February 27, 2008

Let’s Count Them All: Maryland Courts Should Adopt an Interventionist Approach to Contested Elections

John C Armstrong

Available at: https://works.bepress.com/john_armstrong/1/
LET’S COUNT THEM ALL: MARYLAND COURTS SHOULD ADOPT AN INTERVENTIONIST APPROACH TO CONTESTED ELECTIONS

Maryland courts currently take a hands-off approach to challenges to contested elections. In this article, I argue that the Maryland Court of Appeals should overrule some of its precedent and adopt a more active role in judicial challenges to contested elections. In Part I, I discuss the current statutory provisions and case law covering contest elections in Maryland. In Part II, I propose a new test for court challenges to contested elections. In Part III, I briefly summarize federal case law and case law from other states that have adopted an approach similar to the test I advocate. In Part IV, I summarize the scholarship surrounding judicial activism. In Part V, I explain why criticisms of judicial activism do not apply to the courts’ intervention in contested elections.

This article deals with contested elections, not close or recount elections. A contested election is an election in which a losing candidate acknowledges that the count of the votes is correct but argues that something happened to make that count of votes invalid. A recount election is one in which the vote total is very close, and one candidate requests a recount of the votes in order to determine the winner.¹ These two categories are not mutually exclusive.²

¹ The Maryland Court of Appeals already takes an active role in overseeing recount elections. For example, in Hammond v. Love, 187 Md. 138, 49 A.2d. 75 (1946), the Court of Appeals ordered a board of elections to stop counting ballots that did not meet statutory requirements. In Mahoney v. Board of Supervisors of Elections, 205 Md. 325, 336, 108 A.2d 143, 148 (1954), the court held that when an election board has made “an obvious mistake of law in counting or rejecting ballots,” the court has the power to correct the mistake.
² A candidate may allege irregularities in the election and also ask for a recount.
I. Maryland Courts’ Approach to Contested Elections

A. Current Statutory Provisions – The Nuts and Bolts of an Election Challenge

1. Recount elections

A losing candidate may file a petition with the board of elections seeking a recount. The petitioner must submit a bond to cover the costs of the recount. The amount of the bond is to be determined by a judge. The petitioner does not have to pay the costs of the recount if the outcome of the election is changed, the petitioner gains more than 2% of the votes cast, or the margin between the apparent winner and second place candidate is less than .1% of votes cast.

2. Contested elections

The Maryland Code also permits a broad array of challenges to elections. A challenger may bring an action under the particular statutory section which has been violated. If there is no provision in that particular section for judicial relief, the party may seek relief under the “catch-all” section. Section 12-202 permits a registered voter to “seek judicial relief from any act or omission relating to an election, whether or not the election has been held” if no other “timely and adequate” remedy is provided for in the statutes. For example, in Pelagatti v. Board of Supervisors of Elections, the Court of Appeals held that relief under former Art. 33, subtitle 19, §§ 19-1 through 19-5 was

---

3 The candidate must file the petition for a recount with the board of elections with which the candidate filed the certificate of candidacy. MD. CODE ANN., ELEC. LAW § 12-101 (LexisNexis 2003).
4 Id.
5 MD. CODE ANN., ELEC. LAW § 12-105 (LexisNexis 2003).
8 Id.
10 Similar to current MD. CODE ANN., ELEC. LAW § 12-201-204 (LexisNexis 2003).
precluded, because the petitioners could have sought relief under former Art. 33, § 27-10, which “does provide a timely and adequate judicial review remedy.”¹¹ There are many areas in the Maryland election law where the statute provides the remedy, and therefore the catch-all § 12-201 does not apply. For example, § 11-304 permits a candidate or voter to appeal a decision of a board of elections regarding an absentee ballot.¹² Therefore, a candidate alleging that a violation of the laws regarding absentee voting would bring a judicial challenge under § 11-304, as remedies under § 12-201 would be precluded.

Since candidates for office are almost always registered voters, as a practical matter, the candidates will be bringing the challenges. Judicial challenges to elections under § 12-201 et seq. are entitled to expedited appeal to the Court of Appeals.¹³

Section 12-204 also gives the courts broad discretion to craft remedies to post-election challenges. If a court determines that the alleged act or omission “materially affected the rights of interested parties or the purity of the elections process”¹⁴ and “may have changed” the outcome of an election, the court may void the election and order a new election or order “any other relief that will provide an adequate remedy.”¹⁵ A court’s determinations under §12-204 must be shown be “clear and convincing” evidence.¹⁶

Of course, this leads to some confusion because the statute contains conflicting terms. In order to require a new election, a court must determine that the wrongdoing at

---

¹¹ Pelagatti, 343 Md. at 436, 682 A.2d at 243. The court was merely pointing out technical issues in the law, as it made no difference which statute the challenge was brought under. See Pelagatti, 343 Md. at 436, 682 A.2d at 243 (stating that “we do not suggest that the result in this case would have been any different” if the case had been brought under the proper statute).
¹³ MD. CODE ANN., ELEC. LAW § 12-203 (b) (LexisNexis 2003).
¹⁴ MD. CODE ANN., ELEC. LAW § 12-204 (LexisNexis 2003).
¹⁵ MD. CODE ANN., ELEC. LAW § 12-204 (LexisNexis 2003).
¹⁶ MD. CODE ANN., ELEC. LAW § 12-204 (d) (LexisNexis 2003).
issue “may” have change the election result. But all determinations by the court must be made by “clear and convincing evidence.” The Court of Appeals has resolved this dilemma by holding that the correct standard the “substantial probability” standard. In *Suessmann v. Lamone*, the Court of Appeals stated that

> the litigant must prove, by clear and convincing evidence, a **substantial probability** that the outcome would have been different but for the illegality. This is the level of probability anticipated by § 12-202(a)(2)'s requirement that the judicial challenge be based on grounds that an illegal action ‘may change or has changed the outcome of the election.’ A substantial probability, while less than a hundred percent, is significantly more than ‘more likely than not’ and must be proven by clear and convincing evidence. (emphasis in original)

### 3. Pending elections

This article focuses on challenges to elections that have already occurred, however, § 12-204 is clear that a plaintiff may challenge and seek postponement of a pending election. In addition, plaintiffs have had successful challenges to elections which were initiated prior to the election. For example, In *Anne Arundel County v. McDonough*, a group of plaintiffs challenged a referendum question prior to the election. The plaintiffs argued that the wording of the ballot question did not clearly describe the issues covered by the ballot initiative and that the 41 separate zoning amendments being considered could not be incorporated into one question. The trial court “in continuing the case for trial to a post-election date, preserved the issues 'as if heard

---

17 In order to satisfy the “clear and convincing” standard a plaintiff must persuade the fact finder that the truth of his contention is “highly probable,” not “merely probable.” *Hoffman v. United Iron & Metal Co., Inc.*, 108 Md.App. 117, 146-47, 671 A.2d 55, 70 (1996).
19 *Suessmann*, 383 Md. at 720, A.2d at 14. This represented an extension of the substantial probability test from previous versions of the election code.
and decided prior to the election,' and adjudicated the matter as if tried prior to the election." \(^{21}\) The court nullified the election regarding the referendum.

It is important to note that a plaintiff should bring an election challenge as soon as possible, or risk losing the challenge. For example, in *Ross v. State Board of Elections*, \(^{22}\) the Court of Appeals held that a losing candidate had lost the right to challenge and election based on the opponent’s ineligibility for office because of the doctrine of laches.

