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## Restoring the Civil Jury in a World without Trials

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Dmitry Bam\*

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## I. INTRODUCTION

Elected judges are biased. Biased in favor of campaign contributors, in-state litigants, and parties (and causes) popular with the state's electorate. Not every judge is biased, of course, and certainly not in every case, but often enough to make systemic judicial bias one of the biggest threats to the legitimacy of the American justice system and the rule of law.<sup>1</sup> Despite its growing magnitude,<sup>2</sup> the problem has proven intractable. It is not for lack of trying; proponents of judicial impartiality<sup>3</sup> have long recognized these bias concerns and have struggled to discover solutions.

This Article offers what is at once a novel and an originalist approach by reimagining an institution with a rich historical pedigree and one that the Founders believed should (and would) redress judicial bias in civil litigation: the civil trial jury. But the civil jury as we have come to know it is powerless and largely obsolete because, in modern civil litigation, judges alone decide most cases—at least the ones that don't settle—long before they reach the jury, and sometimes, as with post-verdict judgment as a matter of law or remittitur of damages, even after the jury has acted. Their tools of choice are the motion to dismiss, the motion for summary judgment, and the motion for judgment as a matter of law. These procedural mechanisms, which did not exist at common law or at the time of the founding, have made civil jury trials exceedingly rare. Pretrial disputes and motion practice are the most important phases of modern litigation.<sup>4</sup> I argue that the people themselves, serving alongside elected judges on what I call Hybrid Judicial Panels (or Hybrid Panels), can act as a direct check on biased elected judges. These Panels would consist of a (professional)

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1. If this assertion sounds hyperbolic, consider that state judges handle approximately 98% of all civil litigation in the United States, including cases involving federal constitutional and statutory issues. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 9. And more than 80% of those state judges are elected. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 53 (2003). If it is indeed true that judicial elections often (or even sometimes) lead to judicial bias, then it is hard to imagine a bigger threat facing our legal system, a system that presupposes that cases will be tried to an impartial arbiter. See Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 252 (2000) (“One of the central tenets of the adversary system is that the judge remain impartial.”).
  2. In fact, as discussed in greater detail in Part II, *infra*, the problem continues to worsen as judicial elections continue to evolve in ways that accentuate the bias concerns.
  3. These proponents include groups and individuals as diverse as the American Bar Association, law professors, public interest organizations, and even elected (and unelected) judges themselves.
  4. Jeremiah L. Hart, *Supervising Discretion: An Interest-Based Proposal for Expanded Writ Review of § 1404(a) Transfer of Venue Orders*, 72 OHIO ST. L.J. 139, 141 (2011) (“The pre-trial disputes at the center of these early choices dominate modern litigation because few civil cases are tried”).

judge and a small number of jurors (or lay judges),<sup>5</sup> and would decide determinative motions that are now decided by judges alone.<sup>6</sup> The judge and the jurors would work together to decide these dispositive motions, most importantly the motion for summary judgment, removing a biased judge's opportunity to rule in favor of a campaign contributor or against an unpopular litigant on her own.

The concerns that this Article identifies are hardly new. For many years, relying on a combination of anecdotal evidence and common sense, critics of judicial elections have suspected that elected judges may be biased.<sup>7</sup> But for much of American history, empirical evidence unequivocally proving the existence of such bias was lacking. In recent years, that has changed. We now have plenty of data, in both the civil and the criminal contexts, showing that elected judges are biased in favor of those interests that helped them win their previous election(s) and those that can help them win their future ones.

But if concerns about election-related judicial bias are nothing new, why haven't we solved them? Scores of articles have been written discussing these problems, with one scholar even suggesting that the topic of judicial selection is the most written-about topic in all of law.<sup>8</sup> The difficulty lies in the fact that if we accept the proposition

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5. In Part IV, *infra*, I briefly discuss how such jurors might be chosen. However, this Article merely introduces the idea of the Hybrid Panel. Further research and study would be required on the best way to implement the proposal and work out further specific details.

6. Although the focus of this Article is the civil jury, a similar approach could be used to redress judicial bias in the criminal context. In particular, similar hybrid panels could be used during the sentencing phase of a criminal matter to ensure that judicial bias does not influence the punishment an elected judge imposes on a criminal defendant. For evidence of such bias in criminal sentencing, see notes 81–85, *infra*.

7. There is an open question in academic literature whether any judge can be truly impartial, and even on the meaning of impartiality. Every judge is influenced by a number of factors, including his upbringing, personal characteristics, experiences, etc. See Alexander M. Sanders, Jr., *Everything You Always Wanted to Know About Judges but Were Afraid to Ask*, 49 S.C. L. REV. 343, 346 (1998) (“Everyone, including every judge, is a conglomerate enterprise whose values and judgments derive from a mysterious jumble of experiences since childhood.”). For the purpose of this Article, I only focus on the kinds of biases that everyone agrees are improper and should not be a part of judicial decision-making: specifically, a preference for a particular party because a ruling in favor of that party is likely to help the judge retain his job. See *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002) (“One meaning of ‘impartiality’ in the judicial context—and of course its root meaning—is the lack of bias for or against either party to the proceeding.” (emphasis omitted)).

8. Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31, 31 (1986) (“Although surely no one has made a formal count, it is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past fifty years as the subject of judicial selection.”). Although I am not familiar with any empirical studies assessing this claim, it is undoubtedly true that

that elected judges are biased, then we must answer the obvious follow-up question: Who will stop them? So far, that question has gone unanswered.

The most obvious solution—doing away with judicial elections altogether—is also the most untenable. Despite all their warts, judicial elections are supported by an overwhelming majority of the public.<sup>9</sup> Similarly unrealistic is the prospect of electoral reform specifically tailored for judicial elections. Scholars have proposed a number of such solutions, including public financing of judicial elections, contribution and expenditure caps, and close monitoring and regulation of judicial campaign conduct. But recent Supreme Court decisions have made it clear that judicial elections largely play by the same First Amendment rules as all other elections.<sup>10</sup> And those rules favor freedom for potential litigants (and their lawyers) to give money to judicial candidates,<sup>11</sup> to spend money on judicial candidates,<sup>12</sup> and to allow judicial candidates to say what they want to say on the campaign trail.<sup>13</sup> In other words, the very factors that are most likely to lead to judicial bias are the ones that, today, receive the greatest First Amendment protection. Eliminating the corrupting influence of money from judicial elections is not only unlikely to gain political traction, but any efforts to do so are almost certainly unconstitutional under current Supreme Court doctrine.

As a result, states deal with election-related judicial bias the same way they deal with all other types of judicial bias: by requiring the biased judge to recuse herself from the case. Some scholars have indeed touted recusal as the best solution to the biased judge problem.<sup>14</sup>

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judicial selection processes, and judicial elections in particular, have received significant scholarly and media attention.

9. Geyh, *supra* note 1 (explaining that 80% of the public favors selecting judges by election).
10. See *White*, 536 U.S. 765. But see James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y. ANN. SURV. AM. L. 727 (2011) (suggesting that the Court might be willing to recognize different rules in the context of judicial elections); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015) (upholding Florida's direct solicitation ban for judicial election candidates).
11. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014) (invalidating aggregate contribution limits as violating the First Amendment).
12. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that the First Amendment prohibits restrictions on independent expenditures by a non-profit corporation). The Court's more recent decisions have suggested that First Amendment protection applies to all independent expenditures, including those of for-profit corporations and labor unions. Cf. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that a for-profit corporation's religious liberty is protected under the Religious Freedom Restoration Act).
13. *White*, 536 U.S. 765.
14. Molly McLucas, *The Need for Effective Recusal Standards for an Elected Judiciary*, 42 LOY. L.A. L. REV. 671, 692 (2009) (arguing recusal is "the only effective

Judges, too, have hinted that erecting more stringent recusal standards can alleviate election-related judicial bias.<sup>15</sup> The focus on recusal also dominates the judicial ethics rules. The Model ABA Code of Judicial Conduct, as well as the ethics codes in all fifty states, requires judges to step aside not only when they are actually biased, but also when their impartiality could reasonably be questioned.<sup>16</sup> On paper, at least, this strict standard requires that every biased judge, or even one who appears to be biased, be replaced with an impartial colleague. And if recusal worked as intended, it would completely obviate the concerns raised by this Article.

But recusal does not work for election-related judicial bias. One reason may be that judges typically decide their own recusal motions and have a disincentive to recuse precisely when recusal is most needed.<sup>17</sup> A judge who truly feels a debt of gratitude towards a former contributor, or one who hopes to turn a current litigant into a future contributor, is also the judge least likely to step aside.<sup>18</sup> But more importantly *some* judge—a judge—must hear the case, and *every* elected judge must worry about his or her electoral prospects. In other words, while recusal is theoretically a workable solution to individualized judicial bias, recusal fails to address the systemic problem of election-related judicial bias.<sup>19</sup>

This Article proceeds in three Parts. Part II sets out the problem. After briefly discussing the history and evolution of judicial elec-

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means to ensure the impartiality of elected judges”); David K. Stott, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481, 482 (2009) (suggesting “recusal reform offers an effective, constitutional means of solving” the judicial bias problem that results from judicial elections).

15. *White*, 536 U.S. at 794 (Kennedy, J., concurring) (arguing that rather than prohibiting judges from announcing their views during electoral campaigns, states could “adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards”); *see also* *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (holding that a West Virginia Court of Appeals justice was required to recuse himself when an officer of one of the parties played a major role in that justice’s election to the court).
16. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 2.11(a) (2010).
17. *See* Dmitry Bam, *Our Unconstitutional Recusal Procedure*, 84 MISS. L.J. 1135 (2015) (arguing the self-recusal procedure is unconstitutional).
18. These motions are properly understood as a dispute between the litigant and the judge, so the adversarial process would require those two parties to present their dispute to an impartial arbiter. But it is highly unlikely that any state would create such a process, as it is potentially very time-consuming. *See id.*
19. Recusal remains an adequate solution when a specific jurist has a personal bias in favor or against a party that is not shared by his or her colleagues. For example, if the judge owns stock in one of the corporate litigants, or is related to the lawyer arguing the case, the judge must recuse himself. *See* 28 U.S.C. § 455(b) (2012).

tions,<sup>20</sup> Part II highlights the empirical evidence demonstrating that the judicial bias concern is both real and serious. That evidence overwhelmingly shows that elected judges rule in favor of their contributors, in-state litigants, and the perceived political preferences of the electorate, while routinely ruling against out-of-state parties and unpopular litigants and causes. Part II concludes by discussing the failed efforts to solve the bias problem.

Part III examines the role that the jury could play, and was intended to play, in checking biased judges. I show that at the time of the founding, the jury was the primary institution entrusted with ensuring judicial impartiality and independence. Jefferson, Madison, Hamilton, and a long line of their Federalist supporters and Anti-Federalist opponents, all agreed about the importance of the jury and the jury's central role in protecting constitutional guarantees against unscrupulous judges. The jury, more than any other institution, was to protect the people from judicial bias and corruption. Part III also offers some reasons for *why* the jury was (and continues to be) the perfect institution for such a role, and *how* the jury was able to fulfill that function at the time of the founding.

In Part IV, I argue that the jury can no longer serve that bias-checking role.<sup>21</sup> At the time of the founding, civil jury trials were common; today, they are virtually nonexistent. What had once been a vibrant institution integral to the structure of America's government has become little more than afterthought. Today, few can even imagine the jury serving such an important judge-checking role. In fact, of the thousands of articles written on judicial elections, judicial impartiality, and judicial independence, to my knowledge not a single scholar has extensively examined the role that the people themselves might play in checking judicial bias by elected state judges.

I conclude Part IV by offering a new approach. Rather than simply suggesting a return to an eighteenth-century division of labor between judges and jurors, I argue that jurors (or lay judges) should sit on Panels alongside elected judges to make key pretrial decisions that judges make on their own. This novel integration of the jury into the pretrial procedure helps preserve the historical benefit of the jury by allowing the people to act as a check on judicial bias, while at the

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20. Because much has been written about judicial elections, this Part does not offer a complete history or description. Rather, I summarize the practice and offer a history of judicial elections only as necessary to establish my major premise that judicial elections hamper judicial impartiality.

21. As explained in greater detail in section IV.A, over the last century and a half the jury's power has waned as the number of jury trials has declined and as the jury's role in those trials has been limited. At the same time, the jury has been subjected to a number of critiques challenging its competence, impartiality, and efficiency.

same time preserving the advantages associated with judicial expertise and modern rules of civil procedure.

## II. JUDICIAL ELECTIONS AND THE IMPARTIALITY PROBLEM

An Article that begins by scandalously accusing judges of bias must back up that assertion. Therefore, after a brief description of the history of judicial elections in section II.A, section II.B presents the evidence of judicial bias, as well as some reasons why election-related judicial bias is an increasing threat to the rule of law with each passing election cycle. Then, in section II.C, I discuss our failed, recusal-centered approach to judicial bias.

### A. A (Brief) History of Judicial Elections

Although the specific mechanisms vary from state to state, and sometimes even from one level of a state judiciary to another,<sup>22</sup> most state judges obtain, and retain, their seats on the bench through judicial elections.<sup>23</sup> Today, judges in thirty-nine states face the electorate to stay in office.<sup>24</sup> This accounts for approximately 80% of *all* trial judges in the United States, and nearly 90% of our state judges.<sup>25</sup> No other nation on earth elects judges to the extent that we do.<sup>26</sup> This is especially true for lower-level trial judges—the judges that have the most direct interaction with litigants—who are sometimes subject to elections even when state supreme court justices are not.<sup>27</sup>

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22. Some state constitutions, for example, provide for elections of lower court judges, while opting to select their supreme court justices through gubernatorial appointment. *See, e.g.*, S.D. CONST. art. V, § 7.

23. There are three major kinds of elections: partisan, non-partisan, and retention. A rich body of literature has described, and critiqued, each of these methods. *See generally* JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012) (explaining different selection methodologies and the reasons each was adopted).

24. Adam Liptak, *Rendering Justice, with One Eye on Re-election*, N.Y. TIMES (May 25, 2008), <http://www.nytimes.com/2008/05/25/us/25exception.html?pagewanted=all&r=0>, archived at <http://perma.unl.edu/K5EX-6AXY> (citing data from the National Center for State Courts).

25. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1105 (2007).

26. In fact, only two other nations—Japan and Switzerland—have any judicial elections, but both elect a very small portion of the country's judiciary. *See* Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 ARK. L. REV. 249, 258 (2011).

27. *Compare* AM. JUDICATURE SOC'Y, *INITIAL SELECTION: TRIAL COURTS OF GENERAL JURISDICTION* (2013), archived at <http://perma.unl.edu/J9L4-58P9> (discussing selection methods for state trial court judges), *with* AM. JUDICATURE SOC'Y, *INITIAL SELECTION: INTERMEDIATE APPELLATE COURTS* (2013), archived at <http://perma.unl.edu/CYU5-WKCW> (discussing selection methods for state appellate court judges).



This was not always the case. In the late-eighteenth and early-nineteenth centuries, most state judicial selection systems mirrored their federal counterpart. In fact, in the late-eighteenth century, no state judges were elected to office.<sup>28</sup> Rather, state judges were typically appointed by: (a) the governor, (b) the state legislature, or (c) some combination of the two.<sup>29</sup> Not only did the appointment mechanism mirror the federal system, so did the retention mechanism. State constitutions protected judges against political retaliation and favoritism, and sought to preserve judicial independence.<sup>30</sup> Nearly every state offered judges the same tenure protections (i.e., life tenure) as the Constitution provides federal judges.<sup>31</sup>

But in response to a financial crisis that devastated the states in the middle of the nineteenth century and concerns about judicial corruption and politicization, most states abandoned their appointive systems in favor of judicial elections.<sup>32</sup> Some have argued that judicial elections were part of the Jacksonian movement towards greater populism.<sup>33</sup> But historians have largely rejected that justification.<sup>34</sup> Rather, the driving force behind judicial elections was the belief that elected judges would be *more* independent—specifically, more inde-

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28. See Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 855 (2012).

