

2016 Municipal Judges Conference

*THE RULE OF LAW, THE JUSTICE
SYSTEM AND THEIR ROLE IN
CONSTITUTIONAL DEMOCRACY*

Judge Karen Arnold-Burger

- Checklist with IVP Logo
- Courts Work for Kansans
- Unfair Political Attacks on Fair Courts



JUSTICE FREE FROM SPECIAL INTERESTS

<http://ivo.nawi.org/>

When you walk into a courtroom and face a judge what factors do you hope influence his or her ruling in your case?

- Public opinion about the issue that is contrary to your position
- The law of your case
- Your political party affiliation
- The position of special interest groups on the issue
- The facts of your case
- Media reports
- Personal perspectives or affiliations of the judge
- Money or political contributions



COURTS WORK FOR KANSANS

The courts do more than the occasional high-profile case that attracts public attention. Most of the work done by Kansas courts involves everyday issues and problems that impact the lives and communities of ordinary Kansans.

ABUSED AND NEGLECTED CHILDREN

Kansas courts play a life-altering role in the lives of abused and neglected children. They decide whether to:

- Remove a child from a parent to protect the safety of the child and the child's best interests;
- Place a child in foster care;
- Reunite a child and parent or terminate parental rights; and
- Allow adoption of a child.

In FY 2015, Kansas courts presided over:

- 6,762 newly filed child in need of care cases; and
- 1,787 newly filed adoptions.

In addition, periodic reviews and other services were provided in thousands of cases filed in previous years.

TROUBLED YOUTHS

Kansas court services officers, judges, and court staff work with thousands of troubled youths to:

- Ensure community safety;
- Hold young people accountable for their conduct; and
- Change negative behaviors.

Kansas court services officers began FY 2015 supervising a total of 4,877 juvenile offenders and children in need of care. A total of 3,691 additional juveniles were added to supervision in that year and 4,110 completed supervision or were otherwise removed from caseloads.

- Supervised juveniles completed 29,488 community service hours.
- Court services officers collected \$185,589 in restitution from juvenile offenders for the benefit of crime victims.
- Reports to the court were written in 1,758 CINC cases and 3,101 juvenile offender cases.

VICTIMS SEEKING PROTECTION

By issuing protective orders, Kansas courts help shield victims of violence, abuse, and harassment from further harm. In FY 2015, Kansas judges granted:

- 8,145 protection from abuse orders; and
- 4,801 protection from stalking orders.

FAMILIES IN CRISIS

Families in crisis have problems that demand significant court time and resources. Motions and other on-going court actions may be heard in cases filed in previous years, with some cases remaining active for many years. In FY 2015, Kansas courts handled new filings in:

- 12,332 marriage dissolutions;
- 5,422 non-divorce visitation, support and custody cases;
- 1,582 interstate child support enforcement cases;
- 5,002 paternity cases; and
- 3,239 mental health and substance abuse commitment cases.

CIVIL JUSTICE

Kansans from every walk of life rely on the courts to resolve their civil legal problems. In FY 2015, Kansas courts handled new case filings in:

- 5,168 small claims cases;
- 3,056 liens;
- 79,537 debt collection cases;
- 4,979 other contract and employment cases;
- 7,900 other law and equity matters;
- 2,980 tort claims; and
- 623 judicial review of agency action cases.

HOUSING PROBLEMS

Courts are where tenants, landlords, lenders, and homeowners assert and protect their rights. In FY 2015, Kansas courts dealt with new filings in:

- 15,094 landlord/tenant cases; and
- 6,019 mortgage foreclosures.

CRIMINAL JUSTICE

Criminal cases dominate court time and resources, with both judges and court staff spending more time on criminal cases than any other type of case. In 2015, Kansas courts dealt with new filings in:

- 19,951 felony cases;
- 14,308 misdemeanor cases;
- 4,852 DUI cases; and
- 162,812 traffic, and fish and game cases.

Kansas court services officers began FY 2015 supervising 16,198 offenders. A total of 21,123 offenders were added to supervision and 21,045 offenders completed supervision or were otherwise removed from caseloads. In addition:

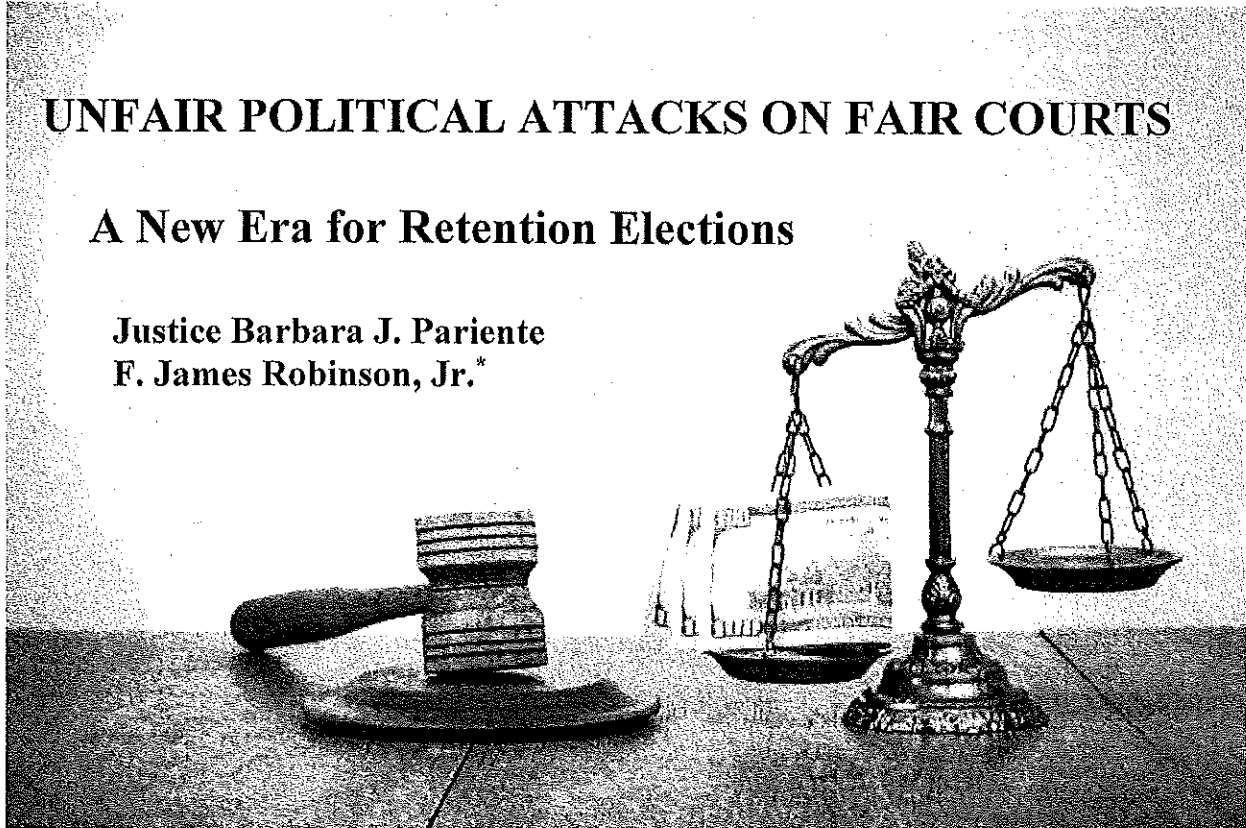
- Supervised offenders completed 24,052 community service hours;
- Court services officers collected \$2,592,896 in restitution from offenders for the benefit of crime victims; and
- Reports to the court were written in 16,788 felony cases and 3,224 misdemeanor cases.

