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SHOULD STATES REFORM THEIR JUDICIAL SELECTION PROCESS DUE TO A POLARIZED POLITICAL ERA?

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I. JUDGES AND POLITICS ARE SEPARATE – RIGHT? JUDICIARY UNDER ATTACK BY POLITICS

James R. Adams is a resident and member of the State Bar of Delaware who, for some time, has had a desire to become a state judge.[1] When several vacancies arose, Adams contemplated applying, but after an announcement was made requiring the candidate to be a Republican, Adams ultimately decided against applying.[2] Adams was neither a Republican nor a Democrat, and

1. *See* Adams v. Governor of Del., 922 F.3d 166, 169 (3d Cir. 2018) (explaining that judges are not policymakers because decisions they make relate to a case, not partisan political interest; and stating that applying for a judicial vacancy requiring association with a given party violates First Amendment rights).

2. *Id.*

thought any application he sent would be futile.[3] Adams brought suit against the Governor of Delaware to challenge the provision of the Delaware Constitution that effectively limits service on state courts to members of just the Republican and Democratic parties.[4] The provision in the Delaware Constitution at the time was written as:

> "Appointments to the office of the State Judiciary shall… be subject to all of the following limitations: First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party."[5]

The Governor of Delaware's argument was that judges are policymakers, and therefore there should be no Constitutional restraints on his hiring decisions.[6] However, the Court of Appeals for the Third Circuit disagreed, informing the Governor that judges are not policymakers, and struck down the aforementioned portion of the Delaware Constitution as violating Adams's First Amendment rights.[7] The court also ignored Delaware's interest of having political balance, as excluding independents and third parties from the ballot was not narrowly tailored to that interest.[8] The court ruled in favor of Adams and against political entanglement on the judiciary.[9] While considered a victory for believers in strict judicial independence, should political entanglement be completely ignored? Despite the polarized political times, a balance must be found.

The United States of America has seen a rapid divide in partisan politics over the last few years, most notably seen during the 2016 Presidential Election.[10] There has been a noticeable divide along party lines, by political attitudes, social values, basic demography, and even beliefs about reality.[11] The aftermath of the

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3. *Id.*

4. *Id.*

5. DEL. CONST. art. IV, § 3 (stating the limitations on the state judiciary, including requiring that there be 5 justices on the Supreme Court, with three justices belonging to one of the major political parties, and the other two justices belonging to the other party).

6. *Governor of Del.*, 922 F.3rd at 169.

7. *Id.*

8. *See id.* (applying the strict scrutiny standard). The Court of Appeals for the Third Circuit came to the conclusion that Delaware's state interest of political balance is irrelevant because the practice of excluding Independents and other third-party voters from judicial employment is not narrowly tailored to that interest.

9. *Id.*

10. *See* Gary C. Jacobson, *Polarization, Gridlock, and Presidential Campaign Politics in 2016*, 667 AAPSS 226 (2016) (explaining the political divide amongst political parties and demographics following the 2016 Presidential Election).

11. *See id.* (explaining where exactly the polarized division of politics has been felt the most).

2016 election had the potential to shake up electoral patterns that have prevailed during the last century, undoubtedly causing uncertain and unpredictable consequences for national politics.[12] With polarization having an additional component of viewing the other party negatively, severe evaluation of state judicial election process must be considered due to the issues that arise with political polarization.[13] The portions of the Delaware Constitution requiring candidates to be affiliated with a political party is further proof that politics have encroached on the judiciary. Reform amongst all states must occur in order to preserve judicial independence, which sets the judiciary apart from other branches.[14]

As Alexander Hamilton once said, "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[15] This Comment will opine that politics were never meant to play a role in the judiciary. In today's political climate, this Comment argues why a balance is needed to accommodate the times.

The Section II of this Comment will address the background and origin of how states have enacted their own judicial election process.[16] Also mentioned will be the various methods used by different states in contemplation of what would succeed in a polarized political climate. This Comment will then provide an analysis of the issue the United States currently faces, which is how politics have drastically become polarized and how the rift between both political ideologies has grown exponentially.[17] This part will also encompass an analysis of the positive and negative aspects of political involvement in the judiciary.[18] Section III of this Comment will then provide an argument for why politics should not be

12. *Id.* at 226.

13. *Id.*

14. *See* The Constitution Restoration Act, Judicial Independence, and Popular Constitutionalism, 56 CASE W. RES. 1083, 1084 (2006) (attempting to understand what judicial independence is and how politics plays a significant role).

15. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (concerning primarily the role and main function of the Judiciary Branch and discussing the power of judicial review).

16. *See, e.g.*, *The Debate Over Judicial Elections and State Court Judicial Selection*, 21 GEO. J. LEGAL ETHICS 1347 (2008) [hereinafter *The Debate Over Judicial Elections*] (examining a panel of federal judges, including Supreme Court Justice Steven Breyer, discussing the relevant issues of the election of state judges and how judge impartiality, which is crucial to a rule of law and to independent judiciary, is under threat).

17. Rebecca Nelson, *The War on Partisanship*, ATLANTIC (Oct. 30, 2015), www.theatlantic.com/politics/archive/2015/10/the-war-on-partisanship/451461/ [perma.cc/4ANE-M674] (studying the partisan divide and animosity that exists for the opposing party).

18. Republican Party v. White, 536 U.S. 765 (2002) (deeming a statute unconstitutional for prohibiting judicial candidates from announcing their political views during a campaign).

completely removed from the judiciary. Section IV will then address whether states should be mandated to reform the judicial election process due to polarized political times and future uncertainty.[19] Finally, this Comment will propose a resolution to the conflicts observed throughout the Comment.

II. THE JUDICIAL ELECTION SYSTEM THROUGHOUT THE STATES

A. State Judicial Election History

A discussion of the history of state judicial elections is needed in order to understand why the current state judicial processes are in place today. Initially, the thirteen original states all chose their judges either through legislative election or gubernatorial appointment.[20] However, halfway through the 19th century "the public had lost confidence in either of the political branches to choose qualified and impartial judges."[21] This was due to the other state government branches lack of consensus on how to determine who is a competent judge.[22] In response, most states started to conduct the election of judges through popular vote, and every new state that joined the union between 1846 and 1912 provided that their judges be selected through popular vote.[23] As political parties began to gain rising influence at the turn of the 20th century, their political influence carried over to the judiciary, which in turn caused widespread public dissatisfaction with the popular vote method as well.[24] It was not until the mid-20th century that most states adopted one of two major reforms: nonpartisan ballots and the merit selection system.[25]

B. The Existing Methods

1. Nonpartisan ballots

Nonpartisan ballots were first enacted during the Progressive Era (1890-1920) in response to the widely held belief that political

19. Stan Greenberg & Linda A. DiVall, *Courts Under Pressure – A Wake-up Call From State Judges*, 41 JUDGES' J. 11 (2002) (observing the concerns of state judges in future state judicial elections).

