

HOW MUCH DEMOCRACY

IS TOO MUCH DEMOCRACY?

by Mary Kathleen Dryer

In Pennsylvania, Democrats are celebrating a huge win. On November 3, three Democratic candidates (Donahue, Dougherty, and Wecht) captured seats on the State Supreme Court. Judicial elections are common — 38 states use them to select justices for courts at all levels: high (Supreme), intermediate appellate, and trial.¹ Despite their widespread use, many rightfully question the prudence of using popular elections to fill state courts.

A key difference between federal and state courts is that while federal judges are nominated by the president and confirmed by the Senate, the majority of jurists at the state level are elected. The reason federal judges, at least judges on the Article III courts, are made by executive selection is the same reason that Supreme Court justices are given life tenure: to insulate them from the whims of public opinion. In *The Federalist*, Alexander Hamilton vehemently defended the idea of insulating courts from public opinion:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men...

*sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.*²

In this passage, Hamilton articulates the fundamental paradox of democracy, a question that genuine republics have always grappled with: how can we control for the “tyranny of the majority?” In other words, how can we entrust people with the power to govern themselves but also prevent them from stripping away the rights of minority groups or from posing a danger to others? As a democratic republic, of course we believe in majority rule, so it seems anathema to Americans to say there is such a thing as too much democracy, but it does exist: what the majority wants is not always just, which we have seen internationally — the United States has more than once been forced to backpedal swiftly on the international stage away from her professed democratic values when foreign populations elect what we

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would term extremists and radicals —and domestically, in cases such as *Brown*.

By most standards today, the ruling made in *Brown v. Board of Education* to overturn *Plessy v. Ferguson* (the case that originally instituted the “separate but equal” doctrine that *Brown* reversed) seems natural and just. The mainstream is virtually empty of any voices that contest this ruling. Though the attitudes supplanted by *Brown v. Board* have now given way to “better information, and more deliberate reflection,” it is important to remember the infamous black-and-white snapshots of protesters toting signs like *Race Mixing is Communism*; *We wont [sic] go to school with Negroes*; and *Communist Jews Behind Race-Mixing* that summed up *Brown*’s Southern reception. We need to remember the iconic images of the Little Rock Nine walking to school surrounded by the National Guard and the photo of Elizabeth Eckford walking away from a crowd of jeering whites and ask ourselves seriously if state laws prohibiting integration and so-called “miscegenation” would have been overruled if the Supreme Court were dependent on those protesters for reelection. The right decision may be difficult

and unpopular. It's imperative to our country's health that we have justices who can make these difficult decisions without having to fear for their jobs.

This is no problem confined to the "old days" of segregation. Because of their vulnerability to the whims of the public, in the last few years a number of judges have been threatened with impeachment for striking down bans on same-sex marriage. After the Court ruled this summer to uphold the legality of same-sex marriage and certain clauses of the Affordable Care Act, a number of conservative commentators, among them presidential candidate Ted Cruz, a self-professed constitutionalist, called for elections to be implemented for Supreme Court. "Sadly, the Court's hubris and thirst for power have reached unprecedented levels," he said. That a justice should face losing his or her job for the heinous crime of returning a verdict distasteful to some of his or her constituents debases our legal system.

Iconic civil rights cases like *Brown* which, while they are vast in impact come but rarely, are not the most pressing concern to opponents of judicial elections. The troubling effects of judicial elections on criminal law enforcement can be seen every day. Most voters, unaware of the finer points of Constitutional law, may not recognize, for example, that it is often necessary for judges to examine the conduct of law enforcement officers. When the police overreach, sometimes the only redress is to suppress evidence — including evidence that incriminates an actually guilty defendant — or even to dismiss charges completely. These types of decisions are deeply unpopular. The hope is

that federal judges, who are selected by the people's representatives instead of the people themselves, will be better able to retain their objectivity in the face of strong public opposition. But judges elected for specific terms, who must run for re-election, or at least retention, have shown themselves to be more vulnerable to the passions of an inflamed public. In election years especially, a judge, being keener than ever to avoid earning the abhorred title of "soft on crime," hands down decisions with one eye turned towards his or her reelection bid: a 2012 study from Berkeley suggested that judges rule more harshly on violent crimes in election years, with as much as a 10 percent increase in sentence length.³

Thomas Jefferson said, "When 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."⁴ This call for levelheaded jurisprudence seems to conflict with the realities of our current electoral system. In addition to making public opinion a misplaced concern, elections force judges to grovel for funds, potentially indebting themselves to groups that have an interest in future cases. In general, the fairness of our current system of campaign finance is something political scientists are currently pondering at all levels of government. As the cost of mounting a competitive election increases drastically, candidates have come to rely more and more on contributions from the private sector. In the last few years it has been the subject of several high-profile Supreme Court cases because of fears that it allows a few heavy spenders to drown out the majority. This is less than ideal

for any position but is particularly concerning for jurists, who are meant to be impartial interpreters of the law. More than just harsher rulings for criminals, when we pit judicial candidates against each other in elections, we force them to court donors who may have less than pristine motivations. According to Shepherd and Kang of Emory University, 76 percent of voters believe that campaign contributions have some effect on shaping judicial rulings, and 46 percent of judges themselves believe contributions have "at least a little" influence.⁵

The views outlined in *Federalist No. 78*, that popular elections would compromise the integrity of the judiciary, were widely accepted for a number of years, making elected judiciaries the exception rather than the norm. The ascendancy of Andrew Jackson, however, popularized new and comparatively liberal views on democracy — the term Jacksonian democracy was coined to describe the increased participation of the general public in government seen during his presidency. This change included a shift away from appointed, towards elected, justices. On the face of things, this was a sensible measure to enact; the shift was a reform, an earnest attempt to keep the democratic procedure open and free. As scholar David Pozen writes, "Elections bring [judiciaries] into the sphere of ordinary politics, inviting voters to conceptualize the individuals selected as agents and representatives rather than autonomous actors or distant technocrats. They invite voters to think about the substantive powers of that institution, and whether they would like to see those powers wielded differently."⁶ Unfortunately, the

view Pozen takes is sadly optimistic. It assumes, falsely, an ideal political environment, where most citizens are well-informed and active in the democratic process. Even during presidential elections, turnout is less than ideal; according to The Center for Voting and Democracy, 60 percent of eligible people participate, and for midterm and off-year elections, participation drops to just 40 percent.⁷

People unfamiliar with domestic politics tend to be leery of appointed justices, who seem to have an alarming amount of power coupled with minimal accountability. The impulse to make judges more responsive to the people whose lives are governed by their decisions is a sympathetic one, but a position on the bench is unlike any other political office. Unlike legislative officials who craft laws to suit their constituents, a justice is asked at the time of his or her inauguration to affirm that their first duty is to uphold the Constitution. They are occasionally thrust into the position of de facto legislator, and thus many citizens impulsively want to tighten the reigns through judicial elections. This is a dilemma that certainly deserves further discussion, but by using judicial elections, we force officials to choose between upholding their duty and keeping their livelihoods. Even then it doesn't produce the desired results. Apathy and stagnation in the political system have made them less the vehicle for upholding popular constitutionalism e than an opportunity for undue influence by a wealthy few.

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