[August 30, 2015 Draft: Reproduction prohibited without the express consent of the authors]

UNFAIR POLITICAL ATTACKS ON FAIR COURTS

A New Era for Retention Elections

Justice Barbara J. Pariente
F. James Robinson, Jr.*



Against a backdrop of recent well-funded, hard-fought state judicial retention elections that grabbed political headlines, in *Williams-Yulee v. Florida Bar*, the United States Supreme Court recognized that, as Chief Justice John Roberts wrote, “Judges are not politicians, even when they come to the bench by way of the ballot.”¹ *Williams-Yulee*, a 5-4 decision, upheld a Florida rule prohibiting judges

* The Honorable Barbara J. Pariente has been a justice on the Supreme Court of Florida since 1998 and served as its Chief Justice from 2004-2006. Before her appointment to the Supreme Court she served as an appellate court judge. In private practice for 18 years, she was a civil trial lawyer. She has been on the ballot for merit retention four times with the last election in 2012 where she and two other colleagues faced politically motivated attacks. F. James Robinson, Jr. is a senior partner in the Wichita, Kansas law firm Hite, Fanning & Honeyman L.L.P. Mr. Robinson is a former President of the Kansas Association of Defense Counsel, current Chair of the Kansas Bar Association’s Legislative Committee and the immediate past Kansas state representative for the Defense Research Institute (DRI). Since 2004, Mr. Robinson has worked on various state and national initiatives advocating for fair and free courts. The authors thank Matthew Christ for his research assistance. Christ is a 2015 graduate of the University of Florida Levin College of Law.

¹ No. 13-1499, 2015 U.S. LEXIS 2983, at *9 (U.S., April 29, 2015).

and judicial candidates from personally soliciting campaign contributions. Chief Justice Roberts' opinion for the majority continued, "the role of judges differs from the role of politicians. . . Politicians are expected to be appropriately responsive to the preferences of their supporters . . . In deciding, cases a judge is not to follow the preferences of his supporters . . ." ²

Even so, voters in retention elections routinely are asked to evaluate judges as politicians. Justice Ruth Bader Ginsburg's concurrence in *Williams-Yulee*, with whom Justice Stephen Breyer joined, noted that in recent years, "issue-oriented organizations and political action committees have spent millions of dollars opposing the reelection of judges whose decisions do not toe a party line or are alleged to be out of step with public opinion." ³

Justice Ginsburg's concurrence in *Williams-Yulee*, echoed concerns she had expressed in 2002 in a dissenting opinion in *Republican Party of Minn. v. White* ⁴ where she wrote that judges "[u]nlike their counterparts in the political branches, . . . are expected to refrain from catering to particular constituencies." ⁵ She added that judges should "decide individual cases and controversies on individual records," not on perceptions of an electoral mandate or the public's will. ⁶

Attacking judges for being out of step with the public blurs the roles of judges and legislators. We may disagree about the similarity of those roles in some respects, but in all respects judges alone are responsible to the law rather than public opinion.

The rule of law is an enduring shared value in our form of government. It is the basis for due process and equal protection rights, guaranteeing equality under the law to all citizens and not just to the most vocal, the most powerful or the most organized. Generations of Americans have resolutely agreed that the best way to uphold the rule of law is to insulate judges from popular will and political intimidation.

We may also disagree about the requisites of "good judging," but our shared history tells us that it is not serving as the megaphone for the majority. We expect judges to issue neutral and impartial rulings based on the rule of law, regardless of

² *Id.* at *22.

³ *Id.* at *42.

⁴ 536 U.S. 765, 821 (2002) (Ginsburg, J., dissenting).

⁵ 536 U.S. at 803-04 (Ginsburg, J., dissenting).

⁶ *Id.* at 804 and 806 (Ginsburg, J., dissenting); *see also id.* (Ginsburg, J., dissenting) ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

how unpopular those decisions may be. The public's confidence in the ability of courts to do their important work rests on that premise.⁷

In 2010, Iowa voters sent shock waves across the country by removing three sitting state supreme court justices based solely on a campaign that attacked the justices for a 2009 decision that struck down Iowa's same sex marriage ban. Campaign spending against the justices totaled more than \$1 million.⁸ The 2010 Iowa election highlighted the effectiveness of a well-funded attack accusing a state court judge standing for retention of being out of step with the march of public opinion.⁹

And Iowa was not the only state that saw politically charged judicial retention elections in 2010; state appellate judges in Alaska, Colorado, Florida, and Kansas were all the targets of well-orchestrated campaigns by special interest groups designed to remove fair and competent judges from the bench.¹⁰

Where only \$2 million had been spent on advertising in retention elections in the decade leading up to the 2010 midterm elections, \$3 million was spent on state judicial retention election advertising that year alone.¹¹ Since 2010, the amount of money spent on judicial retention elections has only increased, along with the acerbity of advertisements targeting sitting judges.¹²

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

⁷ Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573, 582-83 (2009); see also Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV., 308, 310 (1997); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (“[t]he power and the prerogative of a court to [resolve disputes] rest[s], in the end, upon the respect accorded to its judgments.”) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

⁸ Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 CT. L. REV. 118, 120-21 (2011); Todd E. Pettys, *Letter from Iowa: Same-Sex marriage and the Ouster of Three Justices*, 59 KAN. L. REV. 715, 728 (2011).

⁹ A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, THE N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/03/us/politics/03judges.html?pagewanted=all>.

¹⁰ Schotland, *supra* note 8, at pp. 118-20, n. 3. According to Schotland, “The six states with organized opposition saw these declines in the percentage vote for retention: Iowa 27%-28%, Illinois 13%, Colorado 10%-13%, Kansas 6%-7%, Florida 6%-9%, and Alaska 7%.” *Id.* at p. 120, n. 4

¹¹ Sulzberger, *supra* note 9.

¹² See Melinda Gann Hall & Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Elections*, 50 AM. J. POL. SCI. 20, 21 (2006).

up. But, as Professor Rachel Caufield argues, “to allege that judges should universally be assessed based on whether they adhere to political agendas and public opinion is anathema to the unique role that we ask judges to play in refereeing these social and political questions.”¹³

Courts have no natural constituencies who will educate the public about the role of strong courts in our democracy. Survey data reveals surprising evidence of civic illiteracy. And even when survey respondents agree that judges should not promote a political agenda and that every citizen deserves fair and equal treatment under the rule of law, those opinions are soft and can shift quickly based on rhetoric about judges ignoring public opinion or not reflecting the values of the people. Courts need advocates who will educate the public about the basics of what courts do and connect with voters on their commonly-held values of fairness and impartiality and courts free from popular opinion or political pressure. If the legal profession does not fill this role, who will?

DRI’s Judicial Task Force aptly concluded in its important white paper about the challenges to fair courts, titled *Without Fear or Favor in 2011*, that the “fairness of our legal system hangs in the balance . . . [we] must take the steps necessary to address these problems facing the judicial branch.”¹⁴

The Role of Courts in Our Democracy

Before we discuss in detail the recent spate of political attacks in retention elections let’s step back in time and review why the Framers of our democracy established strong courts. They created a judicial system based on “the rule of law, which is a foundation of freedom, [and] presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges.”¹⁵ They fixed basic rights “as legal principles to be applied by the courts.”¹⁶ They equipped courts to administer those principles impartially and in a neutral manner.¹⁷ Thomas Jefferson captured this understanding as he

¹³ Caufield, *supra* note 7 at 584.

¹⁴ DRI, *Without Fear or Favor in 2011: A New Decade of Challenges to Judicial Independence and Accountability*, p. 80 (2011), <http://www.dri.org/News/DRIRReports>.

¹⁵ *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2007) (Kennedy, J., concurring). John Adams famously said that we are a “nation of laws, not men.” John Adams, *Novanglus Papers No. 7*, in 4 THE WORKS OF JOHN ADAMS 106 (1851).

