper. He’s been known to yell at litigants in his courtroom, as well as on one occasion, calling a woman seeking a protective order “stupid.” After word came out about the incident, Watkins told the woman to shut up and stop “shooting off [her] fat mouth about what happened.” Unfortunately for Watkins, that temper has landed him with a suspension that will last the rest of his term.

*Id.* (marks in original).

262. For example, North Carolina has a Judicial Standards Commission that consists of:

[O]ne Court of Appeals judge, two superior court judges, and two district court judges, each appointed by the Chief Justice of the Supreme Court; four members of the State Bar who have actively practiced in the courts of the State for at least 10 years, elected by the State Bar Council; and four citizens who are not judges, active or retired, nor members of the State Bar, two appointed by the Governor, and two appointed by the General Assembly . . . one upon recommendation of the President Pro Tempore of the Senate and one upon recommendation of the Speaker of the House of Representatives.

N.C. GEN. STAT. § 7A-375(a) (LexisNexis 2013). This diverse administrative body has the authority to recommend that the Supreme Court “censure, suspend, or remove any judge for willful misconduct in office, willful and persistent failure to perform the judge’s duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” N.C. GEN. STAT. § 7A-376(b) (LexisNexis 2013). Numerous judges have been removed or censured by the Supreme Court of North Carolina for misconduct. *See In re Inquiry Concerning a Judge (Ammons)*, 473 S.E.2d 326, 327 (N.C. 1996) (accepting the Judicial Standard Commission’s recommendation that state District Court Judge James F. Ammons, Jr. be censured for conduct prejudicial to the administration of justice that brought the judicial office into disrepute by acting improperly in a worthless check case where the prosecuting witness was a personal friend as well as improperly issuing an ex parte order for the arrest of a noncustodial parent in a child custody matter); *see also In re Belk*, 691 S.E.2d 685 (N.C. 2010) (finding that state District Court

Most importantly, public opinion, which is expressed at the voting booth, simply cannot reliably indicate whether a judge has been loyal to the legal principles of our constitutional republic. For example, directly after the United States Supreme Court declared that separate public schooling systems for black and white students were unconstitutional in *Brown v. Board of Education*, 55% of Americans reported agreeing with the decision, while 40% of respondents disapproved of the decision.<sup>263</sup> Only five years later, in 1959, a poll found that “53% of Americans said the decision caused a lot more trouble than it was worth.”<sup>264</sup> Today, an overwhelming percentage of people support the *Brown* decision as a crucial step in ensuring equal protection for all races of people.<sup>265</sup> Yet, if the Warren Court faced a recall election in 1959, the last sixty years of constitutional jurisprudence likely would have been vastly different. We must remember that legal segregation ended because of the actions of the federal judiciary, not through the democratic political process. The judiciary provides a place for individuals and groups whose interests are not represented in the political process or who are discriminated against by discriminatory legislation. If we allow public opinion to influence judicial decision-making, we may prevent the next decision like *Brown* that will be universally revered in fifty years, but is opposed by a political majority today.<sup>266</sup>

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Judge William I. Belk should be removed from office for refusing to sever his professional ties by stepping down as a corporate board member after being elected to the bench and making false statements to the Judicial Standards Commission).

263. Joseph Carroll, *Race and Education 50 Years after Brown v. Board of Education*, GALLUP (May 14, 2004), <http://www.gallup.com/poll/11686/race-education-years-after-brown-board-education.aspx> (last visited July 1, 2014).

264. *Id.*

265. *See id.* “Around the 40th anniversary of the ruling, in April 1994, an overwhelming 87% of Americans said they approved of the [C]ourt’s decision on this matter.” *Id.*

266. *See, e.g.*, Michael J. Klarman, *Gay Rights May Get Its Brown v. Board of Education*, NEW YORK TIMES (Oct. 11, 2012), <http://www.nytimes.com/2012/10/12/opinion/gay-rights-may-get-its-brown-v-board-of-education.html> (last visited July 1, 2014). Klarman writes:

A Supreme Court ruling in favor of gay marriage would divide the nation roughly down the middle, much as the Court’s ruling against racial segregation, in *Brown v. Board of Education*, did in 1954. Yet, within two decades, the *Brown* decision was almost universally revered. A decision protecting same-sex marriage would probably also soon become historic.

*Id.* (italics added).

## IX. CONCLUSION

Eliminating state judicial elections will certainly be no easy task.<sup>267</sup> The dictates of federalism ensure that the federal government cannot require states to use appointment systems for selecting judges.<sup>268</sup> It will likely take local grassroots mobilization to put an end to judicial elections, but as legal scholars and practitioners, we have the ability to influence the political debate that centers on judicial independence and selection. The American Bar Association has taken the lead in these efforts, establishing the Commission on the 21st Century Judiciary and the Standing Committee on Judicial Independence.<sup>269</sup> “The ABA has long supported ‘merit’ selection in appointing state-court judges over elections or the federal model.”<sup>270</sup> “These judges would ideally be immune to removal from their positions save for cases of misconduct.”<sup>271</sup> While the threat of legislative “packing” or “unpacking” of the courts would still remain,<sup>272</sup>

267. See, for example, the February 6, 2012, remarks of Erwin Chemerinsky, who participated in a discussion of *Citizens United* at the University of California, Irvine, School of Law. *Citizens United Impact on Judicial Elections*, 60 *DRAKE L. REV.* 685, 688 (2012). Chemerinsky stated:

So if I could wave a magic wand, I would want to eliminate judicial elections. We could talk about what system would be better—and there are many alternatives—but I think the judicial elections are inconsistent with what society wants the judiciary to be and inconsistent with what we want democracy to be. But the reality is judicial elections are here to stay. In order to eliminate judicial elections in a state requires an amendment to the state’s constitution [sic]. That requires approval of the voters, and the voters aren’t going to vote themselves out of power. They are not going to vote their influence into nonexistence. Efforts to eliminate judicial elections have rarely succeeded. There was not long ago such an effort in Nevada. Sandra Day O’Connor spent a great deal of time there encouraging the elimination of judicial elections and it failed.