### 4. Prior versions of the statute

Prior to the recodification of the Maryland election law, Art. 33, §19 applied to contested elections. The 1990 version of the statute is largely similar to the current version of the Maryland Election law discussed above. There are some notable differences, however. In the 1990 version of the law, the judiciary is empowered to order a new election if the act or omission issue “might” have changed the outcome of an election. \(^{23}\) The change to “may” was effective on January 1, 1999 as result of Senate Bill 188, House Bill 217 of the 1998 session. There is nothing indicated in the legislative history why the change was made. In addition, the bill moved the requirement of “clear and convincing evidence” to another location in the section. Prior to 1999, the section read:

> Upon a finding based upon clear and convincing evidence, that act or omission involved materially affected the rights of the interested parties or the purity of elections process and:

\(^{21}\) *McDonough*, 277 Md. at 295, 354 A.2d at 802.

\(^{22}\) 387 Md. 649, 876 A.2d 692 (2005).

\(^{23}\) The current version replaces “might” with “may.” The change from “might” to “may” did not affect the substantial probability test used by the Court of Appeals. In *Suessmann v. Lamone*, 383 Md. 697, 862 A.2d 1 (2004), the Court of Appeals extended its original adoption of the substantial probability test in *Snyder v. Glusing II*, 308 Md. 411, 520 A.2d 349 (1986).
might have changed the election of an outcome already held… 24

In the current code, the clear and convincing evidence requirement is moved to its own element at the bottom of the section. There was no reason given for the change.

5. Contested Elections for Certain Constitutional Offices

Sec. 19, Art. III of the Constitution of Maryland provides, in part: “Each House shall be judge of the qualifications and elections of its members, as prescribed by the Constitution and Laws of the State.” Sec. 12, Art. IV provides that:

In case of any contested election for Judges, Clerks of the Courts of Law, and Registers of Wills, the Governor shall send the returns to the House of Delegates, which shall judge of the election and qualification of the candidates at such election; and if the judgment shall be against the one who has been returned elected, or the one who has been commissioned by the Governor, the House of Delegates shall order a new election within thirty days.

The courts have held “[i]t is too clear, we think, for serious controversy, that section 19, art. 3, of the constitution names the only tribunal which has the power to decide the question, and that is the [General Assembly] of Maryland itself.” 25 The Maryland courts have further noted that “a legislative body is the sole judge of questions relating to the election and qualification of its members.” 26 Up until 1985, the Election

25 Bowling v. Weakley, 181 Md. 496, 500, 30 A.2d 791, 793 (1943); Covington v. Buffet, 90 Md. 569, 577, 45 A. 204, 205 (1900).
26 Spitzer v. Martin, 130 Md. 428, 430, 100 A. 739, 739-40 (1917).
code even provided the procedure by which contested elections were handled in the General Assembly.\textsuperscript{27}

In 1985, the election laws were amended so that there was judicial remedy for challenges to General Assembly elections. This made the contested election law largely what it is today. The General Assembly’s Preamble to the bill read:

recognizing that the timely determination of issues arising with respect to the elections, promote equity among interested parties, and enhance the confidence of the citizens of the State in the elections process, and recognizing that existing law does not uniformly provide for such determinations, and recognizing that the delayed determination of issues that may affect the outcome of elections often does not provide an adequate remedy, and concluding that a judicial determination of election-relate issues affords the fullest opportunity for providing a timely and adequate remedy, enacts this statute for the purposes and objective hereinabove mentioned and declares that it should be liberally construed to effectuate these purposes and objectives now, therefore…\textsuperscript{28}

The 1985 statute was passed in response to the Maryland Court of Appeals’ holding \textit{Duffy v. Conway}.\textsuperscript{29} In \textit{Duffy}, the loser of the election for register of wills in Baltimore sought to disqualify the winner because the winner had allegedly violated the election law. Duffy alleged that Conway had given “50 smoke detectors, 1,000 loaves of bread, 1,000 sticks of margarine, and 1,000 pounds of chicken” in exchange for votes. At that time, the Maryland Code had several provisions which are no longer in effect. The election law at that time provided for the circuit courts to make findings of fact and then transmit those findings to the State Board of Elections and to the Speaker of the House.

\textsuperscript{27} Code of Article 33 of the Annotated Code of Maryland (1939), Sections 148 to 196 provides the procedure for contesting an election to the House of Delegates. A lesser procedure was described in the Maryland Code Article 33, § 19-4 until 1985.
\textsuperscript{28} Laws of Maryland, 1985, Ch. 755.
\textsuperscript{29} 295 Md. 242, 455 A.2d 955 (1983).
The court had no authority, in cases involving registers of wills and certain other
Constitutional officers, to declare the election void.

The Court of Appeals held that the scheme was unconstitutional, as it was
requiring the courts to issue advisory opinions. This represented a non-judicial function
barred by the separation of powers provisions in Article 8 of the Maryland Declaration of
Rights. The Court noted in a footnote that the law may still be unconstitutional “if
amended to authorize a court to decide the controversy and void the election,” because
the law “might still present serious constitutional problems under provisions such as Art.
IV, § 12, or Art. III, § 19, of the Maryland Constitution which vest jurisdiction in another
governmental body to judge the election and qualification of candidates for certain
offices.”

As a result of these constitutional restrictions, the Maryland courts have had to
have been very careful to avoid trampling on the jurisdiction of the General Assembly in
handling contested elections for these constitutional offices. The Court of Appeals has
noted that the constitutional provisions do “not affect the power of the Court to require
the Board of Canvassers to correct errors, if any, as provided for [in the Maryland
Code].” It is important to keep this constitutional restrictions in mind when analyzing
contested elections. The Court of Appeals has noted that:

\[\text{[t]here is a role for both the courts and the Legislature in resolving questions over the conduct of elections for seats in the General Assembly. Those roles are complementary rather than conflicting, and if each body stays within its}\]

\[\text{[footnotes]}\]

\[\text{Maryland Constitution, Declaration of Rights, Art. 8 reads: “That the Legislative, Executive and Judicial}
\]
\[\text{powers of Government ought to be forever separate and distinct from each other; and no person exercising}
\]
\[\text{the functions of one of said Departments shall assume or discharge the duties of any other.” This serves as a}
\]
\[\text{prohibition against advisory opinions. Duffy, 295 Md. at 255, 455 A.2d at 961.}\]

\[\text{Duffy, 295 Md. at 263 n. 14, 455 A.2d at 965 n. 14.}\]

\[\text{Canvassers of Election v. Noll, 127 Md. 296, 298, 96 A. 452, 453 (1915).}\]
proper and assigned bounds there will be no transgression against separation of powers.\textsuperscript{33}

B. Case Law

Maryland Courts treat a challenge to a contested election as an application for a writ of mandamus.\textsuperscript{34} Mandamus is generally used “to compel inferior tribunals, public officials or administrative agencies to perform their function or perform some particular duty imposed upon them which in its nature is imperative and to the performance of which duty the party applying for the writ has a clear legal right.”\textsuperscript{35} The writ ordinarily does not lie where the action to be reviewed is discretionary or depends on personal judgment.\textsuperscript{36} Prior to granting a writ of mandamus to review discretionary acts, “there must be both a lack of an available procedure for obtaining review and an allegation that the action complained of is illegal, arbitrary, capricious or unreasonable.”\textsuperscript{37}

The Maryland Courts have adopted a hands-off approach to dealing with contested elections. The Maryland approach can best be evaluated by a thorough analysis of three cases: McNulty v. Board of Sup’rs of Elections for Anne Arundel County;\textsuperscript{38} Fowler v. Board of Elections;\textsuperscript{39} and City of Seat Pleasant v. Jones.\textsuperscript{40}