¹⁶ *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

¹⁷ *Id.*

wrote, “[w]hen one undertakes to administer justice, it must be with an even hand, and by rule; what is done for one must be done for everyone in equal degree.”¹⁸

The law does not always provide a clear answer. Some cases might be decided “either way” because “reasons plausible and fairly persuasive might be found for one conclusion as for another.”¹⁹ Recognizing that sometimes neutrality may not be entirely possible and that judges may err, our Framers created a hierarchical system allowing review of lower court decisions by higher courts and required judges to justify their decisions. The appeals process imposes a significant constraint on a judge’s autonomy to deviate from established law.

The Framers removed basic rights from the “vicissitudes of political controversy,” placing them “beyond the reach of majorities and officials.”²⁰ They expected judges to decide cases free from the effects of politics and the changing winds and passions of public opinion.²¹

Courts’ counter-majoritarian role as guardians of individuals, minorities and persons without political power often puts courts in tension with the political branches and this is precisely what our Framers expected.

Ensuring that democracy, liberty and the rule of law were not hollow promises, our Framers created a form of government aimed at avoiding the concentration of power in a single authority. They made the Judiciary an institution “not under the thumb of other branches of Government.”²² James Madison, while introducing in Congress the amendments that became the Bill of Rights, eloquently noted that the Judiciary “will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.”²³ Alexander Hamilton in Federalist No. 78, when he urged New York to adopt the Constitution, argued that “there is no liberty, if the power

¹⁸ W. Cleon Skousen, *THE MAKING OF AMERICA* 241 (Verity Publishing).

¹⁹ Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 165 (1921).

²⁰ *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

²¹ *THE FEDERALIST* No. 78, at 502 (Alexander Hamilton) (Edward Mead Earle ed.).

²² Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 *NEB. L. REV.* 1 (2006).

²³ James Madison, Address to the House of Representatives (June 8, 1789), in *THE MIND OF THE FOUNDER* 224 (Marvin Meyers ed., 1973).

of judging be not separated from the legislative and executive powers . . . The complete independence of the courts of justice is . . . essential”²⁴

It is clear, then, that the Framers called on the Judiciary to patrol the Constitution’s legal boundaries and preserve the rule of law not because judges were believed to be wiser or smarter than those in the government’s other branches; rather, the Framers believed that allowing the other branches to police themselves was too dangerous.²⁵

Judicial review of legislation is a well known friction point between the judiciary and the political branches. In a very recent example of this at the federal level, Chief Justice John Roberts’s opinion for the 6-3 majority in *King v. Burwell*,²⁶ while explaining why the majority was compelled to uphold the Affordable Care Act, addressed the Court’s responsibility to interpret the Act as a whole rather than fixate on a few isolated words as textualism would do: “In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—‘to say what the law is.’”²⁷ Roberts continued, “That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.”²⁸

Yale Law School’s Professor Abbe Gluck comments, “*King* turns out to be a case about understanding Congress, not finding it inscrutable. And it is the first major statutory case in which, rather than shying away from the difficult questions raised by the mounting complexity of the modern statutory era, the Court rises to meet it. In *King*, the Court tells us, in no uncertain terms: ‘We’ve got this.’ In so doing, the case may have ushered in the next chapter in the story of statutory interpretation, the Court, and its relationship to Congress.”²⁹

²⁴ THE FEDERALIST No. 78, at 502 (Alexander Hamilton) (Edward Mead Earle ed.). Without judicial independence, Hamilton argued, “all the reservations of particular rights or privileges would amount to nothing.” *Id.*

²⁵ The executive, with sole power to decide whether executive orders complied with the Constitution, could become too powerful. The legislature, carrying out the will of the voters, would seldom turn down popular statutes that cross the Constitution’s legal boundaries. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 6-11, 215 (2010).

²⁶ 192 L. Ed. 2d 483, 2015 U.S. LEXIS 4248 (June 25, 2015).

²⁷ 192 L. Ed. 2d at 501, 2015 U.S. LEXIS 4248 *36 (quoting from *Marbury v. Madison*, 5 U.S. 137 (1803)).

²⁸ *Id.*

²⁹ Abbe R. Gluck, *Symposium: Congress has a “plan” and the Court can understand it – The Court rises to the challenge of statutory complexity in King v. Burwell*, SCOTUSblog, (June 26, 2015), <http://www.scotusblog.com/2015/06/symposium-congress-has-a-plan-and-the-court-can-understand-it-the-court-rises-to-the-challenge-of-statutory-complexity-in-king-v-burwell/>

Strong courts provide balance in our government. But the Judiciary is also the “least dangerous” branch because it has “no influence over either the sword or the purse . . . it may truly be said to have neither FORCE nor WILL, but merely judgment.”³⁰ Judicial independence depends on the deference of political branches to uphold court judgments.

Jurists, performing their basic role in our democracy, have throughout our history required the other branches to take unpopular actions such as desegregating schools or mandating certain minimum standards for prisons. Often politicians have enough respect for courts that they are circumspect in their statements about unpopular decisions.³¹ They understand the value to the democracy of accepting decisions of our highest courts, even those they think are wrong.

But occasionally politicians and special interest groups who have the idea that justices “are a means to an end, and that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit to them in advance”³² have found the value proposition of criticizing unpopular decisions simply too good to pass up.

In 1937, President Franklin Roosevelt, stung by the U.S. Supreme Court decisions that struck down key pieces of New Deal legislation and buoyed by his landslide reelection in 1936, unveiled a proposal to expand the Supreme Court to as many as 15 judges. Critics charged that Roosevelt was trying to “pack” the Court with justices who would support his New Deal.³³

In sharp contrast, in the wake of the U.S. Supreme Court’s then unpopular decision in *Brown v. Board of Education*³⁴ President Dwight Eisenhower was deferential to the Court. The 11-page decision written by Chief Justice Earl Warren was firm and clear about the end of the separate but equal doctrine in American public schools. The decision was unanimous. Public opinion about it was not. The decision was “an exercise in accountability to the Rule of Law over the popular will,” notes former Justice Sandra Day O’Connor.³⁵

³⁰ THE FEDERALIST No. 78, at 465-66 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

³¹ Bright, *supra* note 7, at 310.

³² Stephen B. Burbank, *Fair and Independent Courts: A Conference on the State of the Judiciary: Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L. J. 909, 910 (2007).

³³ See R. MCCLOSKEY, THE AMERICAN SUPREME COURT 169 (1960); Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 13 (1967).

³⁴ 347 U.S. 438 (1954).

³⁵ Sandra Day O’Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 DENV. U.L. REV. 1, 3 (2008).

The Supreme Court “unlocked the schoolhouse doors,” but it could not by the force of its will end segregation.³⁶ The vagueness about how to enforce the Court’s order with “all deliberate speed” gave segregationists and states’ rights activists the opportunity to organize resistance that put judicial independence to the test.³⁷

President Eisenhower sent Federal troops into Little Rock, Arkansas to enforce a district court’s desegregation order. Before removing those troops Eisenhower sought certain guarantees from Arkansas Governor Orval Faubus about enforcing Federal court orders and keeping the peace. Faubus refused to give them. Historian David A. Nichols writes, “While Eisenhower was a disappointing rhetorical advocate for racial equality, we must balance that assessment with his uncompromising defense of the courts.”³⁸ During an October 3, 1957 news conference, when asked about the impasse with Faubus, Eisenhower spoke eloquently about the Federal judiciary. He said, “These courts are not here merely to enforce integration. These courts are our bulwarks, our shield against autocratic government.”³⁹

Courts are accountable to the Constitution and the law. We do not want a basketball referee to reverse the call when the crowd boos, for fear it was the booing that influenced the referee’s decision.³⁷ And we do not want courts to bend to popular opinion and political pressure.