29. *Id.* (describing the selection methods at the time of founding for all thirteen original colonies).

30. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1016–17 (2001) (“[A]ll of the state constitutions provided some protection for judges against political retaliation . . .”).

31. In fact, the Federal Constitution was modeled in large part on the constitutions created by the states in the years after America declared independence in 1776. See THE FEDERALIST NO. 1, at 6 (Alexander Hamilton) (analogizing the draft Federal Constitution to the New York state constitution); see also William F. Swindler, *Seedtime of an American Judiciary: From Independence to the Constitution*, 17 WM. & MARY L. REV. 503, 519 (1976) (“As finally drafted and ratified, the judicial article of the Federal Constitution in many respects reflected the basic features of the antecedent state instruments, though it also incorporated provisions that varied significantly from the prior state models.”).

32. SHUGERMAN, *supra* note 23, at 10.

33. See, e.g., SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 130 (rev. 2d ed. 2002).

34. See SHUGERMAN, *supra* note 23, at 78; see also Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 HISTORIAN 337, 353 (1983) (arguing that judicial elections were intended to “improve judicial administration, to increase the prestige of the bench and bar, to curtail partisan domination of judicial patronage, and to restore separation of powers by curbing legislative excess”); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 224 (1993) (criticizing “early commentators who disparaged the elective judiciary as the outgrowth of unthinking Jacksonianism”).

pendent of corrupt state legislatures.<sup>35</sup> State judicial selection throughout the nation was transformed during this era. While almost no state used judicial elections prior to the 1830s,<sup>36</sup> by the time of the Civil War twenty-four states had adopted partisan judicial elections.<sup>37</sup>

Concerns about judicial partisanship that grew out of these partisan judicial elections led to two major progressive reforms in the 20th century. First, many states moved away from partisan judicial elections to non-partisan elections.<sup>38</sup> The reformers hoped that removing the corrupting influence of party politics from the judiciary would, again, make judges more independent—this time of party bosses.

Unfortunately, non-partisan elections exhibited many of the same problems as their partisan predecessors. Candidates in non-partisan judicial elections came to be perceived as affiliated more closely with one of the political parties. To make matters worse, removing the party cue from the little information voters already had about judicial candidates left voters entirely uninformed about how to cast their ballot.<sup>39</sup> When the non-partisan experiment failed (in the eyes of the reformers), some states adopted a system of merit selection. Also known as the Missouri Plan, merit selection is essentially a hybrid mechanism that allows a governor to appoint a judge from a short list created by a panel of experts. These panels usually include lawyers and lay people, and are supposed to evaluate potential nominees based on their merit. The nominated judge serves a short term in office, and then stands for a retention election. Retention elections are unusual because the judge does not run against another candidate. Instead, the voters decide whether to retain the judge for another term.<sup>40</sup>

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35. SHUGERMAN, *supra* note 23, at 148–54.

36. A couple states experimented with elections for some judicial posts in the 1810s. *Id.* at 60.

37. At least in theory, these judicial elections were much like any other partisan election for government office. See Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1421–25 (2001) (discussing potential concerns about partisan judicial elections). As discussed below, in practice, it was not until recently that judicial elections began to resemble elections for other offices. Few scholars have defended partisan judicial elections. *But see* PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* (1980).

38. SHUGERMAN, *supra* note 23, at 167–73 (discussing the transition from partisan to non-partisan judicial elections).

39. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1438 (2001) (“[P]artisan judicial elections indicate party affiliation on the ballot, which may be a primary cue for many judicial election voters.”).

40. For a thorough discussion of the Missouri Plan, see Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751 (2009).

As a result of these changes, the states now have three different electoral mechanisms: partisan elections, non-partisan elections, and retention elections.<sup>41</sup> All three, however, lead to concerns about bias.

## B. Evidence of Bias

Are elected judges really biased? A number of recent (and some not-so-recent) studies provide a resounding answer to that question. On the whole, these studies show that elected judges are biased in favor of those interests that helped the judge get elected and can help the judge be reelected (e.g., donors, contributors, in-state litigants) and against the interests that have not and cannot (e.g., out-of-state litigants, unpopular litigants). As a result, certain favored interests, including campaign contributors and donors, fare well, while certain disfavored litigants, including criminal defendants, fare poorly under a variety of metrics and across jurisdictions.

To any students of psychology or human nature, this should come as no surprise. To keep their jobs, judges need to win elections. And to win elections, judges need money—a lot of money.<sup>42</sup> That money often comes from those that are most likely to appear in front of the judge as litigants or lawyers. Keeping the sources of that money satisfied becomes a priority for any judge that wants to keep his job. In addition, at the risk of stating the obvious, to win elections judges need votes. Therefore, keeping the electorate satisfied is another priority for any judge. Those two constant needs—money and votes—lead to significant problems. Worse, they lead to significant bias.

### 1. *Keeping the Contributors Happy*

Let's begin with the group that seems to benefit most from judicial elections: campaign contributors.<sup>43</sup> Studies show that judges over-

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41. For the purposes of this Article, these differences are largely irrelevant. All three methods require judges to raise money for their reelection, and all three methods require that the judge face the electorate in order to keep her job. To the extent that a judge running in a retention election is less concerned about the prospect of losing her job, or needs to raise less money to run her campaign, the bias concerns are lessened, but not entirely eliminated. Furthermore, as I show in section II.C below, even retention elections are becoming highly competitive and raise many of the same bias problems.

42. "To win significant elections today costs a lot more money than it did fifty years ago and requires a much greater media presence, particularly television advertising." Jeffrey W. Stempel, *Lawyers, Democracy and Dispute Resolution: The Declining Influence of Lawyer-Statesmen Politicians and Lawyerly Values*, 5 *NEV. L.J.* 479, 498 (2005); Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 *STAN. L. REV.* 449, 452–55 (1988) (discussing how the amount of money needed to win judicial election has increased dramatically since 1960s).

43. For the purposes of this section, I sometimes use the phrase "campaign contributors" to refer both to those who gave money directly to a judicial candidate and

whelmingly rule in favor of those who helped them fund their earlier campaigns.<sup>44</sup> For example, in one recent study, Michael Kang and Joanna Shepherd analyzed a significant number of judicial decisions, concluding that every a dollar a litigant spends on a judicial candidate increases the likelihood that the candidate, if elected, will rule in that litigant's favor.<sup>45</sup> Likewise, a *New York Times* study of decisions by the Ohio Supreme Court found that justices ruled in favor of their campaign contributors 70% of the time.<sup>46</sup> And Ohio is not unique: another study by Joanna Shepherd concluded that state supreme court justices throughout the nation "routinely adjust their rulings to attract votes and campaign money."<sup>47</sup> This effect is especially profound if one of the parties (or its lawyers) made a *significant* contribution to the judge's campaign.<sup>48</sup> And even when both sides contributed to a judge's campaign, the party that contributed more fares better.<sup>49</sup> These studies offer litigants a simple lesson: if you want to win your case, then you better pay up and hope your opponent does not pay more.

None of this would be so troubling if lawyers and litigants that appeared in front of judges rarely spent money on those judges' campaigns. And, early in the history of judicial elections, this was the

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those that made an independent expenditure to support a candidate. While the distinction between expenditures and contributions is significant for campaign finance law, it makes little difference here. In fact, even the Supreme Court, in *Caperton v. Massey*, referred to the independent expenditures in that case as campaign contributions. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009).

44. See, e.g., Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 73 (2011); see also Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (concluding that Ohio Supreme Court justices ruled in favor of their contributors more than 70% of the time); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002) (concluding that data shows contributors to judicial elections buy changes in law); Margaret S. Williams & Corey A. Ditslear, *Bidding for Justice: The Influence of Attorneys' Contributions on State Supreme Courts*, 28 JUST. SYS. J. 135, 136 (2007) (concluding that some Wisconsin judges tend to rule in favor of contributors).
45. Kang & Shepherd, *supra* note 44, at 73 ("We find that every dollar of contributions from business groups is associated with increases in the probability that elected judges will decide for business litigants.").
46. Liptak & Roberts, *supra* note 44, at A1.
47. Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 625 (2009).
48. See Aman McLeod, *Bidding for Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. DET. MERCY L. REV. 385, 400 (2008).
49. Vernon V. Palmer, *The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors*, 10 GLOBAL JURIST, iss. 3, 2010, at 1, 8.

case. Unlike intensely competitive and highly partisan legislative and executive elections, judicial elections, for much of their history, were described as “sleepy,” “low key,” and “dignified.”<sup>50</sup> Those elections were relatively inexpensive, meaning that judges did not need to fundraise.<sup>51</sup> Candidates often ran unopposed.<sup>52</sup> Few people contributed money to either sitting judges running for reelection, or candidates for office,<sup>53</sup> meaning that judges were less likely to hear a case involving a contributor.

Today, these elections are very expensive. In a matter of a few decades, we have gone from spending almost nothing on judicial elections to spending approximately \$83.3 million between 1990 and 1999 to \$206.9 million from 2000 to 2009.<sup>54</sup> And new records are set every year.<sup>55</sup> A judge seeking to retain his seat on the bench must rely on others to support him.<sup>56</sup>

As a result of this transformation, it is not unusual for judges to hear cases involving a lawyer or a party who helped the judge’s election bid.<sup>57</sup> For example, a recent Pennsylvania study showed that

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50. Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819, 819 (2002) (explaining that judicial elections “were once ‘low-key affairs, conducted with civility and dignity’” (quoting Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995))); David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Selection*, 69 ALB. L. REV. 985, 985 (2006) (“Judicial selection is a historically sleepy affair . . .”)
51. SHUGERMAN, *supra* note 23, at 241 (describing judicial election campaigns as “relatively inexpensive”).
52. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 267 (2008) (describing old-style judicial elections).
53. BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 185 (2006) (“Prior to the 1970s, judicial elections were sleepy events garnering little attention and involving relatively small sums of money.”).
54. JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE* 8 (Charles Hall ed., 2010).
55. Jordan M. Singer, *Knowing Is Half the Battle: A Proposal for Prospective Performance Evaluations in Judicial Elections*, 29 U. ARK. LITTLE ROCK L. REV. 725, 730–31 (2007) (discussing record-breaking campaigns in judicial elections throughout the United States).
56. *See* Pozen, *supra* note 52, at 306 (“[T]he time drain of campaigning has, one assumes, become more pressing in recent years, as campaigns have become more expensive and competitive.”).
57. *See* Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 474 (2002) (“Often, lawyers or litigants who are likely to appear before the judge constitute large proportions of the contributions to judicial candidates.”). A *New York Times* study showed that Alabama Supreme Court justices routinely heard cases involving parties or amici who gave those justices campaign contributions. Liptak & Roberts, *supra* note 44, at A1. Public confidence in judicial impartiality has also suffered as a result. In an important *Justice at Stake* study, 86% of those surveyed expressed concern that “lawyers are the biggest campaign contributors to judicial candidates, and they often appear in court before judges they’ve given

nearly two-thirds of cases heard by the state supreme court in 2008 and 2009 involved at least one party, lawyer, or law firm that contributed to the campaign of at least one of the justices.<sup>58</sup> Likewise, an Illinois study concluded that 34% of the cases that the Illinois Supreme Court decided involved a contributor-litigant.<sup>59</sup> This should come as no surprise, as the parties that are most likely to appear in front of the judge have the most interest in currying the judge's favor with campaign contributions or independent expenditures.<sup>60</sup>

*Caperton*<sup>61</sup> itself is the prototypical example. When it came time to elect a justice to the West Virginia Supreme Court, Don Blankenship, whose company is a frequent litigant in front of that court, was the biggest spender.<sup>62</sup> And despite Justice Kennedy's repeated claims that *Caperton* is unique, extreme, and unusual, that is simply not the case. In fact, we have seen the *Caperton* situation repeat itself a number of times.<sup>63</sup>

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money to." GREENBERG QUINLAN ROSNER RESEARCH & AM. VIEWPOINT, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 8 (2001), archived at <http://perma.unl.edu/69RB-9DZ8>.

58. Malia Reddick & James R. DeBuse, *Campaign Contributors and the Pennsylvania Supreme Court*, 93 JUDICATURE 164, 164–65 (2010). Other surveys have concluded that in many states “nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case.” James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 749 (2011); Anthony J. Delligatti, *A Horse of a Different Color: Distinguishing the Judiciary from the Political Branches in Campaign Financing*, 115 W. VA. L. REV. 401, 436 (2012).
59. Ronald D. Rotunda, *A Preliminary Empirical Inquiry into the Connection Between Judicial Decision Making and Campaign Contributions to Judicial Candidates*, PROF. LAW., Winter 2003, at 16, 17.
60. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the Court appeared to recognize that the independent expenditures, like direct contributions, by one of the litigants to help a judge's campaign could create an intolerable probability of bias. In fact, the Court repeatedly referred to the independent expenditures in the case as “contributions.” *Id.* at 884–86. This blurring surprised election law scholars because the Court, since *Buckley v. Valeo*, had sustained a bright-line distinction between the two. See *Buckley v. Valeo*, 424 U.S. 1, 79–80 (1976) (recognizing a constitutionally significant difference between independent expenditures and direct campaign contributions). Although the *Caperton* Court does not expressly recognize that independent expenditures in judicial elections are inherently corrupting, in the sense that they could be banned consistent with the First Amendment, the Court appears to acknowledge that “there are circumstances in which independent expenditures have the same potential to corruptly influence the actions of elected officials as contributions.” Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1656 (2012).
61. 556 U.S. 868.
62. *Id.* at 873.
63. For example, just a few years earlier, the Illinois Supreme Court heard *Avery v. State Farm Mutual Automobile Insurance Co.*, 835 N.E.2d 801 (Ill. 2005). *Avery* was an appeal of a \$1 billion verdict against State Farm. While the case was pending, Illinois held its election for a seat on the state supreme court. The can-

Common sense tells us that a judge hearing a case involving a contributor would feel a debt of gratitude towards that individual. Indeed, to feel otherwise would defy bedrock social norms.<sup>64</sup> In other words, even if the judge was not consciously trying to rule in favor of a contributor, the judge may subconsciously feel an obligation to return the contributor's favor.

In addition, the next election is always just around the corner. Elected state court judges generally serve shorter terms than appointed judges. This is particularly true of lower state court judges, who typically serve relatively short (4–8 year) terms.<sup>65</sup> This means that elected judges must always consider whether the same contributor would support his or her next election bid. And, given the recent trend in spending on judicial elections, that election bid is likely to be more expensive than the last one. Even judges don't deny "that the knowledge of the identity of a contributor is always 'in the back of the mind of the successful candidate.'"<sup>66</sup>

Ruling in favor of those who have helped you in the past is bad enough. But elected judges must also make sure *potential* contributors are satisfied with the judge's work on the bench. Every litigant and every lawyer is either a promising friend or burgeoning foe in the

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didates for that seat received a record \$9.3 million in campaign contributions. JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, BRENNAN CTR. FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS, 21 (2008). Lloyd Karmeier won the election, having received hundreds of thousands of dollars in contributions from State Farm employees and lawyers. He then cast the deciding vote to overturn the verdict against State Farm. The United States Supreme Court denied certiorari. *Avery v. State Farm Mut. Auto. Ins. Co.*, 547 U.S. 1003 (2006). Two other incidents involving the Ohio Supreme Court and the Michigan Supreme Court are described by Roy Schotland in *Comment on Professor Carrington's Article, "The Independence and Democratic Accountability of the Supreme Court of Ohio,"* 30 CAP. U. L. REV. 489, 493–94 (2002).