20. *The Debate Over Judicial Elections*, *supra* note 16, at 1353.

21. *See id.* (briefing the history of how the first thirteen states of the U.S. elected their state judges).

22. *Id.* at 1354

23. *Id*. (tracking the changes of the state judicial election process as the country was entering the Progressive Era).

24. *Id.* (examining the beginnings of how politics began encroaching into the judiciary and the unrest it created with people).

25. *Id.*

party bosses and organizational machines were corrupting city governments.[26] In nonpartisan elections, candidates are typically nominated to the general election ballot by petition or by performance in a single primary election in which they run without party affiliation.[27] Any declaration of candidacy, petitions and other nomination papers for nonpartisan office have no mention of political party.[28]

In California, an absolute nonpartisan law was instituted because the legislature perceived that partial nonpartisan elections fail to fully achieve its goal of differentiating judiciary elections from other elections.[29] The reasoning was that political party activity can transform nonpartisan elections into contests resembling partisan elections in a variety of ways.[30] Without the absolute nonpartisan law, California believed that candidates for nonpartisan elections would still seek political endorsement and support as if they had official party status.[31]

a. Advantages

Nonpartisan elections are seen as a more efficient way of limiting political party participation in local elections.[32] Nonpartisan elections serve several purposes that differ from the various other methods of electing judges.[33] These purposes include: improving the quality of the bench, removing the strains of partisan politics, providing a better basis for citizens to vote than the partisan affiliations of the candidates, and lessening the impact of moneyed players and other organized interests in judicial elections.[34]

b. Disadvantages

While nonpartisan elections are generally favored and liked,

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26. Nancy Northup, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 COLUM. L. REV. 1677, 1677 (1987) (arguing that refraining from political interest of nonpartisan state judicial elections has greater constitutional gratification than other known methods, despite the fact it borderline violates the First Amendment of the United States Constitution).

27. *Id.* at 1683; *see*, *e.g.*, N.D. CENT. CODE § 16.1-11-37 (2021) (explaining the nonpartisan state judicial selection voting process applied in North Dakota).

28. Northup, *supra* note 26, at 1683.

29. *Id.*

30. *Id.*

31. *Id.* at 1684.

32. *Id.*

33. *Id.*

34. *See* Melinda Gann Hall, *Partisanship, Interest Groups, and Attack Advertising in the Post-White Era, or Why Nonpartisan Judicial Elections Really Do Stink*, 31 J. L. & POLITICS 429, 432 (2016) (explaining the ideology behind judicial nonpartisan voting, but arguing how these elections should be abandoned for other preferred election methods).

they are not without their flaws, and have several disadvantages compared to the other methods.[35] Similar to partisan elections, most voters in nonpartisan elections know little about the viable candidates.[36] However, voters could be deterred from voting for an individual without a political affiliation.[37] For example, a significant decrease in votes occurred when North Carolina switched to nonpartisan elections.[38] Nonpartisan voting has good intent for state judiciaries; however, its flaws are noticeable and whether they can withstand a polarized political era is in doubt.[39]

A trend that began in 2000, nonpartisan elections were under attack in several states.[40] In Idaho, a candidate for the Supreme Court drew party support that was contrary to normal practice since Idaho went nonpartisan in 1932.[41] In Kansas, reform groups in two judicial district had to spend $97,841 to defeat ballot propositions aimed to return to partisan elections.[42] A reason for these departures is because they do not insulate judges from political controversy as originally anticipated.[43]

2. Merit selection system

Another method of the judicial election process is through merit selection system, which is designed to ensure that judges would be selected on the basis of professional merit.[44] Professional merit includes professional qualifications, experience, legal

35. *See id.* at 434 (explaining how contrary to popular theories of belief, nonpartisan elections can work in several ways that contradict the claims of the judicial reform movement).

36. Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure- Its Historical Development*, 7 DUQ. L. REV. 61 (1968) dsc.duq.edu/cgi/viewcontent.cgi?article=1432&context=dlr [perma.cc/VD68-M9PE].

37. Judge Robert H. Hunter, Jr., *Do Nonpartisan, Publicly Financed Judicial Elections Enhance Relative Judicial Independence?*, 93 N.C.L. REV. 1825, 1879 (2015).

38. *Id.*

39. Hall, *supra* note 34 (explaining the ideology behind judicial nonpartisan voting, but arguing how these elections should be abandoned for other preferred election methods).

40. Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1415 (2003) (arguing the need to protect nonpartisan elections as the trend of the states is seemingly moving away from that method).

41. *Id.*

42. *Id.*

43. Brandice Canes-Wrone and Tom S. Clarke, *Judicial Independence And Nonpartisan Elections*, 1 WIS. L. REV. 21, 24 (2009).

44. Rachel Paine Caufield, *What Makes Merit Selection Different?*, 15 ROGER WILLIAMS U. L. REV. 765, 766 (2013) (analyzing the merit selection system with an overview of its origin, while providing an argument for both sides on whether it should be preferred).

expertise, impartiality, and temperament.[45] Reformers tend to praise merit selection and similar appointive systems because these systems allegedly void problems with loss of public confidence and trust that arise in competitive judicial elections.[46]

Under a typical merit selection system, a judicial nominating commission interviews, screens, and selects potential state court judges.[47] The nominating commission then recommends a list of candidates to the governor, who then selects an individual for the bench.[48] Typically, the appointed judge later appears before voters in a "retention election" where the voters can vote to either keep them or have them replaced by an unknown individual.[49] The incoming bench member is later chosen by the nominating commission.[50]

a. Advantages

Proponents of merit selection argue that the system favors the idea of removing politics from the selection of judges.[51] Merit selection proponents also contend that nominating a commission-based system reduces the influence of money and financial means in political campaigns for judgeships.[52] Merit selection also can be argued to produce better quality judges, as a nominating commission thoroughly gives more time and attention to the professional qualifications of a potential judge than voters.[53] In turn, it creates more public trust in the judiciary, as the judges are presumed to be impartial due to being selected by an "expert" nominating board rather than through voters.[54]

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45. *Id.*

46. *Id.*; Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1234-35 (2000) (analyzing why the judicial election process is resilient to change, what other methods would work better, and what it will take to persuade various decision makers that other alternatives are preferable and feasible).