\textsuperscript{34} City of Seat Pleasant v. Jones, 364 Md. 663, 671 n. 7, 774 A.2d 1167, 1171 n. 7 (2001). It is not possible for a plaintiff to plead another cause of action or seek another type of relief, such as an injunction, in the typical contested election case. Maryland courts look to the substance of an action, rather than how it is characterized. See Gisriel v. Ocean City Bd. of Sup’rs of Elections, 345 Md. 477, 500, 693 A.2d 757, 768 (1997) (holding that “even where a particular action against an administrative agency was allegedly brought under a statutory judicial review provision, and did not purport to be a mandamus action, this Court has looked to the substance of the action, has held that it could be treated as a common law mandamus or certiorari action, and has exercised appellate jurisdiction”).
\textsuperscript{35} Criminal Injuries Compensation Board v. Gould, 273 Md. 486, 514, 331 A.2d 55, 71 (1975); see also George’s Creek Coal & Iron Co. v. County Commissioners, 59 Md. 255, 259, 1883 WL 6046, *2 (1883).
\textsuperscript{36} Board of Education of Prince George’s County v. Secretary of Personnel, 317 Md. 34, 46, 562 A.2d 700, 705 (1989).
\textsuperscript{37} Seat Pleasant, 364 Md. at 674-75, 774 A.2d at 1173-74.
\textsuperscript{38} 245 Md. 1, 224 A.2d 844 (1966).
\textsuperscript{39} 259 Md. 615, 270 A.2d 660 (1970).
In *McNulty*, John F. McNulty challenged the results of a primary election for the office of State Senator. McNulty’s name was to be placed last on the ballot in the primary. McNulty urged his supporters to “vote the bottom line” in his campaign literature. At the election, election administrators failed to cover up and lock the lines below McNulty name on the ballot. As a result, if a voter chose to “vote the bottom line,” the voter would have actually cast a vote for no candidate. McNulty lost the election by fifty-two votes, while 136 votes were cast for the blank bottom line.

McNulty challenged the results of the elections to the Board of Supervisors of Elections. The Board of Supervisors unanimously found that:

> the intent of the voter was probably to cast their vote for Mr. McNulty and other candidates on the D Line, when instead they, in error, pulled the lever for the E Line. We feel sympathetic to these candidates; however, our counsel, John Blondell, had advised us there is no legal justification for awarding these votes to them, in the absence of evidence showing that levers over the candidates [sic] names could not be pulled.  

McNulty then petitioned the Circuit Court for Anne Arundel County for a Writ of Mandamus to be directed to Board of Supervisors of Elections, to require them to award to him 136 disputed votes cast in the primary and to declare him the winner. The Circuit Court ruled against McNulty and he appealed to the Maryland Court of Appeals.

The Court of Appeals held that McNulty was not entitled to the 136 disputed votes, nor was he entitled to a new election. The Court of Appeals began its analysis by noting that “the actions of a Board of Supervisors of Elections in the absence of fraud are

---

reviewable on mandamus only in the event that such conduct is capricious or arbitrary.”\(^{42}\)

The Court of Appeals held that since “no voter was actually prevented from voting for the candidate of his choice,”\(^ {43}\) the election must be permitted to stand. The lesson of McNulty is that in order to obtain a new election in the absence of fraud,\(^ {44}\) the party challenging the election must show that actual voters were denied the opportunity to vote.

In *Fowler*, a losing candidate of a Democratic primary for the office of County Commissioner of Prince George’s County, Flora Daun Fowler, challenged the results of the election. Fowler “ran twenty-first, receiving 8619 votes fewer than the lowest of five winners.” As a result, Fowler did “not claim the irregularities in the election processes would have changed the result; indeed, she said she no longer wanted to become a County Commissioner or to run if a new primary were ordered.” Yet, Fowler still argued that a new election should be ordered because of serious irregularities in the election. These irregularities included:

(a) some voting machines had not been properly 'Zeroed' before the first vote was cast; (b) some machines had not been correctly programmed so that Republican candidates in one sub-district were listed on machines placed in another sub-district (in the afternoon the errors were corrected and the polls in the affected places stayed open to Republican voters for an additional two hours, until 10:00 p. m., and this fact was frequently and widely announced on television and radio); (c) some machines had levers that were locked; (d) a number of service men from the

---

\(^{42}\) *McNulty*, 245 Md. at 8, 224 A.2d at 848.

\(^{43}\) *McNulty*, 245 Md. at 9, 224 A.2d at 849.

\(^{44}\) There is no authority directly stating that the result would be different in a Maryland court if ether was evidence of election fraud. Some state courts, however, have held that evidence of election fraud requires that the election results be invalidated. In *Straughter v. Collins*, 819 So.2d 1244 (Miss. 2002), the Supreme Court of Mississippi held that “[e]ven where the percentage of illegal votes is small, this Court will still order a new election if the illegal votes are attended by fraud or willful violations of the election statutes.” In *Straughter*, a campaign worker illegally completed absentee ballots and provided illegal assistance to voters a polling place. Although the plaintiff could not show that the illegal assistance actually affected the outcome of the election, the Supreme Court of Mississippi reversed and remanded the decision of the lower court dismissing the complaint.
headquarters of the voting machine company were flown to the County on the day of the election to repair and adjust machines and this caused delay; (e) the official records and reports of these repairmen were informally made and not in strict conformity with the directives of the statutes; (f) unauthorized persons repaired and adjusted the machines; (g) levers were operative at some blank spaces; and (h) security was not as tight as it should have been at the warehouse where the machines were taken after the election. 45

The trial judge also noted that “I can, with no difficulty, find as a fact that these irregularities occurred during the primary election and that they had passed the point of being minor, and, although that is a relative term, you could very well say that some irregularities were extremely serious and of major proportions.” Despite the seriousness of the election irregularities, there was no evidence of any intentional or fraudulent acts. The Court of Appeals affirmed the trial court’s dismissal of the petition, noting that “there is no evidence that the irregularities affected the fairness of the election.” Accordingly, the Court of Appeals created another element that is necessary for a challenging party to succeed in obtaining a new election. The party challenging the party must show that the errors in the election actually changed the outcome of the election.

In Seat Pleasant, a computer error and other administrative negligence deprived a registered voter, Brenda Brown Smith, of her right to vote. In essence, Smith’s name “did not appear on the voter registration list or the voter authority cards that were provided to Seat Pleasant election officials” by the Prince George’s County Board of Elections (PGC Board). Apparently a computer error occurred when Smith sent in a change of address form, despite the fact that “Smith’s old and new addresses both were located in Seat Pleasant.” When Smith arrived at the polls, “the Chairperson of the Seat

45 Fowler, 259 Md. at 617-18, 259 Md. at 661 (1970).
Pleasant Board of Supervisors of Elections, ("City Board"), attempted, unsuccessfully, to contact the PGC Board by telephone to determine whether Ms. Smith was registered to vote” The phone call went unanswered, however, because Smith had arrived at the polls at 5:00, and the county offices has closed at 4:00. The Chairperson of the City Board had not made arrangements for someone to stay late at the county offices to handle these types of inquiries.