Public confidence in the independence and impartiality of courts is critical to sustain a judiciary that can resolve disputes and ensure the separation of powers. Every day, judges decide cases on the facts and the law that are legally sound but “unpopular and surely disliked by at least 50 percent of the litigants who appear before them,”⁴⁰ yet their decisions are obeyed and enforced. Preserving this high

³⁶ Barack Obama, *Presidential Proclamation—60th Anniversary of Brown v. Board of Education*, May 15, 2014, <http://www.whitehouse.gov/the-press-office/2014/05/15/presidential-proclamation-60th-anniversary-brown-v-board-education>.

³⁷ Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 432 (1998).

³⁸ DAVID A. NICHOLS, *A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION* 278-79 (Simon & Schuster 2007).

³⁹ *Dwight D. Eisenhower, October 3, 1957 News Conference*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=10920>.

³⁷ See, e.g. Bright, *supra* note 7, at 325 n. 79.

⁴⁰ *White*, 536 U.S. at 798 (Stevens, J., dissenting)

level of public confidence in courts should be, as Justice Kennedy noted in his concurrence in *Caperton*, “a state interest of the highest order.”⁴¹

The Original Purpose for Retention Elections

Retention elections⁴² were intended to give the people a voice in whether a state court judge deserved another term without the bruising characteristics of political attacks, partisan tactics and competitive contests. These elections sought to evaluate a judge based on his or her judicial performance—has the judge committed a serious ethical indiscretion or is the judge incompetent?—not the popularity of a single decision or whether the judge is too “liberal” or “conservative.”⁴³ They sought to remove partisan politics and special interests from the election process.⁴⁴ Most importantly, they sought to insulate judges from shifts in public opinion that can undermine the consistency and fairness in the law. Judicial retention elections, then, were never meant to serve as a tool for judicial intimidation or payback for a particular unpopular, but legally sound, decision.

Certainly, there were occasional politically motivated attacks and some were successful⁴⁵ but state retention elections generally served their original purposes.⁴⁶ Retention elections now are taking on many characteristics of regular competitive

⁴¹ See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (quoting *White*, 536 U.S. at 793 (Kennedy, J., concurring)); see also, e.g., *Cox v. Louisiana*, 379 U.S. 559, 565 (1965) (“A State may . . . properly protect the judicial process from being misjudged in the minds of the public.”); *In re Murchison*, 349 U.S. 133, 136 (1955) (“[T]o perform its high function in the best way[,] justice must satisfy the appearance of justice.”).

⁴² This is a judicial election in which an incumbent judge standing for retention is put to a yes/no vote. In many of the 19 states with judicial retention elections for some level of court, nonpartisan nominating commissions provide to the governor a list of judicial candidates and the governor picks one from the list. After the end of each term of office, the judge’s name appears on the ballot with a “yes” or “no” vote as to whether the judge should remain in office. Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 ARK. L. REV., 249, 254 (2011). Between 1964 and 2010, 7,689 judges sought retention. Only sixty-seven judges were not retained. In 2010, the mean national vote for retention was 69.5%. Larry Aspin, *The 2010 Judicial Retention Elections in Perspective: Continuity and Change from 1964 to 2010*, 94 JUDICATURE 218, 228 (2011).

⁴³ See Todd E. Pettys, *Judicial Retention Elections, the Rule of Law, and the Rhetorical Weaknesses of Consequentialism*, 60 BUFF. L. REV., 69, 74 (2012); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 97 (1998).

⁴⁴ Traci V. Reid, *The Politicization of Retention Elections: Lessons Learned for the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 69 (1999).

⁴⁵ In 1986, Rose Bird, Chief Justice of the California Supreme Court, and two of her colleagues, were unseated in a retention election after a high profile death penalty decision. Robert Lindsey, *Deukmejian and Cranston Win As 3 Judges Are Ousted*, N.Y. TIMES, Nov. 6, 1986, at A30. In 1996, Tennessee voters stripped Penny White of her seat on the Tennessee Supreme Court, because of a decision that upheld a conviction for the rape and murder of an elderly woman, but overturned a death sentence in the case. Colman McCarthy, *Injustice Claims a Tennessee Judge*, WASH. POST, November 26, 1996, at C11. In Nebraska in 1996, Justice David Lanphier was defeated because of a unanimous decision striking down Nebraska’s term-limits statute. Gerald F. Uelemen, *Judges Hear the Crocodiles Snapping*, L.A. TIMES, Feb. 19, 1997, http://articles.latimes.com/1997-02-19/local/me-30110_1_death-penalty.

⁴⁶ Carrington, *supra* note 43, at 97.

elections with little or no protection for the judge who is accused of being out step with the march of the public.⁴⁷ Some would argue that voters are entitled to know about the judge's "judicial philosophy" and how it can affect decisions about specific types of cases. Certainly, there is some disagreement about what criteria is most appropriate for assessing judges in retention elections. And certainly some believe, as Professor Caufield observes, "that judge's personal backgrounds and experiences *may* have some influence on their behavior on the bench," but "this does not imply that we *must* accept the normative position that they should be subject to the same political criteria as candidates for legislative or executive positions."⁴⁸

Regardless, given the inherent tension between the desire to free judges to be faithful to the rule of law, deciding cases insulated from popular will, and the need for public accountability in retention elections, it is inevitable individuals and groups will challenge a judge as being out of step with public opinion. Professor Caufield argues, "[i]f we accept the value of accountability and we accept the role of elections in maintaining accountability and providing a check against judicial wrongdoing, then we must assess ways to disseminate information to voters in order to enable the voters to participate in a way that will preserve the integrity of the judicial system."⁴⁹

Recent Retention Elections

Our concern about the need to educate voters about political attacks based on unpopular decisions is the same no matter whether the attacks come from the left or the right, no matter which political party or special interest group is behind them and regardless of whether the case involves the burning issue of the day or something more mundane.

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

⁴⁷ John Gramlich, *Judges' Battles Signal a New Era for Retention Elections*, WASH. POST, December 5, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120400180.html>.

⁴⁸ Caufield, *supra* note 7 at 585.

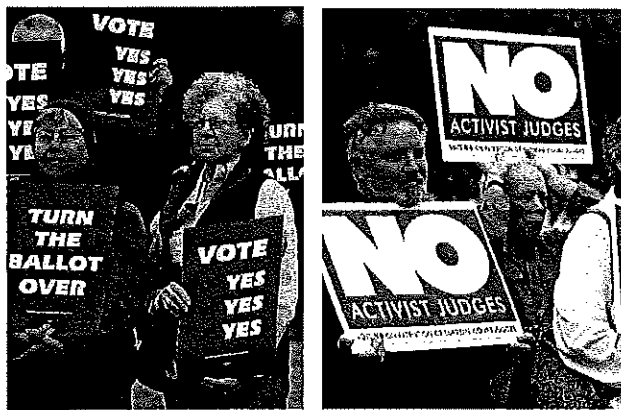
⁴⁹ *Id.* at 588.

outrage to overpower the public's traditional deference to courts as fair and impartial arbiters of disputes.

Although incumbent judges in states that have contested elections, especially partisan elections, often face political attacks and special interest money, judges in uncontested, nonpartisan retention elections are particularly vulnerable. There is no official opponent in such an election that will benefit from politicizing the contest.⁵⁰ And because opposition to the judge is not subject to time limits that exist in contested judicial elections where a challenger must file before the qualifying deadline, there is a grave risk of a blindsiding attack by a politician or special interest group just days before the election. The judge then has little time to launch a campaign, address the attack or form a campaign committee to raise campaign funds.

So let's review recent retention elections in Iowa, Florida, Tennessee and Kansas.

Iowa



In 2010, three Iowa Supreme Court justices lost their seats in retention elections. Iowans supporting the ouster were upset by a unanimous 2009 Iowa Supreme Court ruling overturning the state's prohibition on same-sex marriage.⁵¹

⁵⁰ Dahlia Lithwick, *How to Take Out a Supreme Court Justice: When politicians target elected judges with big money, the justice system loses*, SLATE (June 13, 2014, 5:01 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/06/tennessee_supreme_court_justices_gary_wade_cornelia_clark_and_sharon_lee.html

⁵¹ Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REGISTER, Nov. 3, 2010, <http://archive.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices>.