47. Matthew Schneider, *Options For An Independent Judiciary In Michigan: Why Merit Selection Of State Court Judges Lacks Merit*, 56 WAYNE L. REV. 609, 623 (2010).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 625; *see* Mark I. Harrison et al., *On the Validity and Vitality of Arizona's Judicial Merit Selection System: Past, Present, and Future*, 34 FORDHAM URB. L.J. 239, 256 (2007) (supporting further the idea of a successful merit selection system).

52. Schneider, *supra* note 47 at 626.

53. *Id.*; *see Senate Judiciary Comm. Pub. Hearing on Merit Selection: Senate Bills 1324 and 1325*, 2007-08 Session (Pa. 2008).

54. *Id.*

b. Disadvantages

The merit selection system, despite what its proponents positively suggest, has its fair share of critiques as well.[55] It has been argued that the merit selection system moves politics from out in the open to behind closed doors.[56] In fact, "[a]bout one third of lawyer and non-lawyer commissioners have had high levels of political or civic activity, having served in partisan or public offices."[57] Judicial nomination commissions have tended to be white males and dominated by lawyers and business interests.[58] Furthermore, the criteria for what makes a "quality judge" is difficult for anyone to determine.[59] Judges are asked to perform many tasks, and the job cannot merely be reduced to several characteristics or qualities of an individual.[60]

Another potential for conflict is to the extent appointed judges are influenced by political considerations when they make the decision to run in retention elections and attempt to retain their office.[61] State judges are not free from political isolation, and based on data, merit judges do not behave differently than elected ones, as both exhibit the behavior of elected officials who are mindful of public attitudes as they make decisions.[62] The study, conducted by Professor Melissa Gannon, researched 245 state supreme court justices in thirty-eight states between 1988 and 1995, showing that it is electoral consideration that influences judges selected by merit selection to voluntarily retire from the bench.[63] Examples of electoral consideration include factors such as percentage of the vote received in the previous election, whether a fellow incumbent judge was defeated in the prior election, and the change in the state's ideological climate from the time of the judges initial appointment to the time of the upcoming election. [64] From this evidence, Professor Gannon asserts that retention election promotes accountability since justices appear to be mindful of risk

55. *Id.*

56. Maute, *supra* note 46, at 1235.

57. *Id.* at 1235.

58. *Id.*

59. Caufield, *supra* note 44, at 779.

60. *Id.*

61. Richard B. Saphire and Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of The Judicial Selection Debate*, 39 U. TOL. L. REV. 551, 553 (2008) (challenging the assertions of the benefits of merit selection systems with empirical data and statistics).

62. *Id.* at 570.

63. *Id.*; Melinda Gann Hall, *Voluntary Retirements from State Supreme Courts: Assessing Democratic Pressures to Relinquish the Bench*, 63 J. POL. 1112 (2001) (analyzing the political pressures that influence state supreme court justices to voluntarily retire from the bench).

64. Saphire and Moke, *supra* note 61, at 570; Hall, *supra* note 63, at 1125-26.

of defeat at election polls.[65]

3. Partisan elections

Partisan elections offer the best opportunity for the public to select judges according to their preferred values because they can vote for their party of choice.[66] In this type of election, party affiliation "is an important proxy for determining whether a judge's decisions are likely to reflect the preferences of the voter" and in turn more effectively allow the public to influence their state's judiciary.[67] Party affiliation can provide one of the most valuable determinatives on how a future judge is most likely to decide a case.[68] Other studies have found that removing political affiliation from judicial candidates has "suppress[ed] voting, produces idiosyncratic outcomes, and raises the cost of seeking office."[69] Voters want information to base their vote on, and arguably one of the most important pieces of discovering a judge's judicial philosophy is a judge's political affiliation.[70] The main argument of proponents is that exposing politics to the public produces better quality results than hiding the politics in back room appointments, where decisions are made by an elite few.[71]

a. Advantages

Furthermore, supporters argue that partisan elections most effectively serve to provide accountability.[72] "Partisan elections are much more likely to assure the existence of opposition, vigorous criticism of those in power and effective presentation of alternative policies."[73] The campaign resources necessary to promote these candidates are available through party organizations.[74] Proponents

65. Saphire and Moke, *supra* note 61, at 570.

66. *Id.*

67. *Id.*; Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 805 (2004).

68. Dimino, *supra* note 67 at 805.

69. Kelly Shackelford and Justin Butterfield, *Symposium: Judicial Selection: Part II. Questioning Reform: The Light of Accountability: Why Partisan Elections Are the Best Method of Judicial Selection*, 53 THE ADVOCATE 73, 75 (2010) (advocating the position of partisan elections over other judicial election processes) (quoting Melinda Gann Hall, *On the Cataclysm of Judicial Elections and Other Popular Anti-Democratic Myths,* 12 (2009) ssrn.com/abstract=1394525 [perma.cc/Y7XR-G9UB].

70. Shackelford and Butterfield, *supra* note 69 at 75.

71. *Id.*

72. Kurt E. Scheuerman, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 460 (1993) (analyzing the different methods of judicial elections and which best serves judicial accountability).

73. *Id.* (quoting David Adamany & Philip Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 774 (1976)).