64. See *Caperton*, 556 U.S. at 882 ("Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected."); Thomas M. Susman, *Reciprocity, Denial, and the Appearance of Impropriety: Why Self-Recusal Cannot Remedy the Influence of Campaign Contributions on Judges' Decisions*, 26 J.L. & POL. 359, 366 (2011) (discussing the "reciprocity principle," which is the notion that once an individual benefits from an action of another, it is expected that the recipient of the benefit return the favor).

65. See Roy A. Schotland, *Republican Party of Minnesota v. White: Should Judges be More Like Politicians?*, JUDGES J., Summer 2002, at 7, 10 (discussing the effect of short terms for judges on judicial independence). For an excellent discussion on the interrelationship between judicial independence, accountability, and the length of judicial terms, see Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349 (2010).

66. Banner, *supra* note 42, at 452–55.

election just around the corner.<sup>67</sup> In a survey of nearly 2,500 state judges, almost half (46%) expressed “a belief that campaign contributions influence judges’ decisions.”<sup>68</sup> More than 70% of these judges “expressed concern regarding the fact that ‘[i]n some states, nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case.’”<sup>69</sup>

## 2. *Keeping the Electorate Happy*

In an influential 1995 article, Professor Steven Croley coined the term “majoritarian difficulty.”<sup>70</sup> The difficulty is this: an elected judge may be tempted to resolve a case according to the preferences of the majority (i.e., the people that will decide whether the judge remains in the job), even if doing so is contrary to the law.<sup>71</sup> This means that the unpopular litigant might lose the case because the judge might be worried about how the case will affect his reelection odds. To keep his job, the judge must anticipate how voters will react to a decision, and whether ruling in favor of a certain litigant will cost the judge votes at the polls.

As with money, the majoritarian difficulty was at one time only difficult in theory. When judicial elections were less salient, an elected judge had little to worry about.<sup>72</sup> Incumbents often ran unopposed, and even when they faced a challenger, incumbents almost al-

67. No state elects judges for life, meaning that for elected judges who do not plan to retire or step down from the bench, another election is always in the back (or the front) of their minds. This is particularly true of lower state court judges, who typically serve relatively short (4–8 years) terms. See *supra* note 65 and accompanying text.

68. Sample, *supra* note 58, at 749.

69. *Id.* (quoting GREENBERG QUINLAN ROSNER RESEARCH & AM. VIEWPOINT, JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 9 (2002), archived at <http://perma.unl.edu/5RUS-YT7Y>).

70. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995). The majoritarian difficulty is the counter to Alexander Bickel’s famous countermajoritarian difficulty, which has been at the heart of all constitutional theory. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); see also Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) (describing the countermajoritarian difficulty).

71. Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 731 (2010) (“[E]lective judiciaries pose a risk to the rule of law, which is compromised whenever a judge’s ruling is influenced by majority preferences.”).

72. Of course, every judge might be concerned about public perception of the judge’s work product, including federal judges who are appointed for life. See Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 586 (1993) (“[C]ourts do not trump majority will, or remain unaccountable to majority sentiment, nearly to the extent usually depicted.”).



ways won.<sup>73</sup> Unlike elections for other elected office, judges felt safe in their job, knowing that they were out of any public limelight.

That has all changed in recent years. As judicial elections have become more competitive, individual rulings face closer scrutiny—and pose a greater risk to a judge’s career.<sup>74</sup> As Justice Otto Klaus famously remarked, “There’s no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.”<sup>75</sup> In recent years, a number of judges have either lost elections as a result of unpopular decisions, or squeaked out narrow victories after their opponents used unpopular decisions against them. Most recently, three justices of the Iowa Supreme Court were voted out of office in a retention election for their controversial decision to strike down a state statute defining marriage as between a man and a woman.<sup>76</sup> On average, of course, incumbents are still likely to win their reelection, but the job is no longer a safe one for a sitting judge.<sup>77</sup> And as judicial elections become more and more competitive, pressures to appease and impress the electorate will continue to increase.

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73. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2051 (2010) (“Under the traditional model of judicial elections . . . incumbents almost always won . . .”).

74. See, e.g., Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 73, 75 (Matthew J. Streb ed., 2007) (“Sitting judges facing an imminent election . . . know that every decision is potentially fodder for the opposition. When well-heeled or well-organized interest groups can seize on isolated opinions—even well-reasoned decisions that have been joined by a majority of other judges on the court—as the basis for attack ads in the next campaign, it takes extraordinary integrity and real courage for a judge facing reelection to support a ruling that plainly will be unpopular.”); Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 COLUM. L. REV. SIDEBAR 27, 33 (2011) (“[P]ast judicial elections have taught that justices can be ousted due to their vote in a single case on one of these topics, often a vote portrayed incorrectly or deceptively by the opposition campaign or interest group.”).

75. Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1987, at 52, 58.

76. See Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715 (2011); see also Whitney Woodward, *2010 Justice Kilbride Retention in Illinois*, 60 DRAKE L. REV. 843 (2012) (describing Illinois Supreme Court Justice Thomas Kilbride’s victory); Press Release, Justice at Stake & Brennan Ctr. for Justice, *Gay Marriage, Tax Fights Spark High-Profile Court Races* (Sept. 23, 2010), archived at <http://perma.unl.edu/EB4V-VSDG> (discussing relatively close races in Kansas and Colorado).

77. Some estimate the judicial election races are now at least as competitive as races for the U.S. House of Representatives. See Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 319 (2001) (“The fact of the matter . . . 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.”).

Groups and individuals that are unpopular with the local electorate are the biggest victims of the majoritarian difficulty. For example, studies show that judges are biased against out-of-state defendants. One study demonstrated that the average damages award in a civil case was \$150,000 higher against out-of-state defendants.<sup>78</sup> Of course, this redistribution of wealth to in-state litigants is entirely rational—taking care of the local donors and voters takes priority.<sup>79</sup> In the words of West Virginia Justice Richard Neely, “As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. . . . [M]y job security [is enhanced] because the in-state plaintiffs, their families, and their friends will reelect me.”<sup>80</sup>

Another unpopular group is criminal defendants, and they, too, fall victim to the majoritarian difficulty. As judicial elections approach, elected judges tend to sentence criminal defendants more harshly.<sup>81</sup> And when that sentence is the death penalty, an elected judge is much more likely to sentence a defendant to death when judicial elections are close.<sup>82</sup> One study found that “criminal defendants [convicted of murder] were approximately 15% more likely to be sentenced to death when the sentence was issued during the judge’s election year.”<sup>83</sup> This, too, comes as no surprise as criminal justice issues figure prominently in contested judicial elections.<sup>84</sup> In the words of Ninth Circuit Judge Alex Kozinski:

While many, perhaps, most judges resist the pressure and remain impartial, the fact that they may have to face the voters with the combined might of the prosecution and police groups aligned against them no doubt causes some

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78. Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 162–63 (1999) (concluding that elected judges frequently redistribute wealth from out-of-state defendants to in-state plaintiffs).

79. 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, 289 (2002) (“[A]n elected judge may rationally favor in-state plaintiffs, who vote and have friends and relatives who vote, over out-of-state corporations.”).

80. RICHARD NEELY, *THE PRODUCT LIABILITY MESS* 4 (1988).

81. See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 258 (2004) (“[A]ll judges, even the most punitive, increase their sentences as reelection nears . . .”).

82. Richard R. W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 610 (2002).

83. *Id.*

84. Croley, *supra* note 70, at 737–39 (citing an increase in the number of elections where an incumbent judge loses because of criminal justice issues); cf. Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons from a Bellwether State*, 39 WILLAMETTE L. REV. 1357, 1365 (2003) (explaining that even advocates of tort reform frequently pay for appeals to criminal justice issues because those issues are more salient for voters).

judges to rule for the prosecution in cases where they would otherwise have ruled for the defense.<sup>85</sup>

And regardless of the type of case, empirical evidence seems to support the intuition of the majoritarian difficulty. A number of studies by Joanna Shepherd and others demonstrate that elected judges tend to decide cases at least partly in accordance with the preference of the electorate.<sup>86</sup> According to Shepherd, “[W]hen judges face [conservative electorates] in partisan reelections, they are more likely to [rule] for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases, for original defendants in tort cases, and against criminals in criminal appeals.”<sup>87</sup> Admittedly, every judge without life tenure must consider retention politics,<sup>88</sup> but elected judges do it at a significantly higher level than appointed judges. And with good reason: their jobs depend on it.

### 3. *Perception of Bias*

So far, we’ve only discussed evidence of real bias. But there is another kind of bias that arises as a result of modern judicial elections: the appearance of bias. The legitimacy of our justice system relies in large part on public perception of impartiality—“[P]ublic perception of the courts as impartial . . . is essential to the effective operation of the judicial process.”<sup>89</sup> In the words of Justice Kennedy, “[T]he law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral.”<sup>90</sup>

Three relevant groups also believe that the electoral process influences judicial decisions. First, judges confirm they take electoral considerations into account when making legal judgments.<sup>91</sup> In one

85. Hon. Alex Kozinski, Preface, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxxviii-xxxix (2015).

86. Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169, 169 (2009) (“The evidence supports the widespread belief that judges respond to political pressure in an effort to be reelected.”)

87. See Shepherd, *supra* note 47, at 661.

88. Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009). In other words, even judges who are reappointed by the governor or the state legislature seem to exhibit biases towards those reappointing agents.

89. DUBOIS, *supra* note 37, at 21–22.

90. Peter A. Joy, *Insulation Needed for Elected Judges*, 22 NAT’L L.J., Jan. 10, 2000, at A19, A19 (quoting Justice Anthony Kennedy, Interview by Bill Moyers with Justices Stephen Breyer and Anthony Kennedy, archived at <http://perma.unl.edu/WH9U-NN9W>).

91. See Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 842 (1994) (“Judges admit that they cannot completely trust themselves to hold in check the threats to their independence presented by judicial elections.”); Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312 (1994) (“[E]ven though judges rarely lose retention elections

study, more than 25% of the respondents believed that contributions have at least “some influence” on judicial decisions; approximately 50% thought the contributions have at least “a little influence.”<sup>92</sup> Ohio Supreme Court Justice Paul E. Pfeifer nicely summarized how judges feel. He said, “I never felt so much like a hooker down by the bus station in any race I’ve ever been in as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote.”<sup>93</sup> Second, the contributors believe that their contributions make a difference.<sup>94</sup> In the words of an anonymous AFL-CIO official, “[I]t’s easier to elect seven judges than to elect 132 legislators.”<sup>95</sup> And finally, approximately 80% of the public thought judges were biased in favor of their contributors.<sup>96</sup> A similar percentage thought that judicial decisions were influenced by political considerations.<sup>97</sup> While these surveys do not alone prove that judges are indeed biased, they show that judicial elections create a strong appearance of bias, and that in and of itself is a problem for the judiciary.<sup>98</sup>

### C. Failed Solutions

While this evidence may seem shocking at first, none of it comes as a surprise to judicial-selection scholars. For many years, academics have recognized the potential for bias that results from the judicial selection and retention process. Some scholars have even argued that judicial elections are unconstitutional precisely because of these concerns.<sup>99</sup> After all, the Constitution guarantees impartial judges<sup>100</sup>

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and only 34.9% believe a poor judge will be voted out, still three-fifths believe judicial retention elections have a pronounced effect on judicial behavior.”).

92. GREENBERG QUINLAN ROSNER RESEARCH & AM. VIEWPOINT, *supra* note 69, at 5.
93. Liptak & Roberts, *supra* note 44, at A1.
94. ADAM SKAGGS, BUYING JUSTICE: THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTIONS 4–7 (2010) (summarizing evidence demonstrating that judicial campaign contributors believe that their spending influences judicial decisions).
95. SAMPLE ET AL., *supra* note 54, at 9.
96. Geyh, *supra* note 1.
97. NAT’L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 41 (1999), archived at <http://perma.unl.edu/RW5W-U5X3>; see also Sandra Day O’Connor, Foreword to SAMPLE ET AL., *supra* note 54, at i, i (“We all expect judges to be accountable to the law rather than political supporters or special interests. But elected judges in many states are compelled to solicit money for their election campaigns, sometimes from lawyers and parties appearing before them. . . . [This leads to] a crisis of confidence in the impartiality of the judiciary.”).
98. Republican Party of Minn. v. Kelly, 247 F.3d 854, 867 (8th Cir. 2001) (“The governmental interest in an independent and impartial judiciary is matched by its equally important interest in preserving public confidence in that independence and impartiality.”), *rev’d*, 536 U.S. 765 (2002).
99. Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular*

and an unbiased, neutral adjudication “on the basis of the facts and law of their individual cases.”<sup>101</sup> Without a fair, impartial judge, all other constitutional safeguards are rendered meaningless<sup>102</sup> and the judiciary’s legitimacy suffers. None of our other rights—and laws—matter if the judges enforcing those rights are not impartial.

Three major solutions have been offered to address the problem. These solutions include eliminating judicial elections, reforming judicial elections, and enhancing judicial recusal rules. But these solutions have failed for a number of different reasons: because they are poorly suited to address the problem, because they are highly unpopular with the public, or because they have been held—or are likely to be held—unconstitutional by the Supreme Court.

### 1. *Eliminating Elections*

A favorite pastime of judicial selection scholars is critiquing judicial elections.<sup>103</sup> As David Pozen has observed, “disdain for elective judiciaries” is the dominant theme of the legal literature on judicial selection.<sup>104</sup> In the words of Roy Schotland, “[M]ore sweat and ink have been spent on getting rid of judicial elections than on any other

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*Constitutionalism*, 56 WM. & MARY L. REV. 1, 2 (2014); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 498 (1986) (“[I]n [at least some cases], the use of non-tenured state judges seems to be a clear violation of procedural due process.”).

100. In a long line of cases, the Supreme Court has recognized that the right to an impartial jurist is central to due process. See *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).
101. Redish & Aronoff, *supra* note 99, at 9; see also *Tumey*, 273 U.S. at 523 (holding that the presence of a judge with an interest in the outcome of the case violates due process); Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606, 610 (2002) (“Judicial impartiality is one of the core elements of due process.”).
102. Redish & Marshall, *supra* note 99, at 457, 479 (observing that procedural due process requires a neutral adjudicator). Professors Redish and Marshall explain that “[t]he rights to notice, hearing, counsel, transcript, and to calling and cross-examining witnesses . . . are of no real value . . . if the decisionmaker bases his findings on factors other than his assessment of the evidence before him.” *Id.* at 476.
103. See generally Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2604 (2003); Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter’s Perspective*, 64 OHIO ST. L.J. 13, 41 (2003) (“There is widespread dissatisfaction today with the operation of judicial elections.”). The support for judicial elections largely comes from political scientists rather than lawyers and law professors. See, e.g., CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* (2009).
104. Pozen, *supra* note 52, at 278. There is a rich body of scholarship evaluating different judicial selection and retention mechanisms. It is beyond the scope of this Article to summarize that scholarship, but it overwhelmingly concludes that judicial elections are a poor way of selecting judges.

single subject in the history of American law.”<sup>105</sup> Thousands of articles criticize judicial elections for a wide range of reasons<sup>106</sup>: because they are unseemly,<sup>107</sup> because they discourage the best candidates from running,<sup>108</sup> or because they threaten judicial independence<sup>109</sup> and judicial impartiality.<sup>110</sup>

And the academics are not alone. In response to many of the concerns discussed earlier, the American Bar Association has called on states to end the practice of electing judges entirely.<sup>111</sup> Instead, the ABA recommends that governors appoint judges to serve a single term until a specified age.<sup>112</sup> Justice Sandra Day O’Connor has also been the public face of the campaign against judicial elections.<sup>113</sup> Although O’Connor is an opponent of all judicial elections, she has taken a more moderate position, calling for states to replace contested judicial elections with the merit-selection scheme.<sup>114</sup> And this is just the “tip of

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105. Roy A. Schotland, Comment, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 150 (1998).