Smith submitted an affidavit stating that she would have voted for Thurman D. Jones, Jr. for the office of Mayor of Seat Pleasant. Jones to lost the election by one vote to the incumbent mayor, Eugene F. Kennedy, 247 votes to 246 votes. A third candidate, Eugene Grant, finished with 191 votes. The vote that Smith did not get the opportunity to cast would have forced a run-off election between the top two vote getters. Jones challenged the results of the election, seeking either a run-off or a new special election.46

The Circuit Court found that the City of Seat Pleasant “wrongfully infringed upon Ms. Smith's fundamental right to vote.”47 The Circuit Court issued a writ of mandamus ordering that the “City allow Smith to vote and, if a tie ensued, that a run-off election be conducted.”48 In so doing, the Circuit Court found that the actions of the City of Seat Pleasant were “arbitrary and capricious.”49

The Court of Appeals granted certiorari and reversed. The Court of Appeals held that (1) board did not act arbitrarily or capriciously in failing to allow registered voter to vote, in absence of proof of the voter's registration, and (2) the City and county board of

46 The difference between the run-off and the new special election is that the special election would include the third candidate, Eugene Grant. The run-off would be limited to just the top two vote getters, Kennedy and Jones.
47 Seat Pleasant, 364 Md. at 671, 774 A.2d at 1172.
48 Id.
49 Id.
elections' errors in causing lack of proof of registration, which were at most administrative errors or negligence, were not sufficient to issuance of writ of mandamus. As result, the election result stood with Kennedy as the winner by a margin of one vote.

Judge Wilner dissented from the majority opinion, arguing that the prior holdings in *McNulty* and *Fowler* required a judicial remedy. Judge Wilner argued that the “caveat specifically mentioned in *McNulty* and *Fowler* is precisely the situation now before us. Not only was a citizen's right to vote actually denied, but the vote that she claims she would have cast would, in fact, have changed the result of the election.”

Judge Wilner, commenting on the majority holding that administrative negligence is insufficient to justify a new election, stated that “should be of no consequence that, in a situation such as this, the problem arose from negligence rather than from fraud or that the negligence was somewhat diffuse--the product of carelessness on the part of several election officials. The effect is the same.”

The holding of *Seat Pleasant* is that mere administrative negligence is not sufficient to justify the ordering of a new election. Instead, the party challenging the election results must show some fraud or improper or illegal attempts to increase or to reduce the vote of a particular candidate by election officials.

Taken together, these three cases highlight the reluctance of Maryland courts to get involved in contested elections in which there is no fraud alleged. There are three elements that must be met in order for the Court of Appeals to overturn an election. First,

---

50 *Seat Pleasant*, 364 Md. at 690, 774 A.2d at 1182 (Wilner, J., dissenting).
51 Judge Wilner also poses a hypothetical to the majority. Judge Wilner asks, “What if, through pure negligence, the computer had de-registered all Democrats, or all Republicans, or all people in a given precinct, or all people whose last name begins with the letter "S"? Would the Court still say, "No fraud, no remedy"? At the time the *Seat Pleasant* opinion was written in 2001, this quote seemed like an unjustified fear. At present, however, some fear this electoral catastrophe could occur after the Diebold voting machines failed to operate properly in the 2006 primary election. See Steve Vogel and Rosalind S. Helderman, Requests Hit Record for Absentee Ballots, WASH. POST, October 31, 2006.
actual named voters must be actually disenfranchised. Second, the disenfranchisement must be the result of conduct worse than mere administrative negligence. Finally, the disenfranchisement must affect the outcome of the election. If any element is not met, Maryland courts will not order a new election.

II. Maryland Courts Should Adopt an Interventionist Approach in Deciding Contested Elections

The Maryland Courts should adopt the following test to replace the current three prong test in elections where there is no fraud alleged: Do the election results accurately reflect the will of the majority of those who voted or attempted to vote? The second prong of the current test, that the disenfranchisement of actual named voters must be worse than administrative negligence, should be deleted. For the purposes of brevity, this test will be referred to as the “Accurate Reflection Test” (ART).

The courts should use the discretion granted in the Maryland contested election statute to ensure fair elections. No statutory revision is needed, as the statutes already permit the courts to intervene if the illegality “may” have altered the election outcome. The courts’ hesitance to intervene in contested elections results from judicial philosophy, not from a lack of statutory authorization. If anything, the current judicial philosophy is contrary to the General Assembly’s statement that the contested election laws “should be liberally construed.”

If a plaintiff can show by a “clear and convincing evidence” that the election results do not reflect the will of the electorate, regardless of whether any specific voters

---

52 Laws of Maryland, 1985, Ch. 755.
53 Maryland election statutes require that evidence in contested elections cases to proven with “clear and convincing evidence.” This high standard does not serve public policy. If a plaintiff shows, by a
or disenfranchised or caused by mere administrative negligence, the plaintiff should be entitled to relief. The test can be broken down into two simple elements: first, were there errors, acts, omissions, or irregularities that should not have occurred; second, has the plaintiff shown that these regularizes altered the final outcome of the election.

There is ample support in the Maryland statutes for this type of judicial intervention. Maryland Election Law Article §12-204 permits the courts to “declare void the election” or “order any other relief” if any act or omission “may have changed the outcome of an election already held.” Although §12-204 requires that the courts make its determinations by “clear and convincing” evidence, this does not preclude judicial intervention in many elections. In order to order relief, the court must find by “clear and convincing” evidence that the act or omission at issue “may have changed the outcome of an election” (emphasis added). The word “may” indicates a lower standard of proof, i.e. the mere possibility that the outcome would have changed is sufficient. The courts, granted this discretion from the General Assembly, should take an active role in ensuring that administrative errors do not overturn the will of the majority of voters.

Currently, the Court of Appeals requires that a plaintiff show a “substantial probability” that the outcome of the election was changed by the alleged illegality. This is an incorrect interpretation of the statute that reflects the court’s reluctance to intervene in contested elections. As discussed above, the statute provides two conflicting standards of proof. The plaintiff needs to show “clear and convincing evidence” to support all

preponderance of evidence, that the election results do not reflect the will of eligible voters that intended to vote the plaintiff should be entitled to relief. It would be an error to let stand an election that has been shown to, more likely than not, not reflect the will of the majority because the plaintiff has failed to meet an elevated burden. The standard of review given in the statute, however, is outside the scope of this article. This article focuses on what approach the judiciary should take to contested elections. This disagreement with the Maryland General Assembly is best left to another day.
factual determinations, yet only needs to show that the outcome of an election “may” have changed. The Court of Appeals, understandably confused about the proper standard, came up with the “substantial probability” standard. Of course, such a standard is nowhere to be found in the statute.

The proper, and more reasonable standard, is that all factual determinations should be required to be shown by “clear and convincing evidence.” The court should make factual determinations by the “clear and convincing” standard as required by the statute. There are an infinite number of these factual determinations possible in an election law case. These include whether a voter was actually disenfranchised, whether the poll workers acted illegally, etc. Because the statute requires that a plaintiff only show that the illegality “may” have altered the outcome the plaintiff should be able to prevail upon a lower standard than “substantial probability.” The courts should hold that the plaintiff merely needs to show that more likely than not, the outcome of the election was changed by the illegality.