74. Schuerman, *supra* note 72, at 460.

believe partisan elections maximize judicial accountability because party labels provide voters with cues as to a candidate's basic philosophy.[75]

b. Disadvantages

While partisan elections have their benefits, they do expose the judicial candidate's ideology to the public.[76] This had led to a series of problematic issues, such as campaign funds, which has been a topic for debate within the United States Supreme Court.[77] In a landmark case, the Supreme Court acknowledged this particular concern. The Court decided a landmark case that gave constitutional recognition to an urgent concern of American democracy.[78] In *Caperton v. A.T. Massey Coal Co.*, the Court found that the Due Process Clause required recusal from a case where a judge had received campaign contributions in an extraordinary amount from a board chairman who appeared in suit in front of the judge.[79] The chairman's $3 million dollar donation exceeded the total amount spent by all other donors, and was even more than the judge's candidacy committee.[80] As addressed in a prior case, the Due Process Clause included the common-law rule requiring recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case.[81] The clause also requires recusal where "the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable."[82] All in all, the Supreme Court is not amused when a substantial amount of money is intertwined with the judiciary selection process.[83]

The *Caperton* case is not the only time there has been problematic financial issues with judicial campaigns – in fact, based on a seven-year span, it suggests it happens quite frequently.[84] "Between 2000 and 2007, over $168 million was contributed to state supreme court campaigns, more than twice the amount contributed

75. *See id.* ("The availability of the party label both prompts voters to exercise a choice, thereby increasing the percentage of the eligible electorate participating in the election, and results in the expression in the aggregate of the voters' preferences for the direction of judicial policy").

76. *Id.*

77. 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, 71 (2011) (analyzing the impact of involving partisanship with the judicial selection process, specifically looking at political campaigns and the effect it has had on the judiciary).

78. *Id.* at 70; Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009).

79. *Caperton*, 556 U.S. at 880.

80. *Id.* at 884.

81. *Id.* at 876 (citing Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

82. *Caperton*, 556 U.S. 868 at 876 (citing Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)).

83. *Caperton,* 556 U.S. 868.

84. Kang and Shepherd, *supra* note 77, at 71.

throughout the 1990s."[85] Without such substantial funding, it is severely more difficult to win an election.[86]

Opponents also argue that voters are uninformed and incompetent to make sophisticated selection of judges compared to a selection committee.[87] Furthermore, votes are simply based on political criteria rather than merit.[88] As a result, it becomes more of a political campaign than an election based solely on judicial qualifications.[89] Another critique of partisan elections is that it discourages qualified individuals from seeking a judicial office position due to the fact they cannot raise enough campaign funds compared to other candidates.[90] The common fear shared by opponents is that through judicial voting elections, the dignity and prestige of the position is damaged.[91]

C. Why an Argument for Change is Needed

States are divided among these three different principal systems for selecting state judges.[92] Each state has undergone developments in what process they use, and "[t]hese principles consider components of the rule of law such as judicial impartiality, independence, competence, and accountability."[93] Each method is unique in its own way, but with politics more divisive than ever, the question turns to which judicial process is needed during times when the split between beliefs is polarized at new heights.[94] Ultimately, the question further narrows: Should politics be left out completely during a time when the divide is at its largest?

III. ANALYSIS

A. The Modern Political Climate

It is important to conduct an analysis on the current political climate in order to understand the type of proposed reform needed for the judiciary. An argument will also be made as to whether there

85. *Id.*
86. *Id.*
87. Scheuerman, *supra* note 72, at 460-461.
88. *Id.* at 461.
89. *Id.*
90. *Id.*
91. *Id.*
92. Kang and Shepherd, *supra* note 77, at 79.
93. Norman L. Greene, *Perspectives From The Rule Of Law And International Economic Development: Are There Lessons For The Reform Of Judicial Selection In The United States?*, 86 DENV. U.L. REV. 53, 54 (2008); MICHAEL J. TREBILCOCK & RONALD J. DANIELS, RULE OF LAW REFORM AND DEVELOPMENT 61-63 (2008).
94. Gillian E. Metzger, *Agencies, Polarization, And the States*, 115 COLUM. L. REV. 1739, 1740 (2015).

should be a mixture of politics with the judiciary, or if they should remain separate. The popular perception is that through judicial independence, the institution of the judiciary can be seen as "fair, impartial and efficient."[95] This section will analyze how polarized politics has impacted each branch of government and whether or not a reform of the judiciary should include maintaining judicial independence.

1. Public Opinion of the Executive Branch

Following the shocking 2016 presidential election, the amount of controversy created a forever lasting and profound impact on public opinion.[96] "[T]he CIA and FBI concluded [after the election] that the Russian Government hacked and leaked Democratic Party emails in an effort to help Donald Trump win the election."[97] A majority of American citizens now question the integrity of the nation's election system.[98] In furtherance of this never before seen drama, "Trump himself fueled further controversy during the campaign when he alleged that the Democrats had rigged the election against him and predicted that massive voter fraud would occur on Election Day."[99]

Studies have identified that divisions between "Republican and Democratic voters on a range of political issues have risen sharply in recent years," notably after President Trump's first year in office.[100] These political issues range from race issues, immigration policies, and national security.[101] Since President Barack Obama presidency and up till President Trump's first year, these issues have contrasted to record levels.[102] Clearly the individual in office has influenced the divide in some form for a

95. Hastings v. Judicial Conference of United States, 770 F.2d 1093, 1098 (1985) (quoting Hastings v. Judicial Conference of United States, 593 F. Supp. 1371 (1984), *aff'd in part, rev'd in part* 770 F.2d 1093) (1985)).

96. Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. LAW & PUB. POL'Y 57, 58 (2017).

97. *Id.* at 57.

98. *Id.*; Giovanni Russonello, *Voters Fear Their Ballot Won't Count, Poll Shows,* N.Y. TIMES (Oct. 25, 2016), www.nytimes.com/2016/10/26/us/politics/voter-fraud-poll.html [perma.cc/8WKB-UGGK] (examining the thought process of many Americans during the presidential election of 2016, who believed their vote would not be valuable with corporate interest, as well faith in the voting system).

99. Gaughan, *supra* note 96, at 57.

100. *See* Clare Foran, *America's Political Divide Intensified During Trump's First Year as President*, ATLANTIC (Oct. 5, 2017), www.theatlantic.com/politics/archive/2017/10/trump-partisan-divide-republicans-democrats/541917/ [perma.cc/RL65-PFQ8] (describing the political divide that grew immensely following the Presidential Election of 2016).