106. There are a few exceptions. For example, Michael Dimino has argued that while judicial elections are not perfect, neither are the other methods of judicial selection, suggesting judicial elections are the best way of selecting judges. See Michael Dimino, *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267 (2005). Leading defenders of judicial elections are Melinda Gann Hall and Chris Bonneau. See BONNEAU & HALL, *supra* note 103.

107. Croley, *supra* note 70, at 69 n.22.

108. See, e.g., Harold Laski, *The Technique of Judicial Appointment*, 24 MICH. L. REV. 529, 531–32 (1926) (arguing that the most qualified candidates may shy away from running for office, causing the public to rarely choose the best qualified candidates).

109. Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367 (2002).

110. Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 233 (2012).

111. See Jessica Leval Mener, *The Aftermath of Citizens United v. Federal Election Commission: Preventing Impropriety While Encouraging the Free Flow of Information in Judicial Elections*, 24 GEO. J. LEGAL ETHICS 713, 730 (2011) (discussing the “ABA’s mission to end judicial elections”).

112. No state currently uses exactly such a system. Rhode Island is the only state that grants judges life tenure. Two others—Massachusetts and New Hampshire—require judges to retire when they reach a mandatory retirement age. See *Judicial Selection in the States*, NAT’L CTR. FOR STATE COURTS, <http://www.judicialselection.us/> (last visited Feb. 11, 2015), archived at <http://perma.unl.edu/5SD9-TTWS> (describing the selection methodology for each state).

113. Other judges and Justices have criticized judicial elections. See, e.g., Justice John Paul Stevens, *Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida, August 3, 1996*, 12 ST. JOHN’S J. LEGAL COMMENT. 21, 30–31 (1996) (criticizing judicial elections); Chief Justice Margaret H. Marshall, President of the Conference of Chief Justices, Remarks to the American Bar Association House of Delegates (Feb. 16, 2009) (judicial elections are the “single greatest threat to judicial independence”), archived at <http://perma.unl.edu/F92S-7MCF>.

114. See *supra* section II.A (discussing merit-based selection).

the iceberg of the opposition to judicial elections.”<sup>115</sup> The list of election opponents is long and filled with current and former legal lawyers, judges, and politicians.

Some scholars have gone beyond merely criticizing judicial elections to in fact argue that such elections are unconstitutional. For example, Aviva Abramovsky argued that the only way to restore judicial impartiality, at least in the post-*Citizens United* world, is to end judicial elections.<sup>116</sup> Likewise, Erwin Chemerinsky has argued that judicial elections are inconsistent with the idea of judicial impartiality and the rule of law.<sup>117</sup> In recent years, arguments that judicial elections are unconstitutional have gained some traction. To ensure fair and impartial judges, as required by the Due Process Clause, Martin Redish and Jennifer Aronoff argue that “life tenure, or, at the very least, some form of formal term limit is required.”<sup>118</sup> Lawyers have also essayed to make similar arguments in legal briefs, albeit with no success.<sup>119</sup>

Sitting judges, too, have also spoken out against judicial elections.<sup>120</sup> In *Republican Party of Minnesota v. White*, Justices Ginsburg and Stevens stopped short of declaring judicial elections unconstitutional, but their views on judicial elections are clear. In her dissent, Justice Ginsburg argued that the announce clause, which the Court upheld, is constitutional because due process would be denied if an elected judge sat in a case involving an issue on which he had previously announced his view.<sup>121</sup> Such a judge would have a “direct, personal, substantial, and pecuniary interest” in ruling consistently with his previously announced view to minimize the risk that the judge would lose his job.<sup>122</sup>

With all these voices simultaneously opposing judicial elections, one would think that eliminating elections would be a simple task.

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115. MELINDA GANN HALL, *ATTACKING JUDGES* 1 (2015).

116. See, e.g., Aviva Abramovsky, *Justice for Sale: Contemplations on the “Impartial” Judge in a Citizens United World*, 2012 MICH. ST. L. REV. 713, 717 (2012) (“[T]here are only two legitimate societal choices available, accept the entrance of a pervasive, increasingly powerful influence on judges and its corollary of ever decreasing faith of the public in judges, or end judicial elections entirely.”).

117. Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1988 (1988) (“[R]ule of law requires that judges decide cases based on their views of the legal merits, not based on what will please voters.”).

118. Redish & Aronoff, *supra* note 99, at 2; see Redish & Marshall, *supra* note 99, at 498 (“[T]he use of non-tenured state judges seems to be a clear violation of procedural due process” in at least some cases).

119. See, e.g., Brief for Idaho Conservation League and Louisiana Environmental Action Network as Amici Curiae in Support of Neither Side at 24–30, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (No. 01-521).

120. Justice O’Connor is at the forefront of that movement.

121. See generally *White*, 536 U.S. at 803 (Ginsburg, J., dissenting).

122. *Id.*

But one group overwhelmingly favors judicial elections, and it is the one group that matters most: the people themselves. Despite their concerns about biased elected judges,<sup>123</sup> approximately 80% of the public supports judicial elections.<sup>124</sup> Recent efforts to move away from judicial elections have failed.<sup>125</sup> In fact, since judicial elections came to be the dominant form of judicial selection in the nineteenth century, no state has abandoned judicial elections to revert to a purely appointive system.<sup>126</sup> Doing so would require voters to deprive themselves of the right to vote, and that is not likely to happen. And although there is nothing illogical about a hybrid system of judicial elections followed by a single long term, or perhaps even life tenure,<sup>127</sup> the electorate seems uninterested in retaining the power to elect judges while abandoning power to hold those judges accountable for their decisions in office.

Not only has the movement to eliminate judicial elections failed to gain traction with the public, but the Court does not seem sympathetic to arguments that judicial elections are unconstitutional, either. In *Republican Party of Minnesota v. White*, Justice Scalia preemptively rejected any such arguments. Justice Scalia wrote:

[If] it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process. . . . [These views] are not, however, the views reflected in the Due Process Clause of the Fourteenth Amendment, which has coexisted with the election of judges ever since it was adopted.<sup>128</sup>

It is clear, therefore, that judicial elections are not going away.<sup>129</sup> If we are going to solve the problem of biased judges then it will not be by eliminating judicial elections, but rather by correcting for the biases that such elections create.

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123. Geyh, *supra* note 1, at 43 (noting that 80% of the electorate believes that elected judges are biased in favor of those campaign contributors who helped the judges' election campaign).

124. *Id.* at 72; Hall, *supra* note 34, at 73.

125. See, e.g., Chris W. Bonneau, Op-Ed., *Why We Should Keep Judicial Elections*, WASH. POST (May 26, 2011), [https://www.washingtonpost.com/opinions/why-we-should-keep-judicial-elections/2011/05/26/AGt08HCH\\_story.html](https://www.washingtonpost.com/opinions/why-we-should-keep-judicial-elections/2011/05/26/AGt08HCH_story.html), archived at <http://perma.unl.edu/X9PG-7CS8> (describing Justice O'Connor's failed effort in Nevada to eliminate the practice of partisan judicial elections).

126. In the last sixty years, twelve states abandoned partisan elections in favor of non-partisan elections and merit selection (which includes retention elections). Six other states abandoned non-partisan elections, again in favor of merit selection. HALL, *supra* note 115, at 7.

127. The most prominent proponent of such an approach is Professor Michael Dimino. See Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451, 457 (2008).

128. *Republican Party of Minn. v. White*, 536 U.S. 765, 782–83 (2002).

129. Frost & Lindquist, *supra* note 71, at 721 (“[E]lected judges are here to stay.”).



## 2. Election Reform

Recognizing that the fight to eliminate judicial elections is a lost cause, some have suggested that judicial elections can at least be transformed to reduce or eliminate the factors that lead to judicial bias. For example, to address the concern that elected judges favor their contributors, some have sought to shepherd in a system of public funding for judicial elections, greater restrictions on campaign contributions to judicial candidates, and more robust disclosure of campaign contributions.<sup>130</sup> To address the concern that judges tailor their decisions to the preferences of the electorate, reformers have suggested providing voter information pamphlets,<sup>131</sup> including more information on the ballot,<sup>132</sup> and a greater regulation and monitoring of judicial campaign conduct.<sup>133</sup>

The primary goal of these reforms is to ease, if not eliminate, some of the electoral pressure that judges feel as a result of: (1) facing the electorate to keep their jobs, and (2) deciding cases involving their contributors. The good news is that when it comes to this type of reform, the people are no longer an impediment, as many see the electoral system as broken—maybe even corrupt.<sup>134</sup> The bad news is that there is another impediment: the Supreme Court.

If a major problem regarding judicial bias is the presence of money, then perhaps the solution is to get the money out of the system. But most campaign-financing efforts have been decimated by recent Court decisions. For example, some states have experimented with public financing of judicial elections,<sup>135</sup> but at the core of such a system is a matching funds provision. A matching funds provision is necessary to ensure that if one candidate opts out of public financing and accepts contributions from donors, the other candidate can still run a competitive race by obtaining matching funds from the state. Without matching funds, public financing schemes fall apart.<sup>136</sup> In *Arizona Free Enterprise Club*, the Supreme Court eviscerated such provisions, hold-

130. Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1515 (2005).

131. David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115, 129–30 (2008).

132. Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 555 (2014).

133. The idea here is that judges are more likely to rule in favor of the preferences of the electorate when they have promised the electorate to rule a certain way in the court during their campaign for office.

134. See Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 168 (2007).

135. W. VA. CODE ANN. § 3-12-1 (LexisNexis 2013).

136. Scott W. Gaylord, *Unconventional Wisdom: The Roberts Court's Proper Support of Judicial Elections*, 2011 MICH. ST. L. REV. 1521, 1547 (2011) (“Given that candidates and corporations can spend their own money without limit, public financing

ing that they violate the First Amendment, and essentially taking public financing off the table as a means to curb the influence of money in judicial elections.<sup>137</sup> For example, North Carolina recently experimented with public financing for judicial elections. The experiment was largely unsuccessful as many candidates simply chose to opt out of the system, and the Court's decision in *Arizona Free Enterprise Club* severely limited the states' ability to reward those individuals who opted into the system.<sup>138</sup>

Recent Supreme Court decisions have also clarified that candidates and corporations can spend their money without limit.<sup>139</sup> Since the days of *Buckley v. Valeo*,<sup>140</sup> states have had broad discretion to limit campaign contributions, but those limits are also under attack.<sup>141</sup> In any event, it is not the contributions that are the problem. Take *Caperton*: Burt Blankenship contributed only a few thousand dollars to Justice Benjamin's campaign, but spent millions to get Justice Benjamin elected.<sup>142</sup> When it comes to the gratitude that Justice Benjamin would feel toward Blankenship, there is no meaningful difference between contributions and expenditures that equally help Justice Benjamin get elected.

Efforts to restrict candidates' campaign speech have likewise been dealt severe blows. Many states have historically prohibited judicial candidates from announcing their positions on cases likely to come before them. But in *Republican Party of Minnesota v. White*, the Supreme Court held that such bans also violate the First Amendment.<sup>143</sup> As a result, regulations on judicial speech and conduct are presumptively unconstitutional. Judges now frequently hit the campaign trail, discussing their positions on issues they are likely to see once on the bench, with the concomitant pressure to live up to those promises once on the bench.<sup>144</sup>

These reform efforts also suffer from a theoretical concern: why elect judges at all if we are going to regulate judicial elections in a way

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is necessary, but it is an attractive option to candidates only if they can receive matching funds to keep pace with their privately funded rivals.")

137. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

138. *Id.*

139. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that the First Amendment prohibits restrictions on independent expenditures by a nonprofit corporation).

140. 424 U.S. 1 (1976).

141. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014) (invalidating aggregate contribution limits by holding they violate the First Amendment).

142. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 873 (2009).

143. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

144. *See* Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317 (2010) (highlighting numerous instances of promises to be tough on crime that judges make in the course of their campaign).

that limits the candidates' ability to convey their message to the public and limits lawyers' and litigants' ability to inform the electorate about potentially erroneous decisions for which judges should be held accountable. The public is already relatively uninformed about judicial candidates and making it more difficult for judges (and others) to inform the voters seems counterintuitive to how we usually approach elections. Without judicial campaign speech and extensive (and expensive) advertising, voters are left in the dark. This forces voters to rely on cues that are entirely irrelevant, like candidates' names, or cues that make little sense in an election for a state trial judge, like party affiliations.<sup>145</sup> So while campaign contributions, expenditures, and promises to decide cases a certain way make judges more biased, they also make judicial elections more legitimate.<sup>146</sup>

### 3. *Recusal*

But what about recusal? After all, recusal is at the core of judicial ethics codes<sup>147</sup> and state recusal statutes,<sup>148</sup> and is at the heart of our current approach to the problem of judicial bias.<sup>149</sup> Under the Rules of Judicial Conduct in every state, a biased judge (or even one who appears to be biased) must step aside.<sup>150</sup> And even if judicial elections lead to judicial bias, perhaps those biased judges can, *ex post*, be prohibited from hearing certain cases.

Scholars have suggested that recusal is a potentially viable solution to the problem of judicial bias. Some have argued that recusal is "the *only* effective means to ensure the impartiality of elected

145. Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 690 (2002) (describing the importance of name recognition and ballot position and their impact on the likelihood of electoral success for a judicial candidate).

146. See Pozen, *supra* note 52 (describing this irony).

147. See, e.g., CONN. CODE OF JUDICIAL CONDUCT R. 2.11 (2011); N.M. CODE OF JUDICIAL CONDUCT, R. 21-400 (2004).

148. See, e.g., CONN. GEN. STAT. § 51-39 (2012); LA. CODE CIV. PROC. ANN. art. 151 (2011); ME. REV. STAT. ANN. tit. 14, § 1103 (2003).

149. There is, perhaps, one other alternative: educating the electorate about the judicial role and educating judges about bias, including unconscious and subconscious bias. See, e.g., Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis,"* 99 KY. L.J. 259, 295-324 (2011) (suggesting such strategies). I, too, have written about creating a more informed electorate, with the hope that this would lead judges to be less fearful about losing their jobs based on individual unpopular decisions. See Bam, *supra* note 132. While I continue to believe these efforts are important, such efforts permit the sources of bias to continue and are unlikely to be entirely adequate.

150. See, e.g., TEX. CODE OF JUDICIAL CONDUCT Canon 3 (2002); see generally Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1151-73 (2011) (reviewing the recusal codes and statutes in all fifty states).

judges,”<sup>151</sup> and that “recusal reform offers an effective, constitutional means of solving” the judicial bias problem that results from judicial elections.<sup>152</sup> In fact, recusal can arguably be “precisely targeted to preventing due process problems . . . without restricting campaign speech at all.”<sup>153</sup> In the last decade, and especially since *Caperton*, recusal has been a frequent topic in law journals.

Judges, too, have suggested that recusal can be a remedy to the election-related bias problem. In his *Republican Party v. White* concurrence, Justice Kennedy endorsed more stringent recusal standards as one acceptable means of preserving judicial impartiality.<sup>154</sup> In other words, to the extent that judicial campaigning endorsed by the Court’s decision in *White* creates either bias or the appearance of bias, Justice Kennedy explained that stricter recusal standards can eliminate that problem. Lower court judges have followed suit,<sup>155</sup> suggesting that even if judicial elections lead to judicial bias, recusal ensures that an impartial arbiter will hear the case.

This focus on recusal is not surprising. Recusal has tremendous allure because, at least in theory, it allows us to ensure judicial impartiality at the point of delivery. If recusal works to remedy election-related judicial bias, then states can continue with the practice of judicial elections with no concern about election-related bias influencing judicial decision-making. But, for two reasons, recusal does not work.

*a. Self-Recusal Procedure Is Inadequate*

One important reason why recusal has failed is the self-recusal procedure. In most states, as in the federal courts, judges decide their own recusal motions.<sup>156</sup> This recusal procedure has been followed throughout the United States since the country’s founding, and was

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151. McLucas, *supra* note 14, at 692 (emphasis added).