Of course, this test can be modified for the type of election that is being contested. For example, in an election for the House of Delegates seats in a multi-member district, only a plurality is needed to obtain a seat. Therefore, the test needs to be adapted to read: Do the election results accurately reflect the will of the plurality of those who voted or attempted to vote? The ultimate goal of the test is to determine the correct winner of the election, whether that victory is in the form of a majority of votes or a plurality of votes. For the purposes of the remainder of this paper, the term “majority” will refer to the policy or candidate preferences of the most voters, regardless of whether that constitutes a majority or plurality of voters.
Maryland courts, on a number of occasions, have noted that

[i]t is generally held that an election which has been honestly and fairly conducted will not be vitiated by mere failure to follow the statute precisely unless the result is shown to have been affected or the statute expressly states that such failure renders the election void. After the election is held, statutes giving direction as to the mode and manner of conducting it are generally construed as directory, unless the deviation from the prescribed forms of the law had so vital an influence as probably to have prevented a free and full expression of the popular will. The courts reason that it would be unjustifiable to defeat the expressed will of the electorate if the irregularity did not frustrate or tend to prevent a free expression of the electors’ intention or otherwise mislead them.\(^\text{54}\)

The inverse must also be true. If an election is not to be disturbed unless mistakes “prevented a free and full expression of the popular will,” an election which does not represent the popular must not be permitted to stand. In *Wilkinson v. McGill*,\(^\text{55}\) twenty-six illegal voters voted in an election which was decided by 16 votes. The court upheld the election but noted that the plaintiffs must prove, or at least attempt to prove, how the illegal voters voted. If direct proof cannot be obtained from the illegal voters themselves, other evidence of a circumstantial nature may be offered. In any event, there must be an effort to produce this proof. If an effort is made, which proves futile, and there is no way of producing proper evidence, it may be that the safest procedure is to throw out the election.\(^\text{56}\)

\(^{54}\) Lexington Park Volunteer Fire Dept., Inc. v. Robidoux, 218 Md. 195, 200, 146 A.2d 184, 186 (1958); Anne Arundel County v. McDonough, 277 Md. 271, 354 A.2d 788 (1976); see Soper v. Jones, 171 Md. 643, 648, 187 A. 833, 835 (1936) (stating “[i]f the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement…. In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had, or had not so vital an influence … as probably prevented a free and full expression of the popular will.”) (citing Bowers v. Smith, 20 S.W. 101 (Mo. 1892)).

\(^{55}\) 192 Md. 387, 64 A.2d 266 (1949).

\(^{56}\) *Wilkinson*, 168 Md. at 402, 64 A.2d at 274.
The court in *Wilkinson* imposed upon the plaintiffs a burden which is not necessary today. With modern voting machines and the secret ballot, it is impossible to determine how any voter voted. Moreover, the court’s holding in *Wilkinson* should not be read to add a substantive hurdle to plaintiffs challenging elections but instead should be interpreted as an element of civil procedure. The plaintiff merely needs to show why evidence of the illegal voters’ votes is unavailable. Today, such a showing would be easily accomplished in the pleadings. Applied to modern elections, the court’s holding is that the “safest” method of handling contested elections where the result is in doubt is to throw out the election results.⁵⁷

If the court finds that the election results do not reflect the will of the majority of voters that intended to vote, the court should order a new election. The remedy itself is an important part of the test. The court should not, save extreme circumstances, order the results of the election to be changed and install the officials of the court’s choosing. Such a remedy would undermine the legitimacy of the new regime, be undemocratic, and cause the new regime to lack a mandate to govern.⁵⁸

Although it seems obvious that a court should not unilaterally install the purported loser of an election in a contested election case, some courts have done just that.⁵⁹ For

---

⁵⁷ *See* Graf v Hizer, 144 Md. 418, 125 A. 151 (1924). In *Graf*, the deviation from the terms of the statute was so great as to justify the view that a special election to form a special taxing district should be nullified. The court found, however, that a court of equity did not have jurisdiction to overturn an election. The court found that they did have jurisdiction to decide whether the special taxing district had been legally created according to the terms of the enabling statute. The enabling statute required sufficient notice and other similar events to take place prior the election. The court found that these required events did not take place; therefore the special taxing district had not been created. Although the court used different reasoning, the effect was the same. The results of the election were nullified.

⁵⁸ For further discussion of the concept of legitimacy and the “mandate to govern” see notes 153 and accompanying text infra.

⁵⁹ *See* Kenneth W. Starr, *Federal Judicial Invalidation As A Remedy For Irregularities In State Elections*, 49 N.Y.U. L. REV. 1092 (1974) (arguing that new elections should be ordered when illegality may have affected the outcome).
example, in *Bradley v. Perrodin*, a California trial court held that the loser of a mayoral election, the incumbent, in Compton was entitled to be installed as mayor because the city clerk had made an error by placing the candidate’s names on the ballot in the wrong order. The judge heard testimony that candidates on the “top of the ballot” receive approximately three percent more votes than other candidates. Therefore, the trial judge awarded 302 votes to the plaintiff, whose name should have been placed at the top of the ballot.

The appellate court correctly reversed the trial courts ruling on two grounds. First, it held that the city clerk did not err in placing the names on the ballot. Second, the appellate court held that the ballot order issue did “not justify shifting 306 votes from [the election winner to [the plaintiff].” The appellate court chastised the trial court for transferring votes in another contested election in the same litigation, saying, “in a ruling unprecedented, to our knowledge, in this country, the trial court shifted 295 legal votes from Irving to Andrews based solely on the 3.32 percent primacy effect assumed to be enjoyed, on average, by those listed first on the ballot.” Commentators agreed with the appellate court’s reasoning, stating, “[a]t most, courts should order new elections using the correct ballot order rules.” While the appellate court correctly overruled the trial court’s overreaching, the fact that a trial judge felt authorized to take such a bold step is alarming. Trial courts are traditionally given great deference in their findings of fact,

---

61 Id.
62 Id. at 1164.
63 Id. at 1172.
therefore, it is important that the trial judges remain restrained in the remedies granted in contested election cases.

There are several critical policy reasons for the courts to active role in contested elections. First, “foreclosing injunctive relief” in the courts would only encourage attempts to improperly alter elections through illegal means. Thus, by actively overseeing elections, the courts would serve as a deterrent against illegal, unethical, and even negligent conduct in administering elections. Second, active oversight by the courts will serve to instill public confidence in election administration, which has been much maligned in recent years. The voting public and candidates for elected office will have confidence that the election results accurately reflect the correct outcome of the voting process.

Third, election law is an area that is “essential to a free and democratic society.” “Free and honest elections are the very foundation of our republican form of government.” As Judge Wilner noted in his dissent in Seat Pleasant, “[t]here is no need in this dissent to write a political treatise on the importance of the right to vote. I am sure that my colleagues agree with me that it is the fundamental underpinning of our democratic and republican form of government and must be zealously protected.”

---

66 See Steve Vogel and Rosalind S. Helderman, Requests Hit Record for Absentee Ballots, WASH. POST, October 31, 2006. Cf. Donohue, 435 F. Supp. at 967 (1976) (stating “[i]t is difficult to imagine a more damaging blow to public confidence in the electoral process than the election of a President whose margin of victory was provided by fraudulent registration or voting, ballot-stuffing or other illegal means”).
67 Donohue, 435 F. Supp. at 967
69 Seat Pleasant, 364 Md. at 690, 774 A.2d at 1182 (Wilner, J., dissenting).
judiciary is the institution that should be protecting the vital, yet vulnerable, right to vote.

Fourth, the judiciary must recognize the already significant burden on the plaintiff attempting to challenge elections. Election systems are designed to protect the secret ballot. As a result, a plaintiff often cannot acquire evidence as to how illegal voters voted, or as to how disenfranchised or disqualified voters would have voted. An exact determination of how irregularities affected the outcome of the election is often impossible. Voters are protective of their right to a secret ballot. The Maryland courts should recognize a plaintiff’s difficulty in acquiring direct evidence of the effect of irregularities, and grant a new election even where the plaintiff has not proven exactly how the irregularities affected the election.

Under this test, McNulty and Seat Pleasant would be overruled. In both cases, the official results of the election did not reflect the will of those eligible voters who intended to vote. In McNulty, this was a result of the election board’s finding that those who voted on the bottom line intended to vote for McNulty. In Seat Pleasant, this was the result of

---

70 See Norris v. Mayor & City Council of Baltimore, 172 Md. 667, 676, 192 A. 531, 540 (1937) (stating, “[i]t is, unfortunately, a matter of common knowledge that there are few more fruitful sources of disorder, violence, and fraud than elections, unless protected by adequate regulations, rigidly enforced”).