101. *Id.*

102. *Id.*

variety of different reasons.[103] In 2011, about twice as many Democrats as Republicans said the government should do more for the needy (54% vs. 25%).[104] In 2017, nearly three times as many Democrats than Republicans believe this same proposition (71% vs. 24%).[105] Another noticeable gap in public opinion between the parties according to the same study following the election has been thoughts on racial discrimination.[106] The gap about racial discrimination and black advancement between the two parties has increased about fifty points from each other – evidently, the political divide here has immensely grown.[107] Overall, since the studies on partisan gaps began in 1994, the average partisan gap has increased from fifteen percentage points to thirty-six points.[108]

These statistics also make clear that these divides are more split on partisan ideologies rather than any difference by religious affiliation or racial identities.[109] While presidential elections customarily include issues of political debates, the divide has grown substantially and has forever affected how the executive position is filled.[110] The political climate has intensified, and examining the divides occurring within the executive branch should give reason to consider evaluating the judicial branch, and whether it needs to reform to include politics or exclude it completely.

2. Public Opinion of the Legislative Branch

In this political era, "state legislative elections are dominated by national politics."[111] According to some studies, "legislators affiliated with a president's party – especially during unpopular presidencies – are more likely to face major party challengers".[112] Depending on presidential acceptance by the public, it can have at

103. *Id.*

104. *The Partisan Divide on Political Values Grows Even Wider*, PEW RESEARCH CTR. (Oct. 5, 2017), www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/ [perma.cc/CTD2-89AT] (examining widening differences in political ideologies by Republicans and Democrats influenced particularly by political views, rather than divisions on race, gender, or religious observance).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* (evaluating ten PEW Research Center studies conducted since 1994 and how the partisan ideology gap amongst several different areas have substantially grown further apart over the last few decades).

109. *Id.*

110. *Id.*

111. *See* Steven Rogers, *National Forces in State Legislative Elections*, 667 ANNALS AAPSS 207, 209 (Sept. 2016) (studying the ramifications of state legislative elections depending on the result of a presidential election, as well as the main determination of whether a legislator is voted into office being tied with partisan politics of the current president).

112. *Id.*

least three times the impact on a voters' decision during legislative elections as compared to when an individual makes a decision based on their own opinions of that legislator.[113] The current strategy for a legislative candidate running for a position is taking advantage of the national political conditions.[114]

Another political practice that still occurs today is the act of political gerrymandering.[115] Gerrymandering has been prevalent throughout the history of the United States and has recently become a "critical issue in American political life."[116] The concept of political gerrymandering is that legislators may constitutionally draw the borders of electoral districts for the purpose of receiving an incumbency advantage and securing the spot on the legislation, or to simply retain their party and maintain a political advantage.[117] While negatively viewed as detestable amongst the public, it is legal.[118] The Supreme Court has ruled on the legality of gerrymandering many times throughout the recent course of history.[119]

Time and time again, redistricting, the process of redrawing legislative districts, has created a continuous system for providing security for an overwhelming number of congressional incumbents.[120] It has ensured candidates reelection and has stifled voters from the opposing party.[121] Furthermore, the polarized districts in which gerrymandering creates also produce ideological districts in which legislative members cater only to the partisan members of their base.[122] The ramifications of gerrymandering have

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113. *Id.*

114. *Id.* at 212.

115. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Miller v. Johnson, 515 U.S. 900 (1995) (examining more modern examples of political gerrymandering and how in most instances it is not justiciable, thus making it available for state legislators to enact in order, with the only bar being certain restrictions).

116. Jeffrey G. Hamilton, *Deeper into the Political Thicket: Racial and Political Gerrymandering and The Supreme Court*, 43 EMORY L.J. 1519, 1521 (1994); Davis v. Bandemer, 478 U.S. 109, 164 n.3 (1986) (Powell, J., dissenting).

117. Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage is Unconstitutional*, 24 WM. & MARY BILL OF RTS. J. 1107, 1107 (2016).

118. *Id.* at 1108.

119. *See, e.g.,* Vieth v. Jubelirer, 541 U.S. 267 (2004) (examining where legislators created voting districts based solely on partisan political advantage, it was deemed a non-justiciable political question); *see Redistricting and the Supreme Court: The Most Significant Cases*, NCSL (Apr. 25, 2019), www.ncsl.org/research/redistricting/redistricting-and-the-supreme-court-the-most-significant-cases.aspx [perma.cc/J5HA-Z7BZ] (discussing recent cases involving gerrymandering).

120. Matthew M. Weiss, *Where Do We Draw The Line?: The Justiciability Of Political Gerrymandering Claims In Light Of League Of United Latin American Citizens v. Perry*, 41 GA. L. REV. 1053, 1055 (2007).

121. *Id.*

122. *Id.*

tremendous impact on the legislative branch, with control of state legislatures and even the United States Congress dictated by whichever party can win a majority of seats.[123] While politics in the legislative branch is nothing new, the modern climate of politics has significantly affected the process of who is elected, as well as how easy it is to retain that seat.

3. Politics in the Judiciary

Based on the last two sections, it is clear how modern politics have significantly influenced the executive and legislative branches of government. There is thus merit to the idea that judicial independence should hold steady and that the judiciary should be separate from politics. The grasp of modern politics has already influenced the judiciary in the state level in several ways, with rising costs of judicial campaigns at the top of the list.[124] High campaign costs and contributions lead to inevitable questions of "the integrity and impartiality of an elected judiciary."[125]

In 2009, Mark Thomsen, an attorney from the Milwaukee area, donated $5,000 to a chief justice's judicial campaign and later sent another donation of $500 to the campaign just days before the chief justice ruled on a key issue of a case Thomsen was involved in.[126] The court found in favor of Thomsen, with Abrahamson included in the majority.[127] The statistics show that Wisconsin judges tend to side with the attorney that has financially assisted them with their campaign.[128]

In resistance, states have proposed legislation that would allow the judiciary to retain its function of judicial independence.[129] These types of statutes prohibit judges or judicial candidates from participating in political speeches and advocating for an individual from a particular political party.[130] In retaliating against high judicial campaign costs and elevated monetary donations, the Supreme Court has upheld state statutes prohibiting an individual

123. *Id.*

124. *See* Robert J. Brink, *Electing Judges Can be a Real Gamble*, MASS. LAWYER WEEKLY (Oct. 18, 2004) (analyzing the negative effects the election of judges has on the judicial system, and how politics exacerbates the process and impedes on the definition of judicial independence).

125. James J. Alfini & Terrence J. Brooks, *Perspectives on the Selection of Federal Judges: Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 KY. L.J. 671, 671 (1989).