A television ad sponsored by several special interest groups, opened with the narrator saying, “Some in the ruling class say it is wrong for voters to hold Supreme Court judges accountable for their decisions.”⁵² Showing images of parents, Boy Scouts, hunters and flag-saluting children, the ad condemned the same-sex marriage decision. The narrator asked voters to “hold activist judges accountable, flip your ballot over and vote no on retention of Supreme Court justices.”⁵³ Buzz words in the ads included phrases such as “ignoring the will of the people,” “legislating from the bench,” “liberal” and “out of control.” In the election, the Iowa justices decided to stay above the political fray.

The justices spoke at colleges, rotary clubs, Kiwanis meetings and other public forums when asked. They talked about the same-sex marriage decision and its consistency with the rule of law and the importance of fair and impartial judges who make decisions without fear, favor or hope of reward. However, they did not fundraise or wage active campaigns or even ask for the citizens to vote “yes,” fearing they would serve only to politicize the retention election.⁵⁴ According to one researcher, the justices could have received a five-percentage increase in votes had they campaigned, which would have made the election close.⁵⁵

Exit polling showed that 57% of Iowa voters opposed same-sex marriage.⁵⁶ One of the leaders of the ouster campaign called the vote, “a strong message for freedom to the Iowa Supreme Court and to the entire nation that activist judges who seek to write their own law won’t be tolerated any longer.”⁵⁷

Two years later, another justice who participated in the same-sex marriage decision faced a similar attack when on the ballot for merit retention. Like the three justices defeated in 2010, this justice did not run an active campaign. In an opinion editorial in the *Des Moines Register* the justice explained, “Campaigns are

⁵² Nation for Marriage, *NOM: Iowans for Freedom against Radical Judges: David A. Baker, Michael J. Streit, Marsha Ternus*, YOUTUBE (Oct. 19, 2010), http://www.youtube.com/watch?v=MIFnBBLX_OE.

⁵³ *Id.*

⁵⁴ Lithwick, *supra* note 50; Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System*, A.B.A. J. (Jan. 1, 2011), http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system/; James Sample, *Retention Elections 2010*, 46 U.S.F. L. REV. 383 (2011).

⁵⁵ *See* Curriden, *supra* note 54.

⁵⁶ Krissah Thompson, *Gay marriage fight targeted Iowa judges, politicizing rulings on issue*, WASH. POST, Nov. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110307058.html>.

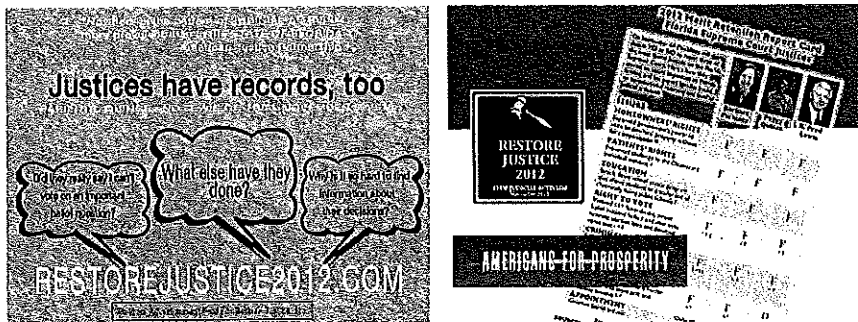
⁵⁷ Bert Brandenburg, *Beating Back the War on Judges: Voters rejected the crusade to politicize the courts*, SLATE (Nov. 12, 2012, 1:06 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/judicial_elections_in_2012_voters_rejected_the_politicization_of_the_courts.html.

political. They require candidates to count votes and appeal to donors. That system has created a big enough mess in Congress. It has no business in the courts. Judges should be beholden only to the constitution and the law.”⁵⁸

By February 2012, 56% of Iowans opposed passing a constitutional amendment banning same-sex marriage.⁵⁹ Amid the shifting winds of public opinion, the justice survived retention in 2012 by receiving 54% of the vote.⁶⁰

In other words, by the time of the 2012 retention election only public opinion changed; the legal merits of the court’s decision did not change. And indeed it is ironic that by 2014, federal courts across the country have almost uniformly held bans on same-sex marriage to be unconstitutional. Yet, unlike state court judges, federal judges enjoy the protection of lifetime appointments.

Florida



In 2012, three justices of the Florida Supreme Court were targeted by several groups. An ad by a group called “Restore Justice” asked “What if we could shake the establishment to its core and take back the last liberal stronghold?” The group argued that judges had unbridled discretion and that some court decisions reflect political choices the judges made. According to the group:

Throughout our country and our state, judicial activism represents a serious threat to our liberty. Judges play partisan politics and cater to special interests, ignoring the constitution and threatening our

⁵⁸ Editorial, *Politics, Principle and an Attack on the Courts*, N.Y. TIMES, Sept. 23, 2012,

http://www.nytimes.com/2012/09/24/opinion/politics-principle-and-an-attack-on-the-courts.html?_r=0.

⁵⁹ William Petroski, *Iowa Poll: Majority opposes ban on same-sex marriage*, DES MOINES REG., Feb. 26, 2012, <http://archive.desmoinesregister.com/article/20120227/NEWS09/302270022/Iowa-Poll-Majority-opposes-ban-same-sex-marriage>.

⁶⁰ Lauren Coffey, *Iowa supreme court justice retention sparks discussion*, THE DAILY IOWAN, Nov. 8, 2012, <http://www.dailyiowan.com/2012/11/08/Metro/30789.html>.

protection under the law. Fortunately, here in Florida, we have a recourse. Every judge is periodically reviewed and placed on the ballot for a merit retention vote.⁶¹

The group criticized the Florida Supreme Court for “undermining property rights, education rights and voters rights,” without any specificity.⁶² The group also criticized a decision removing from the 2010 ballot a constitutional amendment challenging the individual mandate in the Affordable Care Act.⁶³ The only issue for the Court was whether the proposed constitutional amendment ballot summary was misleading. However, the group spun the controversy as justices who would deny voters the right to choose for themselves.⁶⁴

Another group launched a campaign against the Florida justices purporting to call “attention to the court’s decisions that have in fact politicized the bench, allowing their own views to usurp the law and separation of powers, by clearly identifying rulings that bear these instances out.”⁶⁵

Only two months before the election, the justices were attacked for a decision involving the death penalty that had been decided 10 years before. Decisions in criminal cases are particularly vulnerable to distortion. When a court reverses a conviction because the law or the Constitution requires it, paradoxically, some politician, who also has taken an oath to uphold the law and the Constitution, suggests that the decision shows approval for the alleged criminal act or accuses the judge of being “soft on crime” or having “sided” with the criminal.

The challenge for the pro-retention campaign was how to inform the voters about the political motive for the attacks. How would the voters know the attackers’ motive without either the justices or their supporters speaking about it? The three justices decided to fight the unfair attacks, which they believed struck at the very heart of merit retention. They organized their own individual campaigns. They

⁶¹ Peter D. Webster, *Judges Are (and Ought to Be) Different*, 64 FLA. L. REV. 12, 13 at n. 12 (2012), available at <http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1118&context=flr>.

⁶² Restore Justice, *Florida Supreme Court: Justices Pariente, Quince and Lewis*, YOUTUBE.COM (Sept. 30, 2012), available at <https://www.youtube.com/watch?v=9dx5uTXRYpg>.

⁶³ Press Release, Brennan Center for Justice, New York Univ. School of Law, *2012 Spending on Judicial Advertisements Surpasses \$7 Million, With Michigan Leading the Way* (Oct. 11, 2012), available at <http://www.brennancenter.org/press-release/2012-spending-judicial-advertisements-surpasses-7-million-michigan-leading-way>.