152. Stott, *supra* note 14, at 482; *see also* Mark Andrew Grannis, *Safeguarding the Litigant’s Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 415 (1987) (explaining that recusal is “a manageable solution to the problem of possible judicial bias”).

153. Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 568–70 (2004).

154. *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

155. *See, e.g.*, *Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 763 F. Supp. 128, 137 (E.D. Pa. 1991) (contending that judges whose impartiality could be questioned because of campaign promises could be required to recuse themselves under the state code of judicial conduct); *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672, 702 (E.D. Ky. 2004) (same).

156. Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 448 (2014).

followed in England for centuries before that.<sup>157</sup> While there are some exceptions, the judge's decision is final, subject only to appellate review. That appellate review, however, is generally highly deferential to the judge's decision, and reversals are rare.<sup>158</sup>

This self-recusal procedure is particularly inappropriate when it comes to addressing election-related judicial bias for several reasons. First, in the course of their campaigns, candidates for judicial office make all sorts of statements, announcements, and promises.<sup>159</sup> In the next election, voters are likely to expect the judge to have some record as to the category of cases where the judge made promises before. As a result, one might expect judges to hesitate before disqualifying themselves from cases involving issues about which they had campaigned (and, presumably, the issues that voters care about most).<sup>160</sup> Judges who recuse themselves from the cases voters care about most might find themselves out of a job.<sup>161</sup>

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157. See John A. Meiser, *The (Non) Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1803 (2009) (“[O]ur recusal procedures grew out of English common law practice.”).
158. Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1990 (2013) (“[S]elf-recusal decisions are reviewed deferentially and rarely reversed on appeal . . .”).
159. Frost & Lindquist, *supra* note 71, at 734 (describing the efforts of special interest groups to obtain judicial disclosure of their views and positions on contested issues).
160. See James Layman, *Judicial Campaign Speech Regulation: Integrity or Incentives?*, 19 GEO. J. LEGAL ETHICS 769, 775 (2006) (“[I]f a judge is required to recuse himself on all issues related to his campaign promises, ‘the voters do not get what they believe they were promised.’ (citations omitted)). While there have been few studies of voter expectations in judicial elections, studies of candidates running for office in other elections suggest that those candidates expect voters to evaluate them based on their record in office. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION 72–76* (1990) (arguing that voters evaluate the probability that a candidate will choose a voter-preferred policy based on an evaluation of the candidate's records).
161. In fact, some have argued that requiring recusal under these circumstances undermines the purpose of judicial elections. Why have elections, the argument goes, if any substantive information that a candidate can provide to a voter about what they would do when in office disables the judge from doing what they promised? According to some scholars, providing voters with information about a judge, and then requiring the judge who provided the information to recuse from those cases, “work[s] a fraud on the voters.” Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. L. ETHICS 1059, 1076 (1996); see also Penny J. White, *A Matter of Perspective*, 3 FIRST AMENDMENT L. REV. 5, 63–75 (2004) (arguing that mandatory recusal rules might run afoul of First Amendment); Andrea Spektor & Michael Zuckerman, *Judicial Recusal and Expanding Notions of Due Process*, 13 U. PA. J. CONST. L. 977, 1013 (2011) (“If recusal burdens speech, then affording too much weight to a litigant's due process rights may infringe upon the presiding judge's right to speak outside the courtroom, including on the campaign trail, thus harming the marketplace of ideas.”).

The second reason why the self-recusal procedure is ill-suited to addressing election-related judicial bias is that judges might feel that recusing themselves for their campaign statements and conduct would imply that the campaigning itself had been improper. In addition, the ethics codes require judges to recuse sua sponte, meaning that recusal motions put judges in a difficult spot: “[A] successful motion to recuse requires the [judge] to admit that he failed in the first instance to adhere to statutory and ethical requirements.”<sup>162</sup> Even an unbiased judge may worry that a recusal sends a message that he is biased.<sup>163</sup>

Third, the self-recusal procedure is the least effective precisely when it is needed most. Take, for example, the situation where a judge is biased in favor of a financial contributor to the judge’s previous election.<sup>164</sup> Recusal eliminates the judge’s ability to repay his debt of gratitude.<sup>165</sup> And if a judge does recuse himself in every case involving that contributor, that contributor is likely to take his money elsewhere. As a result, the more biased the target judge is, the less likely that judge is to recuse himself.<sup>166</sup> In fact, in a study of judicial voting by the Ohio Supreme Court, the *New York Times* found that in “the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times.”<sup>167</sup>

Moreover, judges rarely recognize their own biases, or even the appearance of bias, because such bias is often subconscious.<sup>168</sup> Take *Caperton’s* Justice Benjamin: he was convinced that he was not biased, and presumably, since he did not recuse, that no one could per-

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162. R. Matthew Pearson, Note, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1833–34 (2005).

163. James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES J. 17, 20 (2007).

164. Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 700 (1995) (“Ordinary rules of social interaction impose obligations of gratitude and loyalty on those who receive a significant benefit.”).

165. In *Caperton*, the Supreme Court emphasized the debt of gratitude that Justice Benjamin owed to Bert Blankenship as one of the reasons recusal was required under the Due Process Clause. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2009).

166. See, e.g., Chris Guthrie, Jeffrey Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

167. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES (Oct. 1, 2006), <http://www.nytimes.com/2006/10/01/us/01judges.html>, archived at <http://perma.unl.edu/J6SM-UBVY>.

168. See Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1333 (2006) (“Because so many biases operate on subconscious levels, it is often difficult for individuals to gauge the factors that may skew judgment.”). The work of Jeffrey Rachlinski, Andrew Wistrich, and Chris Guthrie has demonstrated that judges suffer from similar unconscious biases as the general population. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

ceive him as biased.<sup>169</sup> Modern research in cognitive psychology tells us why—the cognitive biases that affect judicial decisions make it impossible for judges to assess their own conduct dispassionately and open-mindedly.<sup>170</sup> Social science literature refers to this as the “Bias Blind Spot.”<sup>171</sup> The Bias Blind Spot means that everyone, including judges, makes important decisions in a manner skewed to favor their own self-interest.<sup>172</sup> As a result of this tendency, people tend to think they are better than they actually are at a number of different tasks and on a number of different criteria, including fairness and impartiality.<sup>173</sup> Judges are not immune: they overestimate their ability to remain impartial and ignore evidence of judicial bias.<sup>174</sup>

And while shifting the recusal decision to another judge may fix the constitutional objections to the self-recusal procedure, such a shift is unlikely to be a panacea. Judges respect each other, and hesitate to impugn each other’s ability to remain impartial.<sup>175</sup> Furthermore, no third party can decide whether another judge is actually biased without a true adversarial process where both sides present evidence of their state of mind. Recusal is a dispute between a judge and a liti-

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169. Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform*, 32 ST. LOUIS U. PUB. L. REV. 235, 276 (2013) (“Justice Benjamin did what most of us do when evaluating our own biases—he succumbed to the Introspection Illusion, which confirmed his belief that he was not biased in this specific instance.”); Jeffrey W. Stempel, *Impeach Brent Benjamin Now!? Giving Adequate Attention to Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. 1, 53–56 (2010) (discussing the standards applied, and conclusions reached, by Justice Benjamin).
170. See Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913 (1999) (discussing unconscious bias); see also Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133, 143–80 (2000) (discussing self-serving bias).
171. Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 370 (2002).
172. See Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 568 (2003).
173. See David Messick et al., *Why We Are Fairer Than Others*, 21 J. EXPER. SOC. PSYCHOL. 480 (1985).
174. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519–20 (2009). Interestingly, judges are able to identify this bias in their colleagues, but not in themselves. Most judges simply see themselves as “above average.” Guthrie, Rachlinski & Wistrich, *supra* note 166, at 814–15.
175. Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1237 (2002) (discussing the “resistance of other appellate judges to the idea of evaluating allegations of bias or prejudice against their colleagues”); Note, *Disqualification of a Federal District Judge for Bias—The Standard Under Section 144*, 57 MINN. L. REV. 749, 767 (1973) (“Many courts are understandably reluctant to disqualify a fellow judge since a finding of actual prejudice . . . impugns both that judge’s qualifications and those of the system he represents.”).

gant, and an adversarial process that allows those two sides to present their dispute to a neutral third party would be cumbersome and inefficient.<sup>176</sup>

*b. Every Judge Is Potentially Biased*

Admittedly, in some circumstances, recusal works well. For example, recusal is perfectly suited for a situation where one can identify a specific source of bias from which a particular judge suffers. If the source of bias is unique to the judge in question—perhaps the judge owns stock in one of the corporate litigants, or has a close relationship with one of the parties, or has personal knowledge of the facts of the case—then recusal is a perfect fit.<sup>177</sup> The sources of bias are objectively identifiable, and other judges who do not suffer from the same biases may be found. Removing the biased judge from the case eliminates the bias entirely.<sup>178</sup>

But for election-related bias, things are not so simple. The majoritarian difficulty affects *every* state judge who must run for reelection. No judge is safe from the threat of losing the next election. Every judge must consider how her decisions will be characterized in the next election cycle or how potential contributors would react to the decision. When it comes to this election-related bias, recusal is inadequate. Removing one judge who feels pressure to tailor his rulings towards a potential reelection bid, and replacing him with another judge who feels identical pressure, does little to ensure judicial impartiality. The case must still be heard by a judge—there is simply no way to get around that requirement—and every judge will suffer from the same job-security biases. This is particularly true with the majoritarian difficulty; it applies to all elected judges, not just those who received campaign contributions. In short, current recusal rules leave judges essentially immune from punishment for acting in a biased manner,<sup>179</sup> and when it comes to election-related judicial bias, recusal seems to be an inadequate solution.

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176. Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 171–72 (2004) (discussing the efficiency concerns of third-party review of recusal decisions).

177. See 28 U.S.C. § 455(b) (2011) (listing specific circumstances when judicial disqualification is required).

178. For example, under 28 U.S.C. § 455(b), a judge must recuse if he has “personal knowledge of disputed evidentiary facts concerning the proceeding.” Replacing that judge with one who does not have such “personal knowledge” alleviates the problem entirely. *Id.*

179. I am not suggesting a draconian check is necessary. Cf. M.H. Hoeflich, *Regulation of Judicial Misconduct from Late Antiquity to the Early Middle Ages*, 2 LAW & HIST. REV. 79, 82 (1984) (discussing the approaches adopted throughout Europe in the seventh and eighth centuries, including liability to the aggrieved party (and sometimes even the crown) on judges who decided cases as a result of favoritism to the other party).



### III. AN ORIGINALIST SOLUTION: THE JURY AS A CHECK ON JUDICIAL BIAS

For many years, scholars have decried judicial elections and sought answers to the judicial-bias problem described in Part II. Nonetheless, there has been little headway. Now, with every new study showing the extent of judicial bias, the concerns have become dire.

But this is not the first time in our nation's history that concerns about judicial bias were at the forefront of national conversation. In fact, Americans worried about corrupt and biased judges long before judicial elections became popular. In the late-eighteenth and early-nineteenth centuries, judicial independence and impartiality were central to the debates leading up to American independence, as well as the drafting and ratification of the Constitution. But for our forefathers, the solution was not recusal.<sup>180</sup> Instead, the founding generation looked to the people themselves to check judicial bias. They inserted the people directly into the judiciary to control judicial corruption and bias from within. The people, serving on juries, would act to hold judges accountable, and ensure that judges lived up to the principles of the Constitution. For them, the jury was the quintessential bulwark of liberty—a way for ordinary people to stand up to government officials, including judges, and to ensure judicial impartiality.

#### A. The Founders' Fear of Judicial Bias

Although the Founders did not have to worry about judicial elections,<sup>181</sup> they were very concerned about judicial bias and corruption, and generally distrusted judicial power. There were a number of fears—many of which are analogous to modern-day concerns about election-related judicial bias. First, eighteenth-century Americans considered judges to be easily corruptible. Since judges—at least trial judges—typically work alone, and there are few of them in most jurisdictions, they might be bribed or otherwise influenced by those who appointed them, or by those who appear in front of them. One wealthy or powerful litigant who frequently appears in a certain courtroom could easily approach a judge with a bribe, a threat, or a promise.

Second, Americans feared that judges, as government agents, might be biased in favor of the government—especially the Executive

180. In fact, recusal was not even required for bias under British common law or at the time of the founding in the United States. Recusal was only required when a judge had a financial interest in the outcome of the case. Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 952 (discussing the common law recusal standards).

181. Judges were appointed by the governor, the legislature, or both at this time, as judicial elections did not become popular until the middle of the nineteenth century. See *supra* notes 28–29.

Branch—not because of corruption but because of human nature.<sup>182</sup> This was especially true in criminal cases, as well as civil claims against government officials, where judges might go easy on their fellow government officers. After all, both the judge and the Executive official would be on the government's payroll and might have the same (governmental) interests at heart. Pamphlets of the Revolutionary Era frequently included complaints about judicial partisanship in favor of other branches of government.<sup>183</sup>

Third, judges might also be biased in favor of their friends or the community from which they came. After all, American judges are typically prominent individuals, who may have prominent friends. For example, Blackstone acknowledged that while judges are presumed to be impartial, judges “will have frequently an involuntary bias towards those of their own rank and dignity.”<sup>184</sup> Akhil Amar, describing the Founders' concerns, explains that “[u]nchecked by a jury, a judge might be tempted . . . to go easy on his wealthy friends.”<sup>185</sup>

These fears were not irrational. Rather, they were based on the colonists' experience with the judiciary, both in England and in the colonies, in the decades leading up to American independence. For example, British judges were perceived as frequent allies of tyrannical government officials, aligned with the government against the people.<sup>186</sup> In the words of one leading Anti-Federalist, “[A] lordly court of justice [is] always ready to protect the officers of government against the weak and helpless citizen.”<sup>187</sup> The colonial experience with judges was often similar. One of the biggest complaints during the Stamp Act Crisis in 1765 and 1766, for example, was about judicial bias in

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182. Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1341 (2012) (“Citizens could not trust judges to act independently and decide cases without bias toward the British government.”).

183. See ESSAYS OF AN OLD WHIG (1788), reprinted in 3 THE COMPLETE ANTI-FEDERALIST 49 (Herbert A. Storing ed., 1981) (“Judges, unencumbered by juries, have been ever found much better friends to government than to the people. Such judges will always be more desirable than juries to [tyrants].”).

184. 3 WILLIAM BLACKSTONE, COMMENTARIES \*379.

185. AKHIL REED AMAR, AMERICA'S CONSTITUTION 237 (2005). This fear of judges was part of a widespread contempt for lawyers throughout the country during the Colonial Era. And judges, as former lawyers, could just as easily “subvert every principle of law and establish a perfect aristocracy.” Jeffrey R. Pankratz, *Neutral Principles and the Right to Neutral Access to the Courts*, 67 IND. L.J. 1091, 1103 (1991) (citing C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 191 (1970)).

186. See AKHIL REED AMAR, THE BILL OF RIGHTS 87 (1998) (describing “the case of Prynne and the infamous ‘Bloody Assizes’ of Judge George Jeffreys”), for examples of a number of high-profile instances in which British judges “abetted government tyranny.”

187. ESSAY OF A DEMOCRATIC FEDERALIST (1787), reprinted in THE COMPLETE ANTI-FEDERALIST, *supra* note 183, at 61.

trials for colonists accused of failing to pay new taxes.<sup>188</sup> And as Akhil Amar explains, “In ten of the thirteen colonies, the sitting chief justice or his equivalent ultimately chose George III over George Washington” during the Revolution.<sup>189</sup> The “intense and widespread anti-judge sentiment”<sup>190</sup> was a common feature of early American law. Colonists believed that British judges were biased, and their opinion of colonial judges was not all that different.