126. *Id.*

127. *Id.*

128. *Id.*

129. Miss. CJC. Canon 5 (2002); Mich. Code Judicial Conduct 7 (2019).

130. Mich. Code Judicial Conduct 7 (2019); *see e.g.,* Republican Party v. Kelly, 996 F. Supp. 875, 876-77 (D. Minn. 1998) (interpreting the statute that incorporates the limitations upon the judiciary in regards to political involvement).

from personally soliciting campaign funds from potential donators.[131] In Florida, the prohibition of receiving funds from political campaigns was contested, and the argument relied on the premise that it violated the freedom of association and speech under the First Amendment.[132] While it did fall within the reach of the First Amendment, the state of Florida relied on the strict scrutiny standard, as it had a compelling state interest of protecting the judiciary and keeping it impartial, and the statute was necessary to achieve that purpose.[133] Despite this pushback, this new era of judicial campaigning has seen new questionable tactics with fund usage, such as television advertising.[134] In Ohio, television ads accounted for more than half of candidate expenditures in the Ohio Supreme Court.[135]

The reach of modern politics does indeed have a substantial impact on the judiciary, and based on how it has negatively affected the other two branches of government, it could lead one to believe it will continue to get worse.[136] An argument now must be made whether politics should be allowed in the judiciary due to the modern political climate, and if so, what kind of reform should be made.

B. The Argument for Politics in the Judiciary

1. Those Without a Voice

While politics has its negative influences on the judiciary election process, it has also been beneficial to many judicial candidates.[137] The idea of having politics involved is not to deteriorate the concept of judicial independence; rather, it is to provide an opportunity for an individual who wants to reach the highest position in the legal profession.[138] For women judges, politics can play a crucial role in earning their honorable position.[139]

131. Fla. Code of Judicial Conduct Canon 7 (2018); *see e.g.,* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1659 (2015) (reviewing Florida's Code of Judicial Conduct and the prohibition of judicial candidates from personally soliciting from personal funds did not violate the First Amendment because the Canon was narrowly tailored to serve the state's compelling interest in protecting the integrity of the judiciary).

132. *Williams-Yulee*, 135 S. Ct. at 1658.

133. *Id.* at 1664.

134. Michael S. Kang & Joanna Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239, 1248 (2013).

135. *Id.*

136. Martin J. Siegel, *In Defense of Judicial Elections (Sort of),* 36 LITIG. 23 (2010).

137. *See id.* (arguing for the use of judicial elections, which have politics incorporated within the system).

138. *Id.*

139. *Id.*

As Honorable Rhonda Lee Daniele of the Montgomery County Court said: "The key to becoming a judge at the state level is politics, politics, politics."[140] Judge Daniele continued to say that nice and competent lawyers are "a dime a dozen," implying that being a competent lawyer is not enough to become a judge.[141] Pennsylvania Superior Court Judge Phyllis Beck has urged women to be more proactive politically, and that "you have a product and that product is you . . . You have to sell that product to the electorate."[142] In reaching out and making their names known, women have an avenue of getting recognition they unfortunately may not have received in a legal profession that often opposes female professionals.[143] While politics, as discussed above, seems to go against the concept of judicial independence, it can be argued it has provided an avenue for women to gain honorable roles in the judiciary.

Whether elected or appointed, politics has played an important role for many judges in gaining judicial office.[144] For example, Justice Rosalyn Richter of the Supreme Court of Manhattan in New York, who is disabled and openly gay, described how making friends and connections politically with big time lawyers assisted her in gaining her judicial office.[145] Politics plays a major factor in becoming a judge, especially for minority candidates, whose addition to the judiciary is necessary for diversity and impartiality.[146]

Minorities care more about race relations than whites.[147] Racial minorities continue to suffer discrimination.[148] These are prevalent issues, and if politics can help judicial candidates who otherwise would not have the opportunity to gain judicial office and offer representation to the judiciary in hopes to alleviate these issues, politics cannot be separated.

2. A Constitutional Right

One compelling reason why politics should not be removed despite the polarized political times is because it would be in

140. *Id.*
141. *Id.*
142. Siegel, *supra* note 136.
143. *Id.*
144. *Id.*
145. *Id.*
146. *See* Sylvia R. Lazos Vargas, *Diversity, Impartiality, and Representation on the Bench: Does A Diverse Judiciary Attain A Rule of Law That is Inclusive?: What Grutter V. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 102-103 (2008) (indicating the significance of what a diverse and impartial bench has on the judiciary and what impact it can have).
147. *Id.*
148. *Id.*

violation of the First Amendment.[149] The Supreme Court ruled along these lines in its opinion in *Republican Party v. White*, when an attorney who, while running for the Minnesota Supreme Court, distributed campaign literature which criticized several of the court's opinion on matters such as crime and welfare.[150] The attorney did this in violation of a canon of judicial conduct that prohibited judicial candidates from announcing their political views.[151] The court found this canon to be in violation of the First Amendment because the state did not narrowly tailor it to serve a compelling state interest.[152] The First Amendment issue was raised because of the abridgement of the right to speak out on disputed issues.[153] In most scenarios, legislation made to prohibit any kind of speech would have to pass the muster of the court's strict scrutiny test, and the government will most likely have a difficult time in overcoming this scrutiny test.[154] While politics seems like an "attack" on the judiciary, particularly on judicial independence,[155] a limitation on freedom of speech will always invoke a possible violation of the First Amendment.[156]

It can be argued that politics should be restricted from the judiciary if the state has a compelling interest in upholding a statute that is narrowly tailored to that interest.[157] Arizona met that standard in *Wolfson v. Concannon*, when it had a compelling interest in protecting the public's perception of the "judge's honesty, impartiality, temperament and fitness."[158] The court recognized this as a vital state interest, and it was compelling for the state to protect the integrity of the state's sitting judges.[159] The court also

149. *See* Republican Party v. White, 536 U.S. 768, 788 (2002) (providing that the canon of judicial conduct prohibiting candidates in jury selection from announcing their views violates the First Amendment).

150. *Id.* at 768-769.

151. *Id.*

152. *Id.* at 775.

153. *Id.* at 781.

154. *See* Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians.*, 21 YALE L. & POL'Y REV. 301, 303-304 (2003) (arguing that is impossible for the government to make an exception to limit and restrict the political speech of judges and judicial candidates following the decision in *Republican Party v. White*).