72 This passage from McCavitt v. Registrars of Voters of Brockton, 434 N.E.2d 620, 629 (Mass. 1982) may be indicative of how voters would react to such an inquiry:

One voter claimed, “This is all private stuff.” Another voted stated, “I will not answer that question because, as far as I'm concerned, that is illegal. Nobody has the right to know who I voted for.” In sum, as we read the record, the voters were shocked and dismayed to learn that they could be compelled by the government to disclose the candidate for whom they cast their vote.

But see Developments in the Law Elections, 88 Harv. L. Rev. 1298, 1320 n. 109 (1975) (stating that illegal voters are not voters protected by the secret ballot but may be protected against being compelled to disclose their vote by their right against self-incrimination).
one voter being erroneously denied the opportunity to vote for the candidate of her choice. John G. Pope, has argued that *Seat Pleasant* was correctly decided because "‘the greater evil’ would have been to disregard the law in favor of correcting the mistake" by election officials in denying a voter the right to vote. Pope, however, has missed the issue in *Seat Pleasant* entirely. Although election officials in *Seat Pleasant* acted properly in not permitting a woman to vote who was not on the list they were given, they were negligent in the preparation for the election. It is hard to imagine how the disenfranchisement of rightfully registered voters which affects the outcome of an election complies with the spirit or letter of any election law.

**III. Other States’ Approach to Contested Elections**

Other states have adopted similar, interventionist, approaches to contested elections. For example, Georgia appears to have a judiciary more willing to overturn election results. In *Mead v. Sheffield*, a candidate’s first name was incorrectly listed on 481 absentee ballots. The candidate lost by a spot in a run-off election by 382 votes. The Supreme Court of Georgia ordered a new election.

Had this situation occurred in Maryland, the result certainly would have been different. Under Maryland’s current three prong test - actual named voters must be actually disenfranchised; the disenfranchisement must be the result of conduct worse than mere administrative negligence; and the disenfranchisement must affect the outcome of the election – all three elements would not be met. First, no actual voters were

---

74 601 S.E.2d 99 (Ga. 2004).
disenfranchised or prevented from voting for the candidate of their choice. They could have either written-in the candidates name or voted for the box where is first name was incorrectly listed. Second, the disenfranchisement was caused by an administrative error in printing the ballots. Third, it is doubtful the election result would have changed. The candidate lost by 382 votes with 481 erroneous ballots, which would have required the candidate to have received on almost 80% of the remaining ballots. This statistical difficulty did not trouble the Supreme Court of Georgia, which held that “that the focus in an election contest involving illegal ballots is on whether they exceeded ... the margin of victory.”

The Georgia statutory law regarding contested elections is similar to the statutes in Maryland. Section 21-2-527(d) of the Georgia Code requires courts to invalidate an election upon a finding that “that the primary, election, or runoff is so defective as to the nomination, office, or eligibility in contest as to place in doubt the result of the entire primary, election, or runoff for such nomination, office, or eligibility.” This standard is similar to the Maryland standard. In Maryland, the courts are authorized to invalidate an election when irregularities “may” have affected the outcome. In Georgia, the requirement is that the “election is so defective” as to “place the election in doubt.” These two statutes are two different ways of saying the same things: when the court is uncertain of the outcome of the election, the court should order a new election. The Georgia courts have chosen to use their authority to order new elections when necessary. By contrast, the Maryland courts’ judicial philosophy has been to avoid ordering new elections at all costs despite the discretion available to them under the statutes.

---

75 Id. at 101(internal citations omitted).
In *LaCaze v. Johnson*, the Supreme Court of Louisiana affirmed the trial court's decision to order a new election, despite the fact the plaintiff had no way to show that those 144 votes would have affected the outcome of the election. It was sufficient that the result of election was merely cast into doubt.

In *Staton v. Hutchinson*, a Louisiana court ordered a new primary election in a primary election for a village police chief. In order to win, a candidate must receive half of the votes plus one; otherwise there would be a runoff general election. There were 392 votes cast in the election; “Russell D. Hutchinson receiving 197 votes, Carlton L. Staton 172 and Leon McAllister 23.” Hutchinson had received just the number required to avoid a general election. It was later learned, however, that two votes cast were cast illegally, which reduced the number of votes cast to 390. The Supreme Court of Louisiana ordered a new primary election, finding that “[c]onsidering that there is no evidence for which candidate these two votes were cast, and if they were cast for the defendant he would only have 195 votes, it is impossible to determine the result of this election.” The Supreme Court of Louisiana later made a similar holding in *Adkins v. Huckabay*. In *Adkins*, the Supreme Court of Louisiana ordered a new election because the margin of victory was three votes, and five ballots had been invalidated.

---

---

---

---

---
The relevant statutory provisions in Staton and Adkins are similar to the current Maryland contested elections statutes.\textsuperscript{81} The Louisiana Election Code provides that a judge may declare an election void if:

(1) it is impossible to determine the result of election, or (2) the number of qualified voters who were denied the right to vote by the election officials was sufficient to change the result in the election, if they had been allowed to vote, or (3) the number of unqualified voters who were allowed to vote by the election officials was sufficient to change the result of the election if they had not been allowed to vote, or (4) a combination of the factors referred to in (2) and (3) herein would have been sufficient to change the result had they not occurred … \textsuperscript{82}

This statutory provision, although longer than the Maryland contested elections statute, encompasses the exact same principles. The Louisiana Elections Code permits the invalidation of an election if the numbers of illegal voters or disenfranchised voters exceeds the margin of victory.\textsuperscript{83} The Code also permits the invalidation of the election if the election outcome is “impossible” to determine.

Similarly, Maryland courts are permitted by statute to invalidate an election outcome that “may” have been altered. Obviously, an election in which it is impossible to determine the rightful winner due to irregularity “may” have been altered.\textsuperscript{84} In this respect, the statutory schemes of Louisiana and Maryland are similar. Both give the

\textsuperscript{81} The current draft of the Louisiana Election Code was enacted in 1976 and did not go into effect until January 1, 1978. Therefore, the statute was enacted after the LaCaze decision. The prior version of the code required that the plaintiff show “must show that ‘but for’ the irregularity he would have won the election.” Adkins, 755 So.2d at, 222 n. 21, 1999-3605 at *28 n. 21; see La. R.S. 18:364, repealed by 1976 La. Acts 697, § 1, and jurisprudence, see, e.g., Moreau v. Tonry, 339 So.2d 3, 4 (La. 1976).

\textsuperscript{82} La. Rs. 18:1432.

\textsuperscript{83} This provides protection against the exact problem that arose in Seat Pleasant.

\textsuperscript{84} This is an important point. If the Board of Elections declares a winner of an election, but it is impossible to tell which candidate the voters intended to elect, the elections results “may” have been changed to due to the irregularity. The Board of Elections determination may have been correct, or it may have been incorrect.
judiciary broad authority to craft remedies when the outcome of an election is in doubt; Maryland when the outcome “may” have changed, Louisiana when the outcome is “impossible to determine.” The difference between the states lies in judicial philosophy. In Louisiana, the courts have chosen to intervene and invalidate elections when the will of the voters cannot be determined. Maryland courts, by contrast, have permitted elections to stand, such as in *McNulty* and *Seat Pleasant*, when the will of the voters cannot be determined.

