

O'CONNOR, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 01–521

REPUBLICAN PARTY OF MINNESOTA, ET AL., PETI-
TIONERS *v.* SUZANNE WHITE, CHAIRPERSON,
MINNESOTA BOARD OF JUDICIAL
STANDARDS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June 27, 2002]

JUSTICE O'CONNOR, concurring.

I join the opinion of the Court but write separately to express my concerns about judicial elections generally. Respondents claim that “[t]he Announce Clause is necessary . . . to protect the State’s compelling governmental interes[t] in an actual and perceived . . . impartial judiciary.” Brief for Respondents 8. I am concerned that, even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines this interest.

We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. See Eule, Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal, 65 U. Colo. L. Rev. 733, 739 (1994) (quoting former California Supreme Court Justice Otto Kaus’ statement that ignoring the political consequences of visible decisions is “like ignoring a croco-

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dile in your bathtub”); Bright & Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B. U. L. Rev. 759, 793–794 (1995) (citing statistics indicating that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty than are judges who do not run for election). Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public’s confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.

Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds. See Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. Rev. Mich. State U. Detroit College of Law 849, 866 (reporting that in 2000, the 13 candidates in a partisan election for 5 seats on the Alabama Supreme Court spent an average of \$1,092,076 on their campaigns); American Bar Association, *Report and Recommendations of the Task Force on Lawyers’ Political Contributions*, pt. 2 (July 1998) (reporting that in 1995, one candidate for the Pennsylvania Supreme Court raised \$1,848,142 in campaign funds, and that in 1986, \$2,700,000 was spent on the race for Chief Justice of the Ohio Supreme Court). Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. See Thomas, *National L. J.*, Mar. 16, 1998, p. A8, col. 1 (reporting that a study by the public interest group Texans for Public Justice found that 40 percent of the \$9,200,000 in contributions of \$100 or more raised by seven of Texas’ nine

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Supreme Court justices for their 1994 and 1996 elections “came from parties and lawyers with cases before the court or contributors closely linked to these parties”). Even if judges were able to refrain from favoring donors, the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public’s confidence in the judiciary. See Greenberg Quinlan Rosner Research, Inc., and American Viewpoint, National Public Opinion Survey Frequency Questionnaire 4 (2001), (available at <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf>) (describing survey results indicating that 76 percent of registered voters believe that campaign contributions influence judicial decisions); *id.*, at 7 (describing survey results indicating that two-thirds of registered voters believe individuals and groups who give money to judicial candidates often receive favorable treatment); Barnhizer, “On the Make”: Campaign Funding and the Corrupting of the American Judiciary, 50 *Cath. U. L. Rev.* 361, 379 (2001) (relating anecdotes of lawyers who felt that their contributions to judicial campaigns affected their chance of success in court).

Despite these significant problems, 39 States currently employ some form of judicial elections for their appellate courts, general jurisdiction trial courts, or both. American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (Apr. 2002). Judicial elections were not always so prevalent. The first 29 States of the Union adopted methods for selecting judges that did not involve popular elections. See Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 *U. Chi. L. Rev.* 689, 716 (1995). As the Court explains, however, beginning with Georgia in 1812, States began adopting systems for judicial elections. See *ante*, at 15. From the 1830’s until the 1850’s, as part of the Jacksonian movement toward greater popular control

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of public office, this trend accelerated, see Goldschmidt, Merit Selection: Current Status, Procedures, and Issues, 49 U. Miami L. Rev. 1, 5 (1994), and by the Civil War, 22 of the 34 States elected their judges, *ibid.* By the beginning of the 20th century, however, elected judiciaries increasingly came to be viewed as incompetent and corrupt, and criticism of partisan judicial elections mounted. Croley, *supra*, at 723. In 1906, Roscoe Pound gave a speech to the American Bar Association in which he claimed that “compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench.” The Causes of Popular Dissatisfaction with the Administration of Justice, 8 Baylor L. Rev. 1, 23 (1956) (reprinting Pound’s speech).

In response to such concerns, some States adopted a modified system of judicial selection that became known as the Missouri Plan (because Missouri was the first State to adopt it for most of its judicial posts). See Croley, 62 U. Chi. L. Rev., at 724. Under the Missouri Plan, judges are appointed by a high elected official, generally from a list of nominees put together by a nonpartisan nominating commission, and then subsequently stand for unopposed retention elections in which voters are asked whether the judges should be recalled. *Ibid.* If a judge is recalled, the vacancy is filled through a new nomination and appointment. *Ibid.* This system obviously reduces threats to judicial impartiality, even if it does not eliminate all popular pressure on judges. See Grodin, Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections, 61 S. Cal. L. Rev. 1969, 1980 (1988) (admitting that he cannot be sure that his votes as a California Supreme Court Justice in “critical cases” during 1986 were not influenced subconsciously by his awareness that the outcomes could affect his chances in the retention elections being conducted that year). The Missouri Plan is currently used to fill at least some judi-

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cial offices in 15 States. Croley, *supra*, at 725–726; American Judicature Society, *supra*.

Thirty-one other States, however, still use popular elections to select some or all of their appellate and/or general jurisdiction trial court judges, who thereafter run for reelection periodically. *Ibid.* Of these, slightly more than half use nonpartisan elections, and the rest use partisan elections. *Ibid.* Most of the States that do not have any form of judicial elections choose judges through executive nomination and legislative confirmation. See Croley, *supra*, at 725.

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.