155. *See* The Honorable Penny J. White, *Preserving the Legacy: A Tribute to Chief Justice Harry L. Carrico, One Who Exalted Judicial Independence*, 38 U. RICH. L. REV. 615, 615-616 (2004) (arguing that without judicial independence, the United States would be without equal opportunity, respect for constitutional freedoms, and equal justice under the law).

156. U.S. CONST. amend. I.

157. *See* Wolfson v. Concannon, 811 F.3d 1176 (9th Cir. 2016) (holding that restrictions on judicial candidate speech under an Arizona Code of Judicial Conduct survived First Amendment strict scrutiny, as the state had a compelling interest in upholding public confidence in the judiciary).

158. *Id.* at 1181.

159. *Id.* at 1182.

found that prohibiting personal solicitation for campaign funds was narrowly tailored to preserving the public's perception of an honest state judiciary.[160] While *Wolfson* is an example of a case overcoming strict scrutiny, it is a difficult test to pass when excluding politics is in the interest of the state.[161] Unless a state can meet the high standard of narrowly tailoring a law to serve a compelling state interest, politics cannot be excluded completely from the judiciary.

C. Is Reform Needed?

1. The Uncertain Future

The landscape for future judicial elections, without reform, will remain uncertain, similar to the impact modern politics has on the other branches of government.[162] Concurrently, judicial independence cannot be ignored despite the incorporation of politics in the judiciary.[163]

IV. PROPOSAL

Politics must be incorporated into the judiciary and cannot be excluded despite extreme political polarization and the need for judicial independence. However, judicial independence cannot be completely ignored, and there must be a limitation on the level of political involvement in the state judiciary systems.[164] This Comment's proposal seeks to find the proper systematic solution in allowing politics in the judiciary while respecting the independence the judiciary seeks to enjoy. The best method would be utilizing partisan ballots along with a specific budget respective for each state, limiting every candidate to a certain amount that they can spend up to and cannot surpass. This Comment proposes that politics should be involved in state judicial elections because it enables opportunities for potential diverse candidates that otherwise would not be able to receive proper recognition.

There is a clear problem of polarized partisan politics in today's

160. *Id.*

161. *E.g.*, Carey v. Wolnitzek, 614 F.3d 189, 198-199 (6th Cir. 2010) (establishing that statutes limiting or restricting political speech and association is unlikely to pass the muster of the strict scrutiny test); Tashjian v. Republican Party, 479 U.S. 208, 217 (1986) (establishing that states have the "power to regulate the time, place, and manner of elections"); *and* Siefert v. Alexander, 608 F.3d 974, 982 (7th Cir. 2010) (applying strict scrutiny and held that Wisconsin could not show a compelling interest in impeding candidates from publicizing their legal or political views).

162. *Id.*

163. *Id.*

164. *See* Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 576 (2014) (stressing the importance of judicial independence as it is the cornerstone of American constitutionalism).

modern society. Also, the legislative and executive branches have seen an increase in the amount of political partisan issues that have not only divided politics, but society as well.[165] The judiciary has found itself in an awkward position where it does not know whether politics should be incorporated into its elections or not. There is also no exception to the First Amendment that judicial candidates must remain politically silent. No exception should be made to silence an individual.

With this in mind, judicial independence clearly cannot be ignored. As Chief Justice John Marshall once said: "I have always thought, from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary."[166] Judicial independence is "the preservation of liberty, individual rights, and respect for the bench"[167] The founders of this country wanted the judicial branch to be separated from the other two branches of government.[168] The proposal of this Comment keeps this value in mind. Implementation of this proposal would spark an interest in maintaining both judicial independence while allowing candidates to keep their political rights.

The full procedure of this proposal must be explained to fully understand how both concepts of judicial independence and politics can be converged together. First, each individual who wishes to become a judicial candidate must submit a petition containing a substantial number of signatures. The number of signatures should be determined on a state-to-state basis that reflects the general population of each respective area. These signatures can be obtained through any legitimate means, whether it be political conventions or other organizations. Then, the petition will be sent to the respective state's judicial committee where they will look over the candidate's credentials and determine whether they are fit for the judiciary. Each state can enact their own standards and procedure on how best to approve an individual's candidacy. However, at this point the candidate's political affiliation is anonymous to the committee, and the candidate must be approved to become a candidate solely on merit. Once they pass this test, they will be allowed to become a candidate on the state or county ballot.

When the candidate is then placed on the ballot, they are free

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165. *See* Nate Cohn, *Polarization Is Dividing American Society, Not Just Politics*, N.Y. TIMES (June 12, 2014), www.nytimes.com/2014/06/12/upshot/polarization-is-dividing-american-society-not-just-politics.html [perma.cc/8T5H-QFTT] (examining the divide in American society due to the polarization that is dividing politics).

166. Bronson D. Bills, *A Penny for the Court's Thoughts? The High Price of Judicial Elections*, 3 NW. J. L. & SOC. POL'Y 29, 29 (2008); Jefferson B. Fordham & Theodore H. Husted, Jr., *John Marshall and the Rule of Law,* 104 U. PA. L. REV. 57, 61 (1955).

167. Bills, *supra* note 166, at 34.

168. *Id.*

to announce their political affiliation and it may be placed on the ballot as well. They are also free to be endorsed by any organization and may receive funds for campaign purposes. As mentioned, campaign costs have become increasingly high.[169] That is why this proposal also seeks a mandatory budget on how much each candidate can spend. These restrictions should be passed by state legislators, and will be able to pass the strict scrutiny standard of the court for the sole purpose of protecting the integrity of the judicial courts and that it cannot be something that can be purchased.[170] In such a scenario, the Supreme Court has held that the key is that the state must explain their compelling interest in maintaining a fair, impartial judiciary while offering judicial candidates their constitutional rights of freedom of speech and association. [171] While some may see this as having a limiting effect on speech, the interest it serves is keeping the judiciary impartial and maintaining its integrity. It is a seat that must be earned, not bought through astronomical campaign funds.

As mentioned, the limit to how much a campaign can cost is an important issue to address.[172] This should be determined by each county and state respectively. One universal sum might not be ideal for certain counties and states for a variety of reasons. Population size or for what level of the judiciary one is seeking should be factors in determining how high or low the limitation should be. It is important for each state to be thorough when enacting legislation to limit the cost of campaign funding and spending.