Other states have developed similar tests to that of Louisiana. The Supreme Judicial Court of Massachusetts has held that “[w]henever the irregularities or illegality of [an] election is such that the result of the election would be placed in doubt, then the election must be set aside' and the judge must order a new election.”85 The Massachusetts courts has applied this rule on several occasions. For example, in *Penta v. City of Revere*86 the court held that “Marano is the winner of the Ward 1 City Council seat by only four votes. At least eleven votes were wrongly counted. As a result of substantial irregularities or illegality, the outcome of the election for Ward 1 City Council has been placed in doubt. A new election must be held.”87

Massachusetts courts do not rely on statutory authority to take an active role in contested elections. There is no statute that specifically authorizes the courts to invalidate an election of the election is in doubt. The willingness of the Massachusetts courts to intervene in contested elections appears to be the result of only judicial philosophy.

---

87 *Id.* at *12.
Federal courts have also taken active roles in ordering new elections. In *Donohue v. Board of Elections of the State of New York*, the court noted that “federal courts in the past have not hesitated to take jurisdiction over constitutional challenges to the validity of local elections and, where necessary, order new elections.” Although the election in *Donahue* involved a presidential election with factually distinct circumstances from those being discussed here, at least one commentator has noted that “*Donohue* stands as a significant rebuttal to the notion that requests for special elections should be dismissed out of hand in presidential election cases, let alone congressional cases.” That same logic should certainly be extended to state and local elections.

The general federal rule is that courts should invalidate an election, and order a new election, if the violation “could very well have modified the outcome of the election.” In *Smith v. Cherry*, the Seventh Circuit announced a two-part test for obtaining a revote. A plaintiff “must show (1) a ‘serious and substantial’ violation and (2)

---

89 489 F.2d 1098 (7th Cir. 1973), cert. denied, 417 U.S. 910 (1974). It is important to note that *Smith v. Cherry* involved an unusual election challenge. In Smith, the plaintiff charged that another candidate ran a sham candidacy in a primary to defeat him then withdraw. After the withdrawal, party leaders could choose the candidate they wanted all along. The court reversed summary judgment and held that the district court should order new elections if they found a sham candidacy and the sham had “reasonable possibility” of affecting the outcome.
a ‘reasonable possibility’ that the violation affected the outcome of the challenged election.”

In *Perkins v. Matthews*, the Supreme Court of the United States held that federal courts may order new elections where a State or local government held an election without getting the election “precleared” under the Voting Rights Act. In “precleanance” cases, it does not matter whether any voters' rights have actually been violated. Instead, the mere failure to submit a electoral change for preclearance is sufficient cause to order a new election. Although this is a case dealing with the Voting Right Act at the federal level, the analogy is still applicable to state court decisions. Federal courts have used the statutory discretion granted to them by Congress in the Voting Rights Act and the Civil Rights Act to get actively involved with contested elections. The Maryland courts have declined to use the discretion granted to them by the General Assembly.

**IV. Criticisms of Judicial Activism**

Almost any policy that encourages extensive judicial involvement in the affairs of other branches of government is subject to attack as a form of judicial activism. The problems with judicial activism are difficult to resolve, considering the lack of an agreed upon definition for judicial activism. Professor Laurence Tribe has noted that “the common idea that there is such a thing as ‘judicial activism’ which could be objectively

---

95 400 U.S. 379 (1971).
measured in some meaningful way is also deeply wrong. One person’s judicial activism is another person’s stolid defense of right principle against convenience and political popularity.” 98 As another scholar has stated, “even if we ardently disagree about what amounts to ‘judicial activism,’ no serious commentator, liberal or conservative, seems to be calling for more of it.” 99

This confusion is not the result of a lack of effort by scholars to define the term. In fact, during the 1990s, “‘judicial activism’ and ‘judicial activist’ appeared in an astounding 3,815 journal and law review articles. In the first four years of the twenty-first century, these terms have surfaced in another 1,817 articles.” 100 Because of the frequency and intensity of the accusations of judicial activism, any policy proposal which advocates a greater role for the judiciary and does not address these concerns is simply incomplete. Therefore, it is necessary that this paper articulate a response to those commentators that will immediately respond to any intervention in election results by the courts by accusing the courts of engaging in judicial activism.

Legal scholarship surrounding the use of the term judicial activism is confusing at best. 101 Because the ambiguities in defining the term and the chaotic nature of the debate, a bit of background is required on the term judicial activism. The term judicial activism was first used by Arthur Schlesinger Jr. in a January 1947 Fortune magazine article. 102

Schlesinger intended the term to have a variety of meanings, and not all of these meanings still exist in the present day. For example, early uses included the use if judicial activism as a term of endearment, i.e., a compliment. The term is no longer used as a compliment in the modern political discourse.

Scholars have identified five general categories of judicial activism. First, judicial activism occurs when a court strikes down arguably constitutional actions of the executive or legislative branches of government. Second, some scholars argue that judicial activism occurs when the court blatantly ignore precedent. Third, judicial

---

104 See Keenan D. Kmiec, Comment, The Origin and Current Meaning of “Judicial Activism,” 92 CAL. L. REV. 1441, 1451 (2004). (stating that in its early days, the term judicial activist sometimes had a positive connotation, much more akin to “civil rights activist” than “judge misusing authority”).
106 It should be noted that these five categories are not mutually exclusive. That is, a particular judicial decision may be criticized as an example of judicial activism by falling into multiple categories of judicial activism. For example, opponents of the Supreme Court’s decision in Roe v. Wade have argued that the decision is incorrect because it constitutes an effort to “legislate from the bench” (Neil Kinkopf, The Progressive Dilemma, 75 NOTRE DAME L. REV. 1493, 1496 (2000)) and an “undemocratic” invalidation of Texas’s legislative statute. Mark S. Kende, Constitutional Law Symposium: The Role of Courts in Social Change, 54 DRAKE L. REV. 791 (2006). In addition, some scholars will argue that there are a few more or less categories of judicial activism. For example, William P. Marshall argues that there are “seven sins of judicial activism.” Several of Marshall’s sins are duplicative and can be combined into the five major categories discussed here. William P. Marshall, Conservatives and the Seven Sins of Judicial Activism, 73 U. COLO. L. REV. 1217 (2002).
107 See Greg Jones, Proper Judicial Activism, 14 REGENT U. L. REV. 141, 143 (2002) (stating that judicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation. This is activism because it “impose[s] a judicial solution over an issue erstwhile subject to political resolution.”) (citations omitted); Lino A. Graglia, It’s Not Constitutionalism, It’s Judicial Activism, 19 HARV. J.L. & PUB. POL’Y 293, 296 (1996) (arguing that judicial activism occurs when judges … disallow[] policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit”).
108 This is not as simple as it would first appear. There two types of a precedent that a court may be required to follow, vertical precedent and horizontal precedent. Keenan D. Kmiec, Comment, The Origin and Current Meaning of “Judicial Activism,” 92 CAL. L. REV. 1441, 1466 (2004). “Vertical precedent” is controlling case law originating from a higher court. See Steven G. Calabresi & Gary Lawson, Equity and Hierarchy: Reflections on the Harris Execution, 102 YALE L.J. 255, 276 n.106 (1992) (stating that:

hierarchical structure of Article III dictates that inferior courts faithfully apply the precedents of superior courts, just as the hierarchical structure
activism occurs when judges “legislate from the bench.””

Fourth, judicial activism occurs when courts depart from previously accepted methods of interpretation.

of Article II requires executive officials to follow presidential precedents. In other words, while Professor Lawson (though not Professor Calabresi) believes that precedent in the federal system is problematic when applied horizontally, he agrees that precedent is a proper and important part of the judicial system when applied vertically.)

See also, Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam) (stating that in order to avoid judicial anarchy, “a precedent of this Court [the Supreme Court of the United States] must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be”).

By contrast, horizontal precedent is the doctrine requiring a court “to follow its own prior decisions in similar cases.” Keenan D. Kmiec, Comment, The Origin and Current Meaning of “Judicial Activism,” 92 CAL. L. REV. 1441, 1467 (2004).