These concerns did not dissipate with the adoption of the Constitution, which offered federal judges life tenure and almost complete judicial independence. When it came to protecting individual rights and liberties, judges alone could not—and would not—be trusted. Even Article III judges—perhaps the most independent judicial officers in the world—were thought to be too biased to serve impartially the role of the gatekeeper. After all, these judges were appointed by other federal elected officials<sup>191</sup> and may not have the willpower (or the desire) to stand up to those officials in favor of individual litigants.<sup>192</sup> No matter how independent the judges were, colonists continued to believe that judges would tend to favor the government, the wealthy, and their friends over the interests of the common people.<sup>193</sup>

## B. What: The Jury Solution

What was the Founders’ solution to the problem of judicial bias? Unlike modern-day Americans, they did not trust judges to ensure their own impartiality through panoply of recusal rules. In fact, eighteenth-century recusal rules did not even apply to biased judges. Back then, recusal was required only when a judge had a financial stake in the outcome of the case.<sup>194</sup> Instead, the solution to judicial bias was installing a check on judges within the judiciary itself.<sup>195</sup> And that

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188. JEFFREY ABRAMSON, *WE, THE JURY 23* (Harvard Univ. Press 2000) (1994).

189. AMAR, *supra* note 185, at 207.

190. Roger Roots, *The Rise and Fall of the American Jury*, 8 SETON HALL CIRC. REV. 1, 8 (2011).

191. *See* U.S. CONST. art. III.

192. In fact, this is precisely what happened when Congress passed the Alien and Sedition Acts to stifle Republican criticism of the Federalists. The partisan response of the Federalist judges exemplified the Founders’ concerns about judicial independence and the ability of judges to halt unconstitutional governmental action.

193. *See* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 105 (1967).

194. *See* Bam, *supra* note 180, at 952 (discussing the common law recusal standards).

195. Of course, the jury would also serve as a check on legislative and executive authority. *See* Thomas A. Green, *The English Criminal Trial Jury and the Law-Finding Traditions on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900*, at 41, 61 (Antonio Padoa Schioppa ed., 1987) (discussing the role of the jury as a surrogate for what was “viewed as a corrupt and unrepresentative parliament”).

role was entrusted to the juries. As much as Americans in the late-eighteenth century distrusted judges, they revered juries. One of the main reasons for this reverence was that it gave people the power to check corruption within the judicial branch.<sup>196</sup> While we typically think of the *criminal* trial jury as an “essential part of the English government [and] a necessary counter to governmental authority,”<sup>197</sup> this was no less true of civil juries.<sup>198</sup> “For many purposes until the nineteenth century the civil and criminal jury were inseparable . . . .”<sup>199</sup> Colonial supporters of the jury strongly believed that the right of trial by jury in civil cases was an important bulwark against tyranny and corruption, and would serve as a check on corrupt and biased judges.<sup>200</sup> In the early years of this nation “the jury came to be viewed as an essential counterbalance to the threat of excessive judicial power.”<sup>201</sup>

The right to a trial by jury was central in the American campaign for independence. The deprivation of that right was one of the causes of the American Revolution.<sup>202</sup> A key charge against the King in the Declaration of Independence was that he deprived the colonists “of the benefits of Trial by Jury.”<sup>203</sup> Indeed, the right to a jury trial was the only right protected in every state constitution of the founding era.<sup>204</sup>

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196. See BAILYN, *supra* note 193, at 73–76.

197. Suja A. Thomas, *Blackstone’s Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1201 (2014).

198. Solomon, *supra* note 182, at 1340 (“Historically, the civil jury in the United States, like the criminal jury, was justified in large part as a check against the abuse of government power.”).

199. John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY, 1700–1900, *supra* note 195, at 13, 15.

200. Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 150–53 (1991).

201. Stephen H. Landsman, *The History and Objectives of the Civil Jury System*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 22, 23 (Robert E. Litan ed., 1993).

202. See ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868 (2006) (discussing American outrage over Parliament’s creation of juryless courts to adjudicate certain cases).

203. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776). Other Revolutionary Era documents, including the 1774 Declaration of Rights of the First Continental Congress and the 1775 Declaration of the Causes and Necessity of Taking Up Arms, also listed the denial of the right to a jury trial as a grievance against the British government. AMAR, *supra* note 186, at 83.

204. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870–71 (1994). In fact, not only did the constitutions of all original colonies guarantee the right to a jury trial, but every state that entered the union after the ratification of the Constitution did so with a constitution that protected the right in criminal cases. See *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968).

The right to a jury trial was also important in the debates surrounding the adoption of the Constitution.<sup>205</sup> In fact, when the original draft of the Constitution failed to include the right to a jury trial in civil cases, the opposition to the omission almost derailed the entire project.<sup>206</sup> Although the Constitution was ultimately ratified, seven states' ratifying conventions specifically conditioned ratification on a future amendment guaranteeing the right to jury trial in civil cases.<sup>207</sup> Once again, the jury's power to "check the caprice of biased judges" was at the forefront of the colonists' minds.<sup>208</sup> In the words of the Federal Farmer, juries "secure to the people at large their just and rightful control in the judicial department."<sup>209</sup> According to James Madison, the jury would provide a check on governmental power, giving the people direct control over elements of government.<sup>210</sup> Alexander Hamilton also saw the jury as "security against corruption."<sup>211</sup> By inserting the people directly into the judiciary, the people would play a direct role in the administration of justice and in protecting the people from government overreach.<sup>212</sup> Historians and legal scholars, from de Tocqueville to Akhil Amar, have written volumes emphasizing the jury's role as a check on governmental agents.<sup>213</sup>

As is often the case, the writings of Thomas Jefferson reflect the sentiment of the time. In a letter to the Abbé Arnoux in 1789, Thomas Jefferson also focused on the jury as an antidote to the problem of judicial bias. Jefferson argued:

[Judges may be] misled by favor, by relationship, by a spirit of party, by a devotion to the Executive or Legislative . . . . It is left therefore to the juries, if

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205. AMAR, *supra* note 185, at 233–35.

206. *Id.*; see also PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 (2010) (discussing Anti-Federalist arguments against the Constitution based on its failure to protect jury trials); WILLIAM H. RIKER, THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION 26, 265 (1996) (same).

207. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"); *id.* at amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .").

208. Stacey P. Eilbaum, *The Dual Face of the American Jury*, 98 CORNELL L. REV. 711, 717 (2013).

209. 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 183, at 19.

210. 1 ANNALS OF CONG. 453 (1789) (Joseph Gales ed., 1834) (statement of James Madison).

211. THE FEDERALIST No. 83 (Alexander Hamilton).

212. Letter from Federal Farmer (Oct. 12, 1787), in 5 THE FOUNDERS' CONSTITUTION 53 (Philip B. Kurland & Ralph Lerner eds., 1987) ("It is essential in every free country, that common people should have a part and share of influence in the judicial as well as in the legislative department."); see also Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in 5 THE FOUNDERS' CONSTITUTION 363, 364 ("[I]t is necessary to introduce the people into every department of government.").

213. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1966); AMAR, *supra* note 186, at 73–76, 87.

they think the permanent judges are under any bias [sic] whatever in any cause, to take upon themselves to judge the law as well as the fact. Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.<sup>214</sup>

In discussing the importance of the jury to democratic government, Anti-Federalists emphasized that in a dispute between a citizen and a federal officer, a judge would likely be biased in favor of the government official rather than the “helpless citizen.”<sup>215</sup> The jury, the argument went, would serve as an equalizer—a way around biased judges. The fact that judges in most states are now elected, rather than appointed, only increases the importance of the jury as a check.

The Supreme Court, too, has recognized that checking against judicial bias was one of the key functions of the jury when it incorporated the right to a jury trial against the states. In *Duncan v. Louisiana*, the Court explained that “[t]hose who wrote our constitutions knew from history and experience that it was necessary to protect . . . against judges too responsive to the voice of higher authority.”<sup>216</sup> The jury was “an expression of American concerns about judicial independence.”<sup>217</sup>

### C. Why: The Advantages of the Jury

Of course there are a number of reasons for why the Founders revered the jury,<sup>218</sup> many of which had nothing to do with judicial bias. But specifically with respect to judicial bias, why was the jury their chosen mechanism to control biased judges? The Founders were not so naïve as to believe that juries were perfect or that jurors cannot be subject to biases. Rather, they viewed the jury as part of the checks and balances scheme that they created in the Constitution. Just as the House and the Senate might check each other, the lay jurors might act as a “counterpoise” to a professional judiciary.<sup>219</sup>

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214. Letter from Thomas Jefferson to the Abbé Arnoux, *supra* note 212, at 364.

215. *A Democratic Federalist*, PENN. HERALD, Oct. 17, 1787, reprinted in 4 THE FOUNDERS' CONSTITUTION, *supra* note 212, at 393.

216. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

217. Landsman, *supra* note 201, at 23.

218. For example, the Founders emphasized the educational function that the jury might serve, allowing people to become educated of the laws under which they live. In addition, the jury might be able to reach a more just result, even if the judge is not biased. There is a long line of literature describing these justifications for the jury. See, e.g., J. KENDALL FEW, IN DEFENSE OF TRIAL BY JURY (1994); WILLIAM DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY (2002). The jury was also the voice of the community. See TOCQUEVILLE, *supra* note 213. Finally, because there were many jurors, the jury might actually serve to act as a more accurate decision-maker.

219. See ARTHUR O. LOVEJOY, REFLECTIONS ON HUMAN NATURE 37–65 (1961).

First, unlike judges, who could be easily corrupted, jurors would be a much more difficult target. In fact, in the eighteenth century, a number of colonists argued in favor of the jury motivated precisely by this fear of corruption.<sup>220</sup> Elbridge Gerry, for example, “urged the necessity of Juries to guard [against] corrupt Judges.”<sup>221</sup> The reasons are obvious: because judges were known well in advance of trial, they would be much easier to approach and corrupt than a jury. As Blackstone observed, the jury is “not appointed till the hour of trial.”<sup>222</sup> In addition, it would take a lot more effort and resources to corrupt a large body, like the jury, than a single judge.

Second, the jury was and continues to be made up of ordinary citizens who are not on the government payroll. The jury thus would not be subject to many of the biases that sway judges. That is true even for life-tenured federal judges, who “depend upon their role for their livelihood.”<sup>223</sup> The Founders recognized “the corruptions of power and the temptations of office” that judicial appointments would bring.<sup>224</sup> They were concerned largely that those judges would owe a debt of gratitude to their former benefactors (i.e., the President and the Congressmen that appointed them). For jurors, who came to their office for a single case and would afterwards return to their normal life afterwards, there were far fewer temptations. Jurors, unlike judges, were not “dependent on the executive for money and position.”<sup>225</sup> They owed their job to no one and would have to answer to no one for their decisions.<sup>226</sup> Since the agreement of both branches of the judiciary (the people and the judges) would be required to reach a final ver-

220. Paul K. Sun, Jr., *Congressional Delegation of Adjudicatory Power to Federal Agencies and the Right to Trial by Jury*, 1988 DUKE L.J. 539, 557 (1988) (“The Framers recognized that at least one function of the seventh amendment was to protect individual litigants against corrupt judges . . .”).

221. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 369 (2009) (quoting Notes of James Madison (Sept. 12, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 585, 587 (Max Farrand ed., rev. ed. 1966)).

222. 3 WILLIAM BLACKSTONE, COMMENTARIES \*380; David F. Partlett, *The Republican Model and Punitive Damages*, 41 SAN DIEGO L. REV. 1409, 1423 (2004) (“[The jury’s] shifting and impermanent composition restricts the ability of powerful factions and government from suborning the judicial process.”).

223. See Teachout, *supra* note 221, at 369.

224. WILLIAM EATON, WHO KILLED THE CONSTITUTION?: THE JUDGES v. THE LAW 3 (1988).

225. Thomas, *supra* note 197, at 1202 (citing THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800, at 334 (1985)).

226. Of course, this raises its own concerns. One of the major criticisms of civil juries, for example, is the fact that they do not have to explain their decisions, and the decisions they reach are often irrational or based on passion and prejudice. My proposal of a Hybrid Judicial Panel addresses, at least partially, such concerns because jurors would have to deliberate alongside judges and would likely feel obliged to explain their reasoning to the trial judge. See *infra* Part IV.

dict, biased judges alone would be powerless to impose their biases on the people.<sup>227</sup>

Not only would jurors have no biases in favor of the government, they would not be biased in favor of a specific class or set of friends. Whereas a judge might have certain bonds with the powerful or the wealthy, the jury, as a group, would remain impartial and independent. As William Blackstone explained, “[T]he most powerful individual in the state will be cautious of committing any flagrant invasion of another’s right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men.”<sup>228</sup> In fact, the Founders recognized that judicial bias might even be involuntary. Again, in Blackstone’s influential words:

The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to [judges], their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity.<sup>229</sup>

Another important reason why the Founders believed in the jury is that they had experienced first-hand the jury’s ability to stand up to judges who were perceived to be biased. By the late-eighteenth century, the jury had developed a reputation of standing up to power, including judicial power. Two incidents had a particularly profound influence on Americans of the eighteenth century, shaping their views about the role of the jury. First was the jury’s refusal to convict Quakers William Penn and William Mead.<sup>230</sup> The two men were prosecuted for preaching in public. The jury faced strong judicial pressure, and when the jury refused to convict, the judge fined and jailed the jurors. One of the jurors, Edward Bushel, sought habeas corpus, and the Court of Common Pleas held that jailing or fining the jurors was improper. A similar incident took place two decades later, when another London jury acquitted seven bishops of sedition libel, again in the face of judicial pressure.<sup>231</sup>

The colonial experience was shaped by a similar incident. When John Peter Zenger, who had accused the Governor of New York of cor-

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227. Cf. Letter from Federal Farmer (Jan. 18, 1788), in 4 THE FOUNDERS’ CONSTITUTION, *supra* note 212, at 397, 397 (explaining that if judges were to “subvert the law,” then the jury would “check them by deciding against their opinions and determinations.” (punctuation omitted)). Again, this is analogous to the Founders’ design for the federal legislature, where both the lower and the upper houses must agree to pass a law. See U.S. CONST. art. I.

228. 3 WILLIAM BLACKSTONE, COMMENTARIES \*380.

229. *Id.* at \*379.

230. For a brief summary of William Penn’s trial and the subsequent events, see Scott Turow, *Best Trial; Order in Court*, N.Y. TIMES (Apr. 18, 1999), <http://www.nytimes.com/1999/04/18/magazine/best-trial-order-in-the-court.html>, archived at <http://perma.unl.edu/M4JZ-E2ST>.

231. See RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 14–30 (2003).



ruption, was charged with seditious libel in 1735, the judge instructed the jury to convict Zenger if it found that he had published the statement in question. There was no question that he had done so. But Zenger's lawyers argued that the jury could find in favor of Zenger even if conviction was required by the judge's instructions. Zenger was acquitted, and to the Founders, the case stood for the proposition that jurors could defend fundamental rights even when judges were unlikely to do so.<sup>232</sup>

In fact, the seditious libel cases are a perfect example of the jury at work checking judicial bias. Only two people were convicted under the law in America during the colonial period, while hundreds of defendants were convicted of the same crime in England.<sup>233</sup> The main reason was that even when judges were sympathetic to the law, grand juries refused to indict individuals of the crime, and when they did, petit juries refused to convict.

The bias concerns arising out of elections are parallel to those that the Founders were worried about. The Founders were worried that judges would be biased to government and wealthy friends. The election-related concerns are almost identical; judges are biased in favor of their donors and in favor of the partisan preferences of the voters. The Founders were worried that it would be easier to bribe a permanent judge than temporary jurors. Although bribery might still happen, it is more likely targeted at a judge than used to influence the jury.