In *Suster v. Marshall*, a judicial conduct canon that placed a limit on the amount of money a judicial candidate could spend in a campaign was found to be unconstitutional because it limited the political speech of a candidate; and the canon was not narrowly

169. *See* Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U.L. REV. 65, 76-77 (2001) (arguing for the adoption of different reform systems, unlike replacing an election system). Such reform includes "[l]engthening judicial terms, reforming campaign financing, [and] eliminating constraints on judicial speech." *Id.*

170. *E.g.* In re Callaghan, 238 W. Va. 495 (2017) (examining legislation that was able to pass the muster of court's strict scrutiny standard); Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015) (identifying an occurrence where speech restriction withstands strict scrutiny); In re Complaint of Fadeley, 310 Or. 548 (1990) (acknowledging that political speech is subject to the First Amendment); *and* Wolfson v. Concannon, 811 F.3d 1176 (9th Cir. 2016) (examining legislation that was able to pass the muster of court's strict scrutiny standard, and that the state had a compelling interest in protecting the integrity and impartiality of the judicial system by narrowly tailoring a law to that particular governmental interest).

171. Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 495-96 (1985); *see* Suster v. Marshall, 951 F. Supp. 693, 697 (N.D. Ohio 1996) (explaining that "a statute may constitutionally restrict campaign finances to prevent corruption" as long as "the statute does so in a narrowly tailored way").

172. *Id.*

tailored to match the state's compelling interest.[173]

The spending cutoff point must not be so limiting that it hinders free speech and must be narrowly tailored to the states' compelling interest. As seen throughout this Comment, there have been cases where the state had an interest in maintaining the integrity of the courts.[174] The position of a judge is one that must be earned, not bought. This proposal acknowledges this principle, and it is certainly a compelling interest for each state to have in these polarized political times.

A proposal such as this is crucial in these political times. There must be an even balance between both judicial independence and politics. If it is too far politically swayed, the judiciary can have the negative political effects that the legislative and executive branch currently experience. This Comment has also shown the negative effects heavy politics has on the judiciary today. It can be argued that this proposal of allowing politics to be involved with the judiciary should not come to fruition because of how split many are on political ideologies.[175] In fact, public trust in government is declining at a staggering rate.[176] However, the problematic disputes of modern politics are not going away any time soon.[177] The mere fact that politics are seemingly more polarized and prominent should not prohibit judges and judicial candidates from engaging in politics. In actuality, now would be the greatest time to legitimately consider the merit of this proposal. In considering it now, a perfect balance can be created on how much politics should be allowed and to what extent. If this proposal is not considered soon enough, politics will consume the judiciary, and reform will be inevitable.[178] The best way to combat extreme politics in the judiciary is to

173. *Suster*, 951 F. Supp at 702.

174. *Callaghan,* 238 W. Va. 495; *Williams-Yulee*, 135 S. Ct. 1656; *Fadeley*, 310 Or. 548; *Wolfson*, 811 F.3d 1176.

175. *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life*, PEW RESEARCH CTR. (June 12, 2014), www.people-press.org/2014/06/12/political-polarization-in-the-american-public/ [perma.cc/TR55-4BDJ].

176. *See Trust and Distrust in America: Many Americans Think Declining Trust in the Government and in Each other Makes it Harder to Solve Key Problems. They Have a Wealth of Ideas About What's Gone Wrong and How to Fix it*, PEW RESEARCH CTR. (July 22, 2019), www.people-press.org/2019/07/22/trust-and-distrust-in-america/ [perma.cc/6KVG-J8S4] (analyzing the trust American citizens have with the federal government with statistics gathered through various survey questions).

177. Elizabeth Ross, *America's Polarized Politics May be Here to Stay*, PRI (June 3, 2019), www.pri.org/stories/2019-06-03/americas-polarized-politics-may-be-here-stay [perma.cc/6FZQ-TUVA].

178. *See* Patrick Berry, *Reforming State Judicial Selection: States Must Consider how to Safeguard the Independence of State*, BRENNAN CTR. (Oct. 16, 2010), www.brennancenter.org/our-work/analysis-opinion/reforming-state-judicial-selection [perma.cc/UT5J-D6AM] (arguing that the state judicial selection needs reform in several regards in order to limit politics).

presently find a current balance between that and judicial independence.

The balance is needed now more than ever. At the turn of the century, only 3.8% of all state judges were African Americans.[179] "Almost every other demographic group is underrepresented when compared to their respective share in the nation's population."[180] Through political means and support, this Comment has established how politics has enabled those of minority status to gain a place on a judicial bench. While there is political turmoil, a diverse and unique bench can combat the rising polarization of ideologies.

The proposal finally seeks to prohibit any relinquishing of constitutional rights of judicial candidates and judges alike. Whether a judicial candidate or not, everyone has the same rights to freedom of speech and association.[181] An exception cannot be made to prohibit this right to any citizen. The proposal at hand allows for politics to assist those to get nominated for review for the ballot, and it allows voters to see what affiliation each candidate has. The only time where the notion of politics is removed is when the judicial committee must choose from a list of names who must be on the ballot. This is where merit comes above any other criteria. This proposed system is not expected to be perfect. However, no state judicial election system has ever been perfect. This system is able to take the benefits of politics while also negating some of the negative effects on each branch of the government.

V. CONCLUSION

The proposal at hand would allow an opportunity for politics to be involved with the judiciary, while attempting to maintain its fundamental functions. This proposal was created not to make politics the focus, but to establish a balance before politics consumes the judiciary like it has the other branches. It has already been shown how politics has heavily been involved with the judiciary. Now is the time to consider making changes that would strengthen and invoke more trust in the judiciary. Diversity within the judiciary branch will improve through these changes. Additionally, there will be greater emphasis on the candidate rather than the money spent. Money should not be the ultimate factor when considering who should interpret the laws of this country. While it can be argued this proposal opposes judicial independence, it actually is an attempt to balance it with politics and to ensure the judiciary is unharmed from the uncertain political future.

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

180. Ciara Torres-Spelliscy, *Improving Judicial Diversity*, BRENNAN CTR. (Mar. 3, 2010), www.brennancenter.org/our-work/research-reports/improving-judicial-diversity ["].

181. U.S. CONST. amend. I.