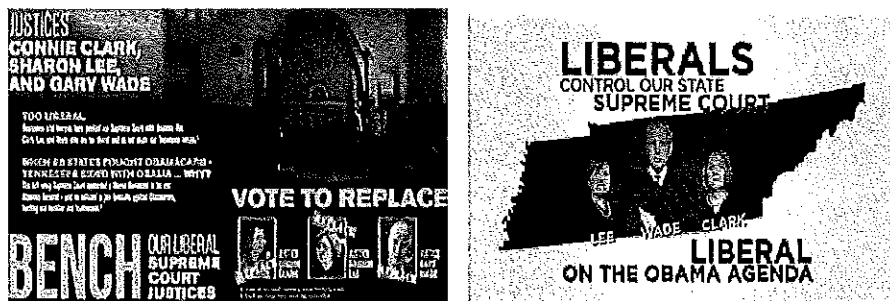
⁶⁴ Americans for Prosperity-Florida, *Shouldn't Florida Courts Protect Our Rights-YouBeTheJudgeFL.com*, YOUTUBE.COM (Sept. 24, 2012), available at <https://www.youtube.com/watch?v=OJgujGDBitE>.

⁶⁵ Press Release, Americans for Prosperity-Florida, *AFP-FL Announces Launch of New Judicial Education Project* (Sept. 26, 2012), available at <http://americansforprosperity.org/florida/newsroom/afp-fl-announces-launch-of-new-judicial-education-project/>.

educated voters on the purposes of merit retention. They visited editorial boards throughout the state.

Ultimately, the justices were retained by over 68% of the voters.

Tennessee



While it was hoped that the strong showing in Florida would discourage politically based attacks in merit retention elections, those hopes were quickly dashed. In August 2014, three justices on the Tennessee Supreme Court faced a retention election challenge. The state's nine member Judicial Performance Evaluation Commission that rated judges found the three justices were qualified to retain their seats.⁶⁶

The state's lieutenant governor led the effort to unseat the justices. He targeted the three jurists as "soft on crime" and "anti-business."⁶⁷ His political action committee contributed \$400,000 to a group called Tennessee Forum.⁶⁸ That group sponsored a television ad claiming the justices were "liberal on crime" and "threaten your freedoms."⁶⁹

A television ad from the State Government Leadership Foundation singled out the Chief Justice as being "liberal on crime, liberal on the Obama agenda."⁷⁰

In Tennessee, there was a political wrinkle because in that state, the Supreme Court chooses the state Attorney General. One group used a radio ad and direct mail

⁶⁶ See Lithwick, *supra* note 50.

⁶⁷ *Id.*

⁶⁸ Brian Haas, *TN Supreme Court battle brings national money, scrutiny*, TENNESSEAN Aug. 5, 2014, available at <http://www.tennessean.com/story/news/politics/2014/08/04/tn-supreme-court-battle-brings-national-money-scrutiny/13550987/>.

⁶⁹ See Lithwick, *supra* note 50.

⁷⁰ Josh Eidelson, *Big Political Money Now Floods Judges' Races, Too*, BLOOMBERG BUSINESSWEEK, July 31, 2014, available at <http://www.businessweek.com/articles/2014-07-31/big-political-money-now-floods-judges-races-too>.

criticizing the justices for picking a “liberal” Attorney General who decided not to join a multistate lawsuit challenging the Affordable Care Act.⁷¹

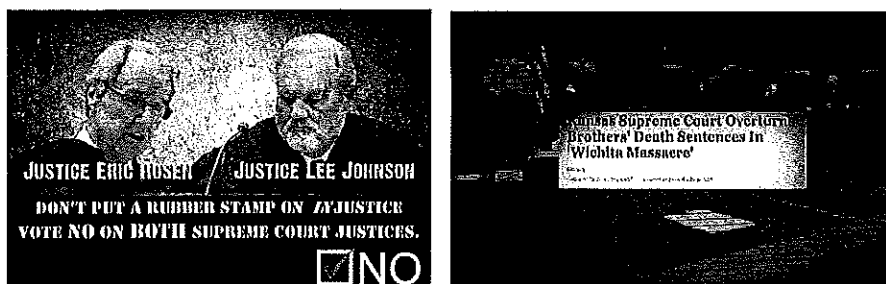
Unlike the Iowa justices and like the Florida justices, the Tennessee justices fought back.

Spending by both sides on television ads topped \$1.4 million, after no spending in Tennessee’s last merit retention election.⁷²

Tennesseans voted to retain the three justices, with each receiving more than 56% of the vote.⁷³ Even so, those opposing retention of the justices claimed a victory.⁷⁴

The Chief Justice credited the jurists’ success to three things: active campaigns defending the record of the Tennessee Supreme Court; the partisan nature of the effort to take control of court putting off voters; and strong support from Tennessee attorneys, who “felt that their entire profession was under fire and assault.”⁷⁵

Kansas



We now turn to Kansas, the fourth example of politically charged attacks in retention elections. In 2010, the anti-abortion group Kansans for Life targeted one of four Kansas Supreme Court justices standing for retention. That group was upset with decisions written by the justice in 2006 and 2008 about the state’s

⁷¹ Press Release, Justice At Stake, *Ads Hit Tennessee Airwaves in Judicial Retention Race: Americans for Prosperity Launches Radio Ad*, (July 23, 2014), available at <http://www.justiceatstake.org/newsroom/press-releases-16824/newsroom/press-releases-16824/newsroom/press-releases-16824>

⁷² Josh Eidelson, *Big-Money Effort to Oust Tennessee Judges Fails*, BLOOMBERG BUSINESSWEEK, Aug. 8, 2014, available at

<http://www.businessweek.com/articles/2014-08-08/big-money-effort-to-oust-tennessee-judges-fails>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

former attorney general's investigation of abortion clinics.⁷⁶ All four justices were retained, garnering about two-thirds of the vote.⁷⁷

Four years later, two Kansas Supreme Court justices stood for retention. In the run-up to the election, the victims' families of a Wichita crime spree formed "Kansans for Justice" to unseat the justices for their role in a 6-1 decision overturning death sentences of brothers Reginald and Jonathan Carr.

The Carr brothers committed unspeakable acts of violence. They were tried jointly in Sedgwick County on charges involving four capital murders, one felony murder, one attempted first-degree murder, and aggravated kidnappings, aggravated robberies, and sex crimes. The jury found Reginald guilty on 50 counts and Jonathan guilty on 43 counts. In the penalty phase of the trial, Reginald was given four death sentences, one hard 20 life sentence, and a consecutive total of 570 months' imprisonment. Jonathan was given four death sentences, one hard 20 life sentence, and a consecutive total of 492 months' imprisonment. The Supreme Court upheld the convictions of each brother on one count of capital murder, which carried with it a life sentence.⁷⁸ Also, the Court upheld Reginald's conviction of 32 crimes and Jonathan's conviction of 25 crimes.

Six justices voted to overturn the death sentences, because of the failure to hold separate penalty phase trials for the men. One justice dissented. She believed the evidence against the men was overwhelming. She wrote the failure to sever the penalty phase of the trial could not have affected the result.

Coming down to the wire, based on polling data published in the media the 2014 Kansas governor's race appeared to be a dead heat. On October 22, 2014, the incumbent governor's polling firm advised the campaign the race was tied. The firm wrote in a memo to the campaign, "Our polling shows that education voters, moral issue voters, and economic issue voters are overwhelmingly decided and show very little potential for movement."⁷⁹ However, the firm noted the challenger's support for the current Supreme Court nominating commission merit

⁷⁶ Fred Mann, *Justices on ballot draw little noise this year*, THE WICHITA EAGLE, Oct. 18, 2010, available at <http://www.kansas.com/2010/10/18/1546834/justices-on-ballot-draw-little.html>.