The jury, as the "lower house" of the judiciary, is not subject to the same biasing influences as judges. Take money, for example. While wealthy individuals contribute money to judges, they cannot do so with juries without violating state and federal bribery laws.<sup>234</sup> Unlike an elected judge, the jury can stand up to the influence of money, the fear of losing an election, or concern about breaking campaign promises. And although an elected judge might be reasonably nervous about how the public will react to his or her decision in a future election, jurors have no such worries, because they are the public, and they are one-shot players with no need to maintain the job. Jurors need not be afraid of how a wealthy corporation will react to their decisions or how their decisions will appear to future voters.

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232. *Id.* at 24.

233. See LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 17 (1985).

234. See THE FEDERALIST No. 83 (Alexander Hamilton) ("As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter.").

#### D. How: Giving Juries the Power to Act as a Check

The Founders' reliance on the jury was not merely theoretical or rhetorical. The jury in fact had the power and the tools to check judges. What made the jury such an effective check on judicial bias? There are two major reasons.

First, there were lots of jury trials.<sup>235</sup> American colonists sought to “channel as much judicial business as possible” into juried courtrooms.<sup>236</sup> Most civil cases, at least cases involving damages, were tried to a jury.<sup>237</sup> Settlement was fairly uncommon—arbitration even less so—which means that the most important decisions in the case were made by jurors.

Perhaps most importantly, there were few devices allowing judges to decide cases on motions without the input or involvement of the jury. Before trial, on a procedure called the demurrer to the pleadings, a litigant could admit all the facts as stated by the opposing side.<sup>238</sup> This procedure is somewhat akin to the modern Rule 12(b)(6) motion, but a demurrer was a risky proposition for a litigant. If the defendant lost the motion, then the plaintiff won the case since the defendant had admitted all the facts.<sup>239</sup> As a result, these motions were rarely brought or granted.<sup>240</sup>

But if the defendant did not file a demurrer motion and the plaintiff did not voluntarily drop the case (a procedure called a nonsuit),<sup>241</sup> the case would go to the jury. The judge could not grant judgment in favor of one of the parties because, in the judge's opinion, the facts seemed unlikely or implausible, or because the judge concluded that no reasonable jury would rule in favor of a litigant. That was the jury's decision. If, after trial, the judge was convinced that the evidence was insufficient to support the jury's verdict, he could order a new trial.<sup>242</sup> But ultimately, it was the jury who decided which party should win, and how much should be awarded in damages. Judges

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235. See James Oldham, *Law-Making at Nisi Prius in the Early 1800s*, 25 J. LEGAL HIST. 221, 226 (2004); Thomas, *supra* note 197, at 1209 (“[M]any jury trials occurred.”).

236. AMAR, *supra* note 186, at 110.

237. Under English common law, the jury heard all cases involving damages while equity court judges decided issues involving equitable relief, including specific performance and injunctions. Suja A. Thomas, *A Limitation on Congress: “In Suits at Common Law,”* 71 OHIO ST. L.J. 1071, 1084–96 (2010).

238. See Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 706–07.

239. See *id.*

240. See *id.* at 709, 712.

241. *Id.* at 722–25.

242. If the second jury agreed with the first, a third trial was rarely ordered. 3 WILLIAM BLACKSTONE, COMMENTARIES \*387.

had no fact-finding power, and the jury could play an active role with virtually no judicial interference.<sup>243</sup>

Not only was the jury able to act as a check on biased judges in making its decision, but its mere presence served a watch-dog function. With the jury constantly monitoring judicial behavior, and perhaps reporting their observations to fellow citizens, judges would think twice before engaging in corrupt or biased behavior. That is one big benefit of jury trials: they require judges to act openly and publicly. In fact, some have argued that the court-watching function is the core interest of the jury system.<sup>244</sup>

Another important reason why the jury was able to act as a check on judicial bias was the scope of the jury's power when those trials took place. The jury of our Founders had a significant law-finding power. The jury's power of "jury review"—the ability to acquit a defendant who was charged under what the jury deemed to be an unconstitutional law—was at the core of the jury's powers. The Supreme Court (in *Georgia v. Brailsford*) held that this law-finding power was one of the rights of the jury.<sup>245</sup> In fact, some state constitutions expressly provided for the jury's law-finding power. The language of Georgia's constitution exemplifies this approach: "The jury shall be judges of law, as well as of fact."<sup>246</sup> James Wilson, one of the leading drafters of our Federal Constitution, wrote that the jury is "the ultimate interpreter[ ] of the law."<sup>247</sup> Any other approach, according to John Adams, would be an "absurdity."<sup>248</sup>

The power that the common law jury wielded was much more than the mere ability to engage in jury nullification, a power that exists to

243. Incidentally, the same pattern holds true when it comes to criminal cases. At around the time of the founding, there was little plea bargaining. Pleas were atypical, and plea bargaining was viewed with suspicion. Alschuler & Deiss, *supra* note 204, at 923–24. Nearly every prisoner demanded a jury trial, without countervailing pressure by the court. J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND: 1660–1800*, at 336–37 (1986) (discussing the prevalence of jury trials in criminal cases and a lack of support for plea bargaining). There were no trials by judge alone as a trial without the jury was seen as illegitimate. See *Thompson v. Utah*, 170 U.S. 343 (1898) (holding that a defendant cannot waive the right to a trial by jury).

244. Daniel J. Kopp, Note, *A Constitutional Right of Access to Pretrial Documents: A Missed Opportunity in Reporters Committee for Freedom of the Press*, 62 *IND. L.J.* 735, 748–49 (1987) (discussing the importance of public monitoring of judges).

245. *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) ("Gentlemen, . . . you have . . . a right to take upon yourselves . . . to determine the law as well as the fact in controversy.").

246. GA. CONST. art. 1, § 1, para. IX.

247. AMAR, *supra* note 186, at 100 (quoting 2 *THE WORKS OF JAMES WILSON* 221 (James DeWitt Andrews ed., 1896)).

248. 2 *THE WORKS OF JOHN ADAMS* 254 (Charles Francis Adams ed., 1850) (explaining that the jury should disregard the judge's instructions on the law if such instructions were "against [the jury's] own opinion, judgment, and conscience").

this day. Rather, the jury had a legal right, and a moral right, to judge both law and fact. Lawyers frequently argued the law to the jury. And many commentators of the time agreed that the jury has the duty to find both the law and the facts.<sup>249</sup> This power lays largely in the jury's ability to render a general verdict.<sup>250</sup>

#### IV. RESURRECTING THE JURY

Part III showed that at the time of the founding, the civil jury was the primary check on judicial bias in civil litigation. But today, the idea that the civil jury can check judicial bias makes little sense. The reason is that the civil jury is virtually dead.

##### A. The Decline of the Jury

What has happened to the jury? Despite its prominent role in American history, the civil jury has been essentially eliminated as a major player in our justice system. Recall that the primary reason that the jury was able to perform its bias-checking function at common law was because jury trials were common. Today, jury trials make up less than 1% of all state court civil disposition.<sup>251</sup> Few lawyers, even litigators, ever see the inside of the courtroom. In a span of two centuries we have gone from trials in almost all civil cases involving damages, to almost none. The decline began in the nineteenth century.<sup>252</sup> Throughout the nineteenth century, authority and power shifted away from the jury and to judges. Judges, the government agents whom the jury was intended to check, and corporate interests, the people to whom judges were feared to be indebted, systematically removed the most fundamental judicial decisions from the jury's hands and moved them into the hands of the judge.<sup>253</sup>

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249. See Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 583 (1939).

250. See AMAR, *supra* note 186, at 100–01; William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1005 (2010).

251. See Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 768 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012). Once again, the trend is almost identical in the criminal context. At the time of the founding, the criminal jury heard almost every serious criminal case. Now, approximately 95% of criminal defendants plead guilty. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 91–100 (2005).

252. Notes and Comments, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170–71 (1964).

253. It is not just judges who have sapped the jury's power. The passage of the Federal Arbitration Act, as well as recent Supreme Court decisions favoring arbitration, have made it significantly less likely that a jury will ever get to hear a dispute between a powerful corporate entity and a harmed individual. See *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63 (2010) (holding that an arbitrator,

There are a number of reasons for this transformation. On occasion, the jury's power has been transferred to other tribunals—often arbitrators.<sup>254</sup> In addition, because the Supreme Court has not incorporated the Seventh Amendment against the states, most states do not require juries for cases involving smaller amounts of money, domestic relations cases, and a number of other disputes.<sup>255</sup> Furthermore, many state and federal rules of procedure now heavily promote settlement, requiring the parties to engage in frequent settlement and mediation conferences, often supervised by the trial judge who may place pressure on the parties to settle.<sup>256</sup>

But the most important force that has led to the disappearance of the civil jury is the creation and development of procedural tools that allow the judge, rather than the jury, to act as the primary decision-maker (and fact-finder) in many cases. Giving this power to a judge—especially a judge who may be biased in favor of one of the parties—is problematic, and eliminates the most important check on judicial bias. It allows the judge to decide the case behind closed doors, without any neutral observer overseeing the judicial decision. There are three key dispositive motions that define modern civil litigation. None of the three existed at common law, and all three significantly enhanced judicial power at the expense of the jury.

The first is the power to dismiss the case upon a defendant's motion to dismiss. By granting a motion to dismiss, the judge is able to terminate a case if he concludes that the alleged facts do not state a claim on which relief may be granted.<sup>257</sup> At first glance, this appears

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rather than the court, has the power to decide whether an entire agreement containing an arbitration agreement is unconscionable); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that the FAA preempts state law prohibiting waiver of access to a class action in an arbitration agreement). For a discussion of this issue, see Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1258–59 (2014).

254. Because parties agree to arbitration contracts “voluntarily” and arbitrators are not elected, this shift does not raise the same bias concerns that were discussed in Part II.
255. See Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159, 172–75 (2012); LESTER WALLMAN & LAWRENCE J. SCHWARZ, *HANDBOOK OF FAMILY LAW* 291–92 (1989). Only Texas appears to allow for jury trials in child custody and other family matters. Kevin Gick, “*Twelve Mommies and Daddies, Not a Scary Judge Clad in Black*”: *Why Does Only One State Let Juries Decide Child Custody Cases?*, 43 FAM. CT. REV. 612, 617 (2005).
256. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982).
257. See, e.g., FED. R. CIV. P. 12(b)(6); see also *Discussion of Principles of the Law of Nonprofit Organizations*, 88 A.L.I. PROC. 258, 258 (2011) (“Every state has its rules on motions to dismiss . . .”). Most states modeled their local rules pursuant to the federal rules and, therefore, have a correlative rule to Federal Rule 12(b)(6). See, e.g., FLA. R. CIV. P. 12(b)(6); Barbara Arco, *When Rights Collide:*

to be a purely legal decision. And, before the modern evolution of the Rules of Civil Procedure, this was not much of a threat for a plaintiff. The case would be dismissed only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>258</sup> Just as with the motion for demurrer under common law,<sup>259</sup> the motion to dismiss was rarely brought because most cases were sufficiently pled to survive this stage.<sup>260</sup> But in recent years, the Supreme Court has made it easier for trial judges to dismiss cases if they determine, using “judicial experience and common sense,” that the claim is implausible.<sup>261</sup> While some states have rejected the federal standard, others have followed suit,<sup>262</sup> making a motion to dismiss an important stage in litigation and leaving the trial judge, rather than the jury, as the decision-maker in a large number of cases.<sup>263</sup>

The second, and probably most important, procedure that has led to the decline of the jury is the motion for summary judgment. Once again, summary judgment gives the judge an opportunity to dismiss a claim before a jury has a chance to get involved. In recent years, summary judgment has become a docket-clearing mechanism for many judges.<sup>264</sup> But even worse, summary judgment allows a judge to rely on his view of the evidence, without any oversight, to reach whatever result the judge desires.<sup>265</sup> Many scholars have observed that judges are essentially making factual determinations under some legal guise.<sup>266</sup> Today, summary judgment is the most important tool that judges use to take cases away from jury. Not only was there nothing

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*Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587, 600 n.88 (1998).

258. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

259. See discussion *supra* Part III.

260. See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 24 (2010).

261. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see generally Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554–62 (2002) (discussing the history of Rule 8 and the liberal pleading standard of the federal rules).

262. *E.g.*, *Iannachino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008) (adopting *Twombly*'s standard).

263. See Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

264. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

265. This is particularly true following the 1986 “summary judgment trilogy” that made the summary judgment standard much easier to meet for movants. See Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1904 (1998).

266. Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993) (discussing how summary judgment allows judges to act as fact-finders).

like it at common law, but fact-finding was considered one of the most important functions of the jury.<sup>267</sup> And in the criminal context, the Supreme Court has held that when a judge takes fact-finding authority away from the jury, the defendant is deprived the right to a jury trial. But judges in civil cases do this every day. In some cases, including many involving civil rights claims, a number of judges overwhelmingly grant summary judgment in a majority of cases, even in those involving numerous disputed factual issues.<sup>268</sup> Of the three procedures listed, summary judgment appears to be the biggest culprit behind the decline of civil jury trials.<sup>269</sup>

The third procedure, one that is substantively similar to summary judgment, is judgment as a matter of law (JMOL). With JMOL, just as with summary judgment, the judge decides whether a reasonable jury could find for the nonmoving party.<sup>270</sup> The judge can even grant such a motion *after* a jury finds in favor of nonmoving party. But rather than merely having the power to grant a new trial and allowing a new jury decide the case, as a judge was able to do under common law,<sup>271</sup> the judge can now, alone, dismiss the case based on the judge's own opinion of the evidence.

A non-dispositive procedure that nonetheless enables a biased judge to aid a favored litigant in the face of the jury's verdict is the remittitur of damages. Historically, juries have had the power to set damages.<sup>272</sup> In recent years, some of that power has been taken away, protecting corporate defendants from "excessive" punitive damages. In a long line of cases,<sup>273</sup> the Supreme Court held that due process limits the amount of damages that a jury can award. By characterizing punitive damages as questions of law rather than ques-

267. See also *Blakely v. Washington*, 542 U.S. 296 (2004) (finding unconstitutional Washington's mandatory sentencing guidelines that permitted judges to increase a defendant's sentence above the statutory maximum if the judge found that the defendant acted with deliberate cruelty).

268. M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. & WOMEN'S STUD. 311 (1999).

269. See David H. Simmons, Stephen J. Jacobs, Daniel J. O'Malley & Richard H. Tami, *The Celotex Trilogy Revisited: How Misapplication of the Federal Summary Judgment Standard Is Undermining the Seventh Amendment Right to a Jury Trial*, 1 FLA. A&M U. L. REV. 1, 11 (2006) ("[C]ourts are impermissibly weighing evidence, construing inferences in favor of the moving party, and making credibility determinations that deny litigants the ability to reach trial and thereby obstruct litigants from their Seventh Amendment right to a jury trial.").

270. FED. R. CIV. P. 50.

271. *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 379 (1913).

272. See *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (holding that it is well-settled that "where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict").

273. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996).

tions of fact,<sup>274</sup> these holdings shift a key power away from the jury and into the hands of the professional judiciary. To make matters worse, if a judge decides that damages are excessive, the court can order that damages be reduced.<sup>275</sup>

All of these procedures give the judge the power to determine the sufficiency of the evidence and act as fact-finders.<sup>276</sup> As discussed earlier, this was a not a power that judges had under the common law and at the time of the founding. With so few cases going to trial, the people rarely have an opportunity to perform the heroic functions intended for the jury. And as a result, the key mechanism for holding biased judges accountable has faded into oblivion.

### **B. A Twenty-First-Century Jury: The Hybrid Judicial Panel**

So what is the solution? After all, despite significant scholarly criticism of these modern procedures, they, like judicial elections, are unlikely to go away. Not only are they engrained in modern civil litigation, but it is unclear whether the justice system can ever return to trial-centered approach where most cases go to trial. Thus, while a proposal to reverse the clock and return to the common law civil procedure is the easiest one to make, it is highly unlikely to be implemented.