*Id.*

268. *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) (“In resolving this case, however, we should refrain from criticism of the State’s choice to use open elections to select those persons most likely to achieve judicial excellence. States are free to choose this mechanism rather than, say, appointment and confirmation.”).

269. *Standing Committee on Judicial Independence*, AM. BAR ASSOC., [http://www.americanbar.org/groups/justice\\_center/judicial\\_independence.html](http://www.americanbar.org/groups/justice_center/judicial_independence.html) (last visited July 1, 2014); *ABA Weighs in on Judicial Selection*, FEDERALIST SOC’Y L. & PUB. POL’Y STUDS. (Aug. 3, 2012), <http://www.fed-soc.org/publications/detail/aba-weighs-in-on-judicial-selection> (last visited July 1, 2014) [hereinafter *ABA Weighs In*].

270. *ABA Weighs In*, *supra* note 269.

271. *Id.*

272. This problem is not unique to state judiciaries, and Congress has the power to change the number of justices on the United States Supreme Court, though such an alteration would be almost universally disdained as a violation of separation of powers if done for politically-motivated, partisan reasons. Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 *AM. J. COMP. L.* 173, 197 (2013). Robinson writes:

In 1881, Senator Manning proposed increasing the [United States Supreme] Court’s capacity by dividing it into three panels of three judges each, or alternatively having twenty-one judges

recent efforts at these measures have been unsuccessful.<sup>273</sup> “In fact, throughout all of [U.S.] history, instances of Court packing, Court shrinking, jurisdiction stripping, and impeachment of justices have been exceedingly rare.”<sup>274</sup>

In future debates over judicial selection systems, we must be mindful of the fact that all judicial elections, even when publicly financed, will foster representative judges. Although this outcome has some democratic appeal, it will strike at the heart of judicial independence and threaten our adherence to the constitutional, statutory, and common law principles that govern our constitutional republic. We must not be convinced that popular sovereignty should govern the judiciary,<sup>275</sup> for if we cede to the these populist calls, we may prevent the next *Brown* from being decided by our courts, while at the same time stunting political progress and the equal protection of the laws for all of the citizenry.

Instead, we must demand judicial independence and virtual representation from our state legislators so that one day, if we are the citizens oppressed by discriminatory legislation, we can have our day in court in front of an impartial and independent judiciary. Indeed, it is a heady feeling being in the political majority and having all branches of government accountable to your beliefs,<sup>276</sup> but we must not forget that one day the tables may be turned and our only recourse as members of a political minority will be in a court of law.<sup>277</sup> If this day comes, I want the

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divided into three panels of seven. Along similar lines, in 1890, the Senate Judiciary Committee considered increasing the number of justices to eleven or eighteen . . . .

*Id.* (citation omitted). “Although unprecedented, and constitutionally undesirable, the Court-packing plan [of President Franklin Roosevelt] did not exceed the constitutional powers of the elected branches.” Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2134 (2002).

273. See Cohen, *Unpacking*, *supra* note 164.

274. Matthew E.K. Hall, *Rethinking Regime Politics*, 37 LAW & SOC. INQUIRY 878, 898 (2012).

275. “Legal historians generally associate the movement toward an elected judiciary with the ideas of popular sovereignty espoused by the Jacksonian Democrats in the first half of the nineteenth century.” John J. Gibbons, *The Quality of the Judges Is What Counts in the End*, 61 BROOK. L. REV. 45, 47–48 n.9 (1995).

276. *But see* *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (“The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”).

277. See Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 BYU L. REV. 1005, 1023 (2004). Gey writes:

The countermajoritarian role of courts in protecting political minorities is compatible with a democratic process that is defined by majoritarian control of political power because today’s minority might be tomorrow’s majority. By protecting political minorities and the expression of minority political sentiments today, the courts are thereby protecting the long-term survival of a vivid and flexible system of majority rule. In the end, this means that all policies are

judge presiding over my case to have allegiance only to justice and the law,<sup>278</sup> not to the political interests that can ensure his or her reelection.<sup>279</sup>

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presumptively temporary, and the government may not enshrine any policy or principle as unquestioned or sacrosanct.

*Id.*

278. *See Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting). Justice Brandeis writes:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

*Id.*

279. Chief Justice Burger once wrote, a court's

individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. The lines ascribed to Sir Thomas More by Robert Bolt are not without relevance here: "The law, Roper, the law. I know what's legal, not what's right. And I'll stick with what's legal. . . . I'm not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake."

*Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978) (quoting ROBERT BOLT, *A MAN FOR ALL SEASONS*, in *THREE PLAYS* 147 (Heinemann 1967)).