⁷⁷ Earl Glynn, *10 Counties Voted Not to Retain Kansas Supreme Court Justices*, KANSASWATCHDOG.ORG (Nov. 10, 2010), available at <http://watchdog.org/36825/ks-10-counties-voted-not-to-retain-kansas-supreme-court-justices/>.

⁷⁸ *State v. Jonathan D. Carr*, 329 P.3d 1195 (Kan. 2014), *petition for cert. filed*, Oct 20, 2014 (No. 14-449); *State v. Reginald Dexter Carr, Jr.*, 331 P.3d 544 (Kan. July 25, 2014), *petition for cert. filed*, Oct 20, 2014 (No. 14-450).

⁷⁹ Memorandum from Pat McFerron, President, Cole Hargrave Snodgrass & Associates, Inc. to Mark Dugan, Campaign Manager, Brownback for Governor, Inc., (Oct. 22, 2014), available at <http://cjonline.com/sites/default/files/Oct%2022%20%20Poll%20Memo.pdf>.

process for selecting justices “creates an opportunity for moving a significant number of voters.”⁸⁰ The memo continued, “Our polling shows that when voters are informed of [the challenger’s] relationships with the supreme court justices and reminded of that court’s decision to overthrow the conviction and sentencing of the Carr brothers, they break against [the challenger] by a better than five-to-one ratio.”⁸¹

The Governor launched a television ad mentioning the Carr brothers. Over images of the Carr brothers the ad told about the “killing spree” and the death sentences. The narrator said that “liberal judges” overturned the death sentences. The challenger was said to be a “liberal defense lawyer” who “supported these judges [a veiled reference to efforts in the legislature to abolish merit selection of judges in favor of a federal-type model] who let the Carr brothers off the hook.” The ad promised the Governor would appoint “tough judges” to the Kansas Supreme Court.⁸²

During the last gubernatorial debate, the Governor cited the Carr brothers’ case. “The Kansas Supreme Court is a very liberal court,” the Governor said. He argued that his challenger “wants to continue to appoint liberal judges to that court; I want to appoint judges who will interpret the law, not rewrite it as they choose to see it to be.”⁸³

Following the debate the Governor issued a press release charging, “the Kansas Supreme Court has repeatedly created law and refused to follow the law, rather than interpreting the law, as is their constitutional responsibility. The justices’ decision in the Carr Brothers case is just the latest example.”⁸⁴ Saying the “Kansas Supreme Court has lost its way,” the release pledged the Governor’s support of “Kansans for Justice’s effort to non-retain” the justices and called on the challenger to state his position.⁸⁵

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Sam Brownback Ad, *Carr Brothers*, YOUTUBE.COM, available at <https://www.youtube.com/watch?v=wm0FZnUT9hY>.

⁸³ Ryan Lovelace, *How the ‘Wichita Massacre’ Became a Factor in the Kansas Gov’s Race*, NAT’L REV., Oct. 22, 2014, available at <http://www.nationalreview.com/corner/390931/how-wichita-massacre-became-factor-kansas-govs-race-ryan-lovelace>; Dion Lefler, *Carr brothers’ case highlights bitter debate between Sam Brownback and Paul Davis*, THE WICHITA EAGLE, Oct. 22, 2014, <http://www.kansas.com/news/politics-government/election/article3204377.html#storylink=cpy>.

⁸⁴ Press Release, Brownback for Governor, Inc., *Governor Reiterates Support for Non-Retention of Supreme Court Justices, Call on Davis to State His Position* (2014), available at <http://brownback.com/governor-reiterates-support-non-retention-supreme-court-justices-calls-davis-state-position/>.

⁸⁵ *Id.*

The former prosecutor of the Carr brothers condemned the attack. She found it “beyond disgraceful that [the Governor] would exploit this tragedy and make the victims’ families relive that horrific crime every time they turn on their television.”⁸⁶ She called the Governor’s use of the case for political gain “reprehensible.”⁸⁷

On November 3, 2014, the Governor received 50% of the vote.⁸⁸ His challenger received 47%.⁸⁹ 53% of voters statewide supported retention of both justices.⁹⁰ Interestingly, in Sedgwick County where the Carr brothers’ crimes occurred, one of the justices received 45% of the vote for retention and the other received 46%.⁹¹

We Need Leaders Who Will Defend Against Political Attacks on Courts

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

There is no quick fix to counter the spiraling political attacks of politicians and special interests determined to unseat judges. There is too much campaign value in the cynical on-camera sound bite uttered by a politician on the courthouse steps that courts have forced government to take unacceptable and unpopular actions.

⁸⁶ Dion Lefler, *Former DA Foulston: Brownback’s Carr brothers ad ‘beyond disgraceful’*, THE WICHITA EAGLE, Oct. 22, 2014, available at <http://www.kansas.com/news/politics-government/election/article3251657.html#storylink=cpy>.

⁸⁷ *Id.*

⁸⁸ *2014 Election Results: State of Kansas*, THE WICHITA EAGLE, Nov. 4, 2014, available at <http://www.kansas.com/news/politics-government/election/article3560735.html>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *November 4th, 2014 General Election Official Results - Sedgwick County*, SEDGWICK COUNTY.ORG, (Nov. 13, 2014, 11:40 PM), available at http://www.sedgwickcounty.org/elections/election_results/Gen14/index.html.

Or, last minute attack ads using grainy images of scary criminals and misconceptions about what a court has done.

The “out of step with public opinion” attack is used because it works. A recent national survey of registered voters commissioned by the National Center for State Courts found that even though 60 percent of the respondents said state courts are fair and impartial, providing equal justice to all, the survey also found that “public opinions of the courts are soft and can shift quickly based on external factors or high profile media stories.”⁹²

Judicial retention elections are difficult for voters. They are low information contests. Most voters have little interaction with appellate judges. Unlike contested partisan judicial elections, voters in retention elections lack typical voting cues such as the judge’s party affiliation. Voters are often puzzled as to why the judge is on the ballot since there no challenger. And, having limited familiarity of the Constitution and judicial reasoning, voters have little understanding of how to assess the judge’s performance.⁹³ All of these things contribute to a high rate of “ballot roll-off,” where voters in the voting booth complete a ballot but neglect to vote on retaining judges.⁹⁴

National surveys have consistently revealed surprising evidence of civic illiteracy. A 2012 national survey of civic literacy by Xavier University’s Center for the Study of the American Dream showed that one in three natural born citizens failed the civics portion of the U.S. Citizenship Test, compared to a 97.5 percent pass rate for immigrants.⁹⁵ 75 percent of respondents were not able to correctly answer, “What does the judicial branch do?”⁹⁶

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

- While little more than a third of respondents (36 percent) could name all three branches of the U.S. government, just as many (35 percent) could not name a single one.

⁹² Gerstein Bocia Agne, *Analysis of National Survey of Registered Voters* (December 4, 2014), available at <http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/2014-State-of-State-Courts-Survey-12042014.ashx>.

⁹³ See Caufield, *supra* note 7 at 574.

⁹⁴ *Id.* at 586-87.