But what if, rather than bringing civil litigation back into the eighteenth century, we brought the jury into the twenty-first? After all, it is not modern civil procedure that needs to be updated, but our outdated approach to when the jury gets involved in the case. If modern civil litigation revolves around pretrial motion practice—including motion to dismiss, summary judgment, and judgment as a matter of law—then perhaps the jury can be integrated into pretrial practice. Jurors can serve alongside judges on mixed pretrial courts, deciding key procedural motions that are now made by judges alone. The jurors would be selected from a jury pool, like we use today, and screened by judges to ensure that they are not biased. But rather than waiting until trial to empanel a jury, a mini-jury can be empaneled early in the case. These Panels, which I call Hybrid Judicial Panels, integrate the jury into modern litigation, allowing jurors to serve as a check on judicial bias, and give the people a voice at the points where we know judicial bias has the potential to be at its peak.

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274. *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001) (treating punitive damages as questions of law).

275. In this situation, the court must give the plaintiff an option of a new trial. *See Irene Sann, Remittitur Practice in the Federal Courts*, 76 COLUM. L. REV. 299 (1976).

276. *See Thomas, supra* note 263, at 251; ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 288–94 (2001).



Take the motion for summary judgment. The use of summary judgment has increased dramatically over the last few decades.<sup>277</sup> As explained earlier, when a judge grants summary judgment, the judge makes what is ultimately a factual determination: a judge decides how a reasonable jury would see the facts, and this perception may be colored by the judge's conscious or subconscious biases.<sup>278</sup> As a number of scholars have pointed out, "[I]t is clear that courts have used summary judgment to dismiss many . . . factually intensive cases."<sup>279</sup> By reserving key decision-making to themselves, judges have excluded the jurors from the process. That's why many Seventh Amendment scholars have argued that summary judgment violates the constitutional right to a jury trial.<sup>280</sup>

Now consider my proposal. Rather than permitting the judge alone to decide whether the facts are sufficient for a reasonable jury to find in favor of the nonmoving party,<sup>281</sup> the judge and a group of jurors (perhaps as few as two) would consider the motion together. The judge could not single-handedly end the case. If the defendant was a key contributor to a judge's election campaign, then a judge could not grant summary judgment in the defendant's favor without convincing at least one lay person—a juror—that summary judgment should be granted. And in order to convince that juror, the judge would have to explain why the law is on the defendant's side.

While the idea of judges and jurors working together to decide pre-trial motions may seem unusual to us, there are a number of jurisdictions throughout the world that have adopted the use of similar mixed courts, albeit in different context. The most well-known instances of mixed-court use are in France, Germany, and Japan. All three nations allow lay judges (akin to American jurors) to serve alongside professional judges in serious criminal cases, and the German system in particular has been the subject of numerous articles.<sup>282</sup> In fact, as the

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277. See Miller, *supra* note 264, at 984 (noting that summary judgment has been transformed from an infrequently granted procedural tool to a powerful pretrial device for early resolution).

278. See McGinley, *supra* note 266.

279. Thomas, *supra* note 197, at 1226.

280. See, e.g., Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988); Arthur R. Miller, *supra* note 264, at 1060 ("The right to a jury trial is at stake on both summary judgment and directed verdict motions.").

281. FED. R. CIV. P. 56.

282. See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 462 (1997) (noting that France, Italy, and Germany employ mixed courts consisting of lay and professional judges); Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U. ILL. L. REV. 791, 823 ("[I]n France there is no separate sentencing hearing as in a typical American court."); see also John C. Reitz, *Why We Probably Cannot Adopt*

jury system has fallen into disrepute throughout the world,<sup>283</sup> the use of mixed courts has evolved in its place.<sup>284</sup> Even in the United States, some commentators have suggested “experimentation with combinations of laymen and professional judges.”<sup>285</sup>

Admittedly, not much has been written about the use of a mixed panel during the pretrial phases, as I am suggesting here. And I have been unable to find any nation or jurisdiction that extensively allows jurors to work together with judges to decide pretrial motions like the motion to dismiss or the motion for summary judgment.<sup>286</sup> Nonetheless, there is no reason why such a panel would not be feasible in the United States. Our courts have access to a large number of potential jurors. But because less than 1% of the cases actually get to a jury trial, these jury pools are often unused. And because many of the decisions made by judges in deciding motions for summary judgment and judgment as a matter of law are factual in nature, there is nothing unusual about asking jurors to help the judge make those decisions.

While there are many benefits associated with mixed courts in other nations, I want to focus in particular on how such a Panel once again restores the ability of the people to act as a check on judicial bias. A Hybrid Judicial Panel immediately offers a check on judicial bias because lay judges would outnumber professional, elected judges. Just as we saw earlier with the jury, the mere presence of the jury may lead a judge to act in a more impartial manner.<sup>287</sup> More importantly, the judge would have to deliberate with the jurors, explaining to them why he believes summary judgment should be granted or denied.<sup>288</sup> Because the judge’s decision would, in a sense, be public, it is

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*the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 987 (1990) (discussing mixed courts in Germany).

283. Almost no nation in the world uses juries in civil litigation. Charles S. Desmond, *Current Problems of State Court Administration*, 65 COLUM. L. REV. 561, 565 (1965) (“[O]urs is the only major country in the world using civil juries . . .”).

284. John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195.

285. Justin A. Stanley, *The Resolution of Minor Disputes and the Seventh Amendment*, 60 MARQ. L. REV. 963, 971 (1977).

286. In Germany, mixed courts appear to be used in a small number of specialized court cases. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 865 (1985).

287. 3 WILLIAM BLACKSTONE, COMMENTARIES \*380.

288. Some have argued that independent jury deliberation increases the ability of lay judges to check a biased professional judge. Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 AM. J. COMP. L. 227, 257 (1995) (“The collaborative model, of course, did not carve out an area of independent deliberation for the lay participants and therefore limited the lay participants’ ability to check the bias of the professional judges.”). This may be true, but the inclusion of jurors in the deliberation is better than the status quo, with the judge deciding key dispositive motions without any layperson involvement.

unlikely that the judge would offer, as a reason, that the defendant is an in-state litigant likely to support his reelection bid. And just like jurors of the past few centuries, the panelists would not be beholden to any special interest group or an especially valuable campaign contributor. Of course, merely including lay judges in the deliberation does not alone *guarantee* an impartial adjudication; the risk of bias is reduced if only because the different biases and interests are balanced against each other.<sup>289</sup>

The Hybrid Judicial Panel does more than just reduce the likelihood that the professional judge will exercise his bias during the most important phase of the adjudicatory process. In fact, “[T]he mixed jury system would afford the professional judges and laypersons with the opportunity to share their knowledge and experience through effective communications.”<sup>290</sup> Jury participation in pretrial motions will lead to more robust deliberation, and may lead to better results, a higher quality of justice, and a better understanding of the facts.<sup>291</sup> Because a decision by a Hybrid Judicial Panel would be a decision of 3–5 people, rather than a single judge, it is less likely to be the result of bias and more likely to be anti-dictatorial.<sup>292</sup> The increased number of participants, and increased diversity, would likely make Panel decisions more accurate than those made by a single jurist.<sup>293</sup>

### C. The Best of Both Worlds: Check on the Jury

And that’s not all! Not only does the Panel provide protection against judicial bias, but it also addresses the three major criticisms of the jury system. The jury’s decline is partly due to three major critiques of the jury: that the jury is incompetent, biased, and inefficient. There is a rich body of literature both attacking the jury and defending it from these critiques.<sup>294</sup> I would like to conclude by explaining how the Hybrid Judicial Panel can address these critiques as well.

One of the most prominent complaints about the civil jury is that the jurors are incapable of understanding the complex issues that are

289. ABRAMSON, *supra* note 188, at 99–141.

290. Antoinette Plogstedt, *Citizen Judges in Japan: A Report Card for the Initial Three Years*, 23 *IND. INT’L & COMP. L. REV.* 371, 393 (2013) (“This hybrid system would inject public sentiment and common sense, eliminate judicial bias, and improve civic education.”).

291. See Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 *E. ASIA L. REV.* 125, 155–56 (2009) (discussing how the Japanese jury system has secured these advantages).

292. See 2 *THE WORKS OF JAMES WILSON*, *supra* note 247, at 222.

293. See JAMES SUROWIECKI, *WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS* (2004).

294. See, e.g., VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 201; STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995).

central to modern civil and criminal litigation. Civil cases often require the understanding of sophisticated technology, complex machinery, or complicated products. But jurors, the argument goes, have no training or knowledge in any of these fields.<sup>295</sup> To make matters worse, the selection process has been criticized for producing a jury of limited intellectual ability and sophistication.<sup>296</sup> As a result jurors are potentially swayed by appeals made to prejudice or emotion and may be unable to evaluate the evidence placed before them.<sup>297</sup> And as laws, and jury instructions, have become more complex, these criticisms of the jury have grown.

To make matters worse, we rarely know why a jury did what it did. Juries do not give reasons for their decisions, and their deliberations are usually secret. We don't know whether the jury simply ignored the law and the facts. These concerns lead to another one: lack of predictability. Different juries reach different conclusions in seemingly identical cases. In recent years, juries have received negative publicity because of some surprising verdicts.<sup>298</sup> While some of these complaints may be overblown—studies seem to show that juries decide cases similar to judges,<sup>299</sup> and judges generally praise jury performance—there is certainly some truth to all of them.

The Hybrid Judicial Panel addresses many of these critiques. If the trained professional judge is indeed more competent to resolve the complex factual dispute between two litigants, the judge can share his knowledge with the jury, educating the jurors in the process. Rather than leaving jurors alone to understand the vagaries of patents or medical technology, the judge can guide the discussion of these issues to the extent they are relevant to deciding a summary judgment mo-

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295. *But cf.* Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1174 (2001) (discussing the jury's ability to understand complex trial evidence).

296. Albert W. Alschuler, *Explaining the Public Wariness of Juries*, 48 DEPAUL L. REV. 407, 408 (1998) ("The public who serve as jurors are less educated than the norm . . . ." (emphasis added)).

297. *See id.*

298. Perhaps the most famous case involved a large verdict awarded to a woman burned by her McDonald's coffee. *See* Stuart Pfeifer, *L.A. Woman Sues McDonald's Over Hot Coffee, 20 Years After Huge Verdict*, L.A. TIMES (Jan. 9, 2014), <http://articles.latimes.com/2014/jan/09/business/la-fi-mo-la-woman-sues-mcdonalds-over-hot-coffee-20-years-after-huge-verdict-20140109>, archived at <http://perma.unl.edu/SVJ9-7P76> ("[A] jury awarded \$2.9 million to a woman who was badly burned after she spilled hot coffee into her lap at a McDonald's in Albuquerque. That verdict was widely criticized and became a rallying cry for advocates of legal reform.").

299. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 63–64 (1966) (concluding that judges and juries reach similar decisions around 80% of the time); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Effects*, 18 LAW & HUM. BEHAV. 29, 46–49 (1994) (presenting similar conclusions).

tion or a motion to dismiss. This allows jurors to learn about judges and the law, and that has historically been seen as an important function of the jury system.<sup>300</sup> In fact, the “jury was in part an intermediate association designed to educate and socialize its members into virtuous thinking and conduct.”<sup>301</sup>

Even though jurors would outnumber judges on the Panel, it is unlikely that jurors would simply ignore the judge’s views. Quite to the contrary. Judges will be popularly elected political figures, and they would exercise some influence over their co-panelists. In fact, this was true even under the common law jury system. Judges were frequently highly respected local figures who could hold sway over their neighbors and acquaintances serving as jurors.<sup>302</sup> Even during the time when the jury had the power to determine both law and fact, Thomas Jefferson recognized that jurors often deferred to the judge on questions of law, using its law-finding functions in cases involving “biased judges.”<sup>303</sup> Studies have shown that a jury foreperson holds significant sway over jury deliberations,<sup>304</sup> and it is likely that a trained judge would hold similar sway over a group of lay jurors.<sup>305</sup>

The secrecy concerns are also diminished. Today, juries do not give reasons for their decisions, and some have suggested that for this reason, the jury’s “claim to be [a] deliberative-democracy institution[ ] is on shaky ground.”<sup>306</sup> But the Hybrid Panel would give a reason for its decision. It would have to write an opinion explaining why a motion for summary judgment, or a motion to dismiss, was denied. Thus, while judge-jury deliberations would still remain secret (just as single-judge “deliberations” remain secret), the final product of those deliberations would be revealed. In addition, public (and litigant) confidence about jury decision-making is likely to increase by simply knowing that a professional judge has taken part in the deliberation.

Some might complain that while I spent a great deal of time discussing judicial bias, I have ignored the fact that jurors are often biased as well. They might be biased against deep pocket defendants

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300. Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127.

301. AMAR, *supra* note 186, at 93.

302. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 33 (1975).

303. Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35, 38 (2005).

304. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 729–30 (1992) (discussing the important role that the jury foreman can play in jury decision-making).

305. Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 295 n.270 (2000) (explaining that juries accord judges “enormous deference and respect”).

306. Solomon, *supra* note 182, at 1365.

such as insurance companies, hospitals, and large corporations.<sup>307</sup> They might harbor racial or gender biases.<sup>308</sup> There is no question that one of the reasons the jury lost much of its power is due to its own biases.

But just as the presence of the jury can help counter judicial bias, the presence of a judge will help counter jury bias for many of the same reasons. Jurors will be forced to deliberate with a professional judge about the law and could not simply rely on prejudices or biases in justifying their decision. Arguments based on race and gender bias are less likely to be made in the presence of a respected judge. But even if the Hybrid Panel reached the “wrong” verdict, its mistakes would arguably be less harmful. Every new case would involve a new set of jurors. Unlike a judge, who might be biased in favor of a wealthy contributor in *every* case involving that contributor, a new group of jurors would hear the next case involving that contributor. The Panel’s mistakes would not threaten the right to impartiality (or democratic virtues) like the biases of a single judge could.

Finally, one important reason for the increased use of pretrial procedures like summary judgment is that litigation is costly and time consuming, and summary judgment allows for the resolution of issues without trial and the expenses associated with it.<sup>309</sup> With long backlogs in most state courts, jury trials require a great deal of time and resources. But while the Hybrid Judicial Panel adds additional expense and time, the Panel is substantially more efficient than a full-blown jury trial. Since the judge must already decide the motions alone, adding a group of jurors to that consideration is unlikely to significantly delay the resolution of the motions. Also, the jury is significantly smaller than the typical twelve-person jury we see in the few civil cases that actually reach trial.<sup>310</sup> In addition, the benefits of countering judicial bias far outweigh the minor additional delay and expense that might result from the inclusion of lay judges in the pre-trial litigation process.

## V. CONCLUSION

Civil litigation has evolved a great deal since the time of the founding. Whereas litigation then revolved around the trial, modern civil

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307. Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the “Deep-Pockets” Hypothesis*, 30 LAW & SOC’Y REV. 121 (1996).

308. J.R. POLE, CONTRACT & CONSENT: REPRESENTATION AND THE JURY IN ANGLO-AMERICAN LEGAL HISTORY 133 (2010) (discussing history of jury racial bias in civil rights litigation in the South); *see also* Ham v. South Carolina, 409 U.S. 524, 526–27 (1973) (recognizing that racial bias infects jury deliberations).

309. *See* Miller, *supra* note 264, at 986 (discussing the “recent outcry” in curbing the social costs of litigation).

310. *See* JONAKAIT, *supra* note 231, at 90 (discussing the benefits of smaller juries).

litigation is largely about pretrial. Discovery and motion practice are at the core of the twenty-first-century civil lawyer's experience. But our conception of the jury has remained static. The jury appears on stage only at trial, and these days, the play is long over. It is time for the civil jury to evolve. The jury should play an active role at the most important stages of modern civil litigation. My proposal—the Hybrid Judicial Panel—allows for just that. It reintroduces the jury into American civil jurisprudence, and allows the jury to serve the bias-checking role it was intended to serve.