⁹⁵ Center for the Study of the American Dream, Xavier Univ., *Civic Illiteracy: A Threat to the American Dream*, available at http://xuamericandream.blogspot.com/2012_04_01_archive.html

⁹⁶ *Id.*

- Just over a quarter of Americans (27 percent) know it takes a two-thirds vote of the House and Senate to override a presidential veto.
- One in five Americans (21 percent) incorrectly thinks that a 5-4 Supreme Court decision is sent back to Congress for reconsideration.⁹⁷

In a March and April 2015 Pew Research Center survey just 33 percent of the respondents knew that there are three women on the U.S. Supreme Court.⁹⁸ 14% thought there was just one woman on the Court.⁹⁹

Attack ads are a demonstrated “*mobilizing force*” spurring increased voter participation in state court elections.¹⁰⁰ Repeated negative attacks in a retention election may make up much of the information available to voters. Those attacks may trump voters’ general favorable impressions of courts.¹⁰¹

Professor Larry Aspin’s study of retention elections from 1964 through 2006 found, “[i]n the typical retention election, non-judge specific factors (e.g., political trust) play large roles, whereas judge-specific variables (e.g., a judge’s controversial act, organized campaign against retention, negative recommendation from a judicial performance commission) play large roles when judges are defeated.”¹⁰²

Judges in retention elections often do not possess the tools to mount an effective defense. Participating in a political discussion about a court decision is counterintuitive for judges. It is well understood that “the business of judges [is] to be indifferent to popularity.”¹⁰³ Usually, judges are heard only in court or in their written decisions, and properly so. These are the conventions within which they operate. But those who lob political attacks at judges exploit this. If a judge publicly responds to the attack or explains the law that required the result in a case the judge risks the danger of becoming an active participant in the political

⁹⁷ Annenberg Public Policy Center, Univ. of Pa., *Americans know surprisingly little about their government, survey finds* (September 17, 2014), available at <http://www.annenbergpublicpolicycenter.org/americans-know-surprisingly-little-about-their-government-survey-finds/>

⁹⁸ Pew Research Cntr., *What the Public Knows — In Pictures, Words, Maps and Graphs*, (April 28, 2015), available at <http://www.people-press.org/2015/04/28/what-the-public-knows-in-pictures-words-maps-and-graphs/>; Meredith Dost, *Dim public awareness of Supreme Court as major rulings loom* (May 14, 2015), available at <http://www.pewresearch.org/fact-tank/2015/05/14/dim-public-awareness-of-supreme-court-as-major-rulings-loom/>.

⁹⁹ *Id.*

¹⁰⁰ Melinda G. Hall and Chris W. Bonneau, *Attack Advertising, the White Decision, and Voter Participation in State Supreme Court Elections*, 66 POLITICAL SCIENCE Q. 115, 119 (2013).

¹⁰¹ See Gerstein Bocia Agne, *supra* note 103.

¹⁰² Aspin, *supra* note 42 at 210.

¹⁰³ *Chisom v. Roemer*, 501 U.S. 380, 401 n. 29 (1991) (quotation marks omitted).

process. But if a judge does not respond, some may believe that the criticism is valid.

Arguments about the need for fair and impartial courts may lack the rhetorical power to reach voters who are convinced that a judge is out of step with public opinion. Sometimes these arguments “serve only to underscore the very problem that targeted judges’ opponents have diagnosed—namely, that those judges regard themselves as free to disregard the will of the sovereign people.”¹⁰⁴

If retention elections are to serve their intended function of providing a measure of public accountability while insulating judges from the harmful effects of popular opinion and political pressure, then, as Professor Caufield notes, “voters must be able to participate in a meaningful way apart from individualized campaigns that advance narrow political agendas.”¹⁰⁵

The National Association of Women Judges is doing its part to raise civic literacy and assist voters. Its’ *Informed Voters--Fair Judges* project is a non-partisan national project to educate the public about the role and importance of fair and impartial courts in our democracy. The project has a website: <http://ivp.nawj.org/>. The website is an excellent resource for a fair courts service project, presentations to civic groups and schools, including community colleges, and Law Day and Constitution Day talks.¹⁰⁶ Posted there are alerts, presentations, talking points, radio and television public service announcements, state specific information and a five-minute film produced by the Discovery Channel and narrated by retired Justice Sandra Day O’Connor, who remarks during the film, that

Americans look to their courts for fairness because they trust the judge will handle their case with an even hand, free from the influence of politics and

¹⁰⁴ Pettys, *supra* note 43, at 120.

¹⁰⁵ Caufield, *supra* note 7, at 588.

¹⁰⁶ The Informed Voters Project was unanimously endorsed by the Conference of Chief Justices, an organization comprised of the Chief Justices of each state’s supreme court:

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

NAWJ Editorial, *Conference of Chief Justices Adopts Resolution 10 Supporting the Informed Voters Project*, IVP.NAWJ.org (February 4, 2014), available at <http://ivp.nawj.org/content/conference-chief-justices-adopts-resolution-10-supporting-informed-voters-project#.VQj4K1PF-Wy>.

partisanship. Judges who don't represent one group or party versus another, judges who don't bend the rules, judges who stand for one thing and only one thing... fairness. Because doing what's right is not based on the poll numbers. When a judge gives every case and every person the same treatment our courts are what they have always been and must always be...fair and free."

Educating voters about political attacks is a heady task. Voters cannot easily weigh the competing arguments. Those who urge retention typically argue that judges should never be ousted in response to a single decision. The argument continues that such an ouster lessens the public's respect for courts as fair and just forums to resolve disputes. Those who oppose retaining a judge often reject this argument as undemocratic rhetoric. They urge voters to reign in judges who are out of step with popular opinion. Beyond explaining the role of courts in our democracy, pro-retention campaigns must preempt would-be attackers by telling voters about the retention election's purpose and any objective information about a judge's qualification to serve.

Professor Todd Pettys argues that voters "cannot peer into the future and definitively see what the consequences of sustained anti-retention activity will be."¹⁰⁷ Professor Pettys predicts voters will "take refuge in whichever set of arguments best suits their preferences at a given moment in time" and will "seek guidance from cultural authorities who share their core values."¹⁰⁸ He concludes, "regardless of their merits, consequentialist arguments about judicial independence and the need for fair and impartial courts simply lack the rhetorical power necessary to reach voters who are convinced that an unrepentant judge has committed a grave moral transgression."¹⁰⁹

Persuading voters to set aside their moral outrage about unpopular decisions requires advocates who can engage the public in a spirited discussion about the merits of controversial decisions. There is little a court can do when it is unfairly criticized. Attorneys must step forward and stand up for courts. "Where is the Bar with all of its committees upon committees? Why is there not a strike force, a rapid response team, to deal with attacks . . ."¹¹⁰

¹⁰⁷ Pettys, *supra* note 43, at 137.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Bright, *supra* note 7, at 308.

We must build coalitions of like-minded private citizens, corporate leaders, politicians, attorneys, teachers, media professionals, retired judges and others. We must educate the public about the basics of what courts do. We must connect with voters on their commonly-held values of fairness and impartiality and courts free from popular opinion or political pressure. We must express to politicians our disapproval of political attacks and efforts at intimidating judges. We must mobilize as first responders to refute any deceptions or distortions. We must put a challenged court decision in the broader perspective of the rule of law. We must point to the legal principles and facts underlying the decision. We must explain that judges unlike legislators decide cases based on the rule of law and not what is politically popular. We must go public with the attacker's strategy and the motive behind their political attack. Most importantly, we must always bring the focus back to the importance of fair and free courts to our democracy.

If we doubt the layperson's ability to engage in intelligent discussion of court decisions and legal principles, Professor Pettys argues, "then we are foolish to maintain a system in which voters are asked to decide whether judges should remain in office."¹¹¹

In state after state, judicial retention elections that were designed to be apolitical affairs focused solely on judicial qualifications and competence are increasingly becoming as contentious as any contested partisan election. Qualified and competent judges who choose to decide cases based on the law, rather than the changing winds and passions of public opinion, are vulnerable in America. Years ago, two U.S. legal scholars, each at different ends of the political spectrum, joined in an essay on the value of fair and free courts. They aptly commented, "It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans."¹¹²

Preserving fair and impartial courts is advanced citizenship. We need court advocates who will educate the public about the role of strong courts in our democracy and fight back with effective messages when court decisions are attacked for being out of step with public opinion.

¹¹¹ Pettys, *supra* note 43, at 145.

¹¹² Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?* 84 JUDICATURE 58, 63 (2000).