(citations omitted). The debate over whether courts should follow their own precedent is much more controversial matter than that of vertical precedent. After all, Brown v. Board of Education, 347 U.S. 483 (1954), would never have occurred if the Supreme Court remained bound by Plessy v. Ferguson, 163 U.S. 537 (1896). But cf. Engle v. Issac, 456 U.S. 107 (1982) (Brennan, J. dissenting) (chastising the majority for a “conspicuous exercise in judicial activism--particularly so since it takes the form of disregard of precedent scarcely a month old.”) For a discussion of when it is appropriate for the Supreme Court to overrule its own vertical precedent, see Planned Parenthood v. Casey, 505 U.S. 833 (1992) (“stating that stare decisis is not an ‘inexorable command”’ and providing a list of factors for when it is appropriate to overrule the Supreme Courts own precedent).

In his 2006 State of the Union, President George W. Bush, speaking about his plan not to appoint “judicial activists,” stated, “I will continue to nominate men and women who understand that judges must be servants of the law, and not legislate from the bench.” (emphasis added) http://www.c-span.org/executive/transcript.asp?cat=current_event&code=bush_admin&year=2006. This type of judicial activism is not actually judicial activism but is merely a truism. Of course it is inappropriate to “legislate from the bench.” One might similarly add that it is inappropriate to “adjudicate from the floor of the Senate” or “pass sentence from the floor of the House of Representatives.” It is also important to note that judges are unlikely to actually consider themselves “legislating from the bench.” See Kathleen M. Sullivan, The Supreme Court, 1991 Term-- Foreword: The Justices of Rules and Standards, 106 HARV. L. REV. 24, 112 (1992) (stating that “[a]ll the Justices seek to distinguish the judicial enterprise from politics; none seeks to 'legislate from the bench”).

See Keenan D. Kmiec, Comment, The Origin and Current Meaning of “Judicial Activism,” 92 CAL. L. REV. 1441, 1474-76 (2004). (stating that the failure to use the “tools” of the trade appropriately--or not at all--can be labeled judicial activism; Adam J. Levitin, Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime, 80 AM. BANKR. L.J. 1, 15 (2006) (arguing that “[j]udicial lawmaking in the sense of creating new rules of decision, however, is often viewed with great suspicion as ‘judicial activism,’ violating the separation of powers principle”) The argument would be much simpler if scholars and judges could agree on what are the proper methods of interpretation. The “difficulty is immediately apparent. Although there is some baseline of consensus, scholars and jurists do not agree on what constitutes the ‘appropriate’ way to interpret the Constitution. Accordingly, they will remain in disagreement over a charge of judicial activism in this context.” Keenan D. Kmiec, Comment, The Origin and Current Meaning of “Judicial Activism,” 92 CAL. L. REV. 1441, 1474 (2004).
Finally, scholars argue that judicial activism occurs when courts engage in outcome-oriented adjudication.\textsuperscript{111}

A. Why is Judicial Activism a Bad Thing: Four Major Criticisms of Judicial Activism

Although legal and public opinion is hardly unanimous, in the current political climate judicial activism has a negative connotation.\textsuperscript{112} The criticism of judicial activism regardless into which particular category a particular judicial decisions falls, has been ferocious.\textsuperscript{113} There appears to be four major criticisms of judicial activism, which roughly correspond to the categories of judicial activism listed above.\textsuperscript{114} Like the categories of judicial activism, the four criticisms are not mutually exclusive. One particular attack on the use of judicial activism will borrow philosophical and theoretical perspective from the other three criticisms.

\begin{flushright}
\begin{footnotesize}
\textsuperscript{111} Keenan D. Kmiec, Comment, \textit{The Origin and Current Meaning of “Judicial Activism,”} 92 CAL. L. REV. 1441, 1452 (2004). William P. Marshall calls this “partisan activism.” See William P. Marshall, 73 U. COLO. L. REV. 1217, 1220 (describing “partisan activism” as the “use of judicial power to accomplish plainly partisan objectives”). This has the potential to be the most evil category of judicial activism. This category of judicial activism occurs when judges disregard statutory law, precedent, and every other legal tool at their disposal to craft a decision that favors a particular group or political objective. Naturally, this is probably the most difficult type of judicial activism to attempt to prove. See Keenan D. Kmiec, Comment, \textit{The Origin and Current Meaning of “Judicial Activism,”} 92 CAL. L. REV. 1441, 1476 (2004). (stating that “[t]here is rarely smoking gun evidence of an ulterior motive” in a judicial decision).
\textsuperscript{112} Compare Frank H. Easterbrook, \textit{Do Liberals and Conservatives Differ in Judicial Activism?}, 73 U. COLO. L. REV. 1401, 1401 (2002) (stating that “[e]veryone scorns judicial activism) with Justice John Paul Stevens, \textit{Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today’s World}, C.B.A. Rec., Oct. 16, 2002, at 26 (stating that “[b]ecause I did not participate in any of the foregoing cases, I cannot be entirely sure about how I would have voted, but with the benefit of hindsight I can say that I now agree with each of those examples of judicial activism”).
\textsuperscript{113} See Jack Wade Nowlin, \textit{The Judicial Restraint Amendment: A Populist Constitutional Reform in the Spirit of the Bill of Rights}, 78 NOTRE DAME L. REV. 171, 174 (2002) (stating: “commentators across the political spectrum have criticized the Court in recent years for its general ‘arrogance,’ ‘hubris,’ ‘contempt for the competing views of the political branches,’ and ‘strategic concern for [the Court’s] own institutional prerogatives,’ as well as for its displays of political ‘feuding,’ constituency-serving, results-oriented judging, excessive ‘partisan[ship],’ and lack of ‘respect for the dignity and authority of the law.’”
\end{footnotesize}
\end{flushright}

\textsuperscript{114} See notes 105 – 10 supra and accompanying text.
The most obvious and most frequent criticism of judicial activism is that often results in overruling the will of the political majority, or at least the will of the political branch elected to represent the majority.\(^{115}\) One can quickly think of numerous examples, with both positive outcomes and negative outcomes, of the judiciary making rulings in opposition to the majoritarian branches.\(^{116}\) This criticism, however, is typically limited to the judiciary’s rulings in which the strike down “clearly” unconstitutional statutes.\(^{117}\)

This limitation exposes the criticisms’ greatest weakness, “the line between proper judicial review and judicial activism depends on the speaker's understanding of the Constitution.”\(^{118}\)

A second, related criticism of judicial activism is that judges are not well equipped to decide open-ended policy issues, but are instead equipped to decide questions with binary outcomes.\(^{119}\) The court system, with its adversarial, nature, is

\(^{115}\) Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (arguing “[s]ince the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected …”)

\(^{116}\) The landmark decision in the school desegregation case Brown v. Board of Education stands out as a positive example of the judicial branch imposing a ruling upon the popular will of the Southern majority. On the opposite end of the spectrum, many Lochner era decisions have been attacked as harmful judicial activism. See Cass R. Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873, 874-76 (1978) (attacking Lochner for forbidding the legislature (the majoritarian institution) to make necessary economic adjustments to assist the lower class); see also Howard Gillman, The CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 1 (stating “[w]hen contemporary commentators decry the abuse of judicial power or the evils of 'judicial activism' the historical examples that most readily come to mind are drawn from Supreme Court decisionmaking around the turn of the century, a period often referred to as the Lochner era”).

\(^{117}\) For example, if Congress chose to pass a law which permitted prosecutors to re-try defendants after they had been acquitted of the same charge, no one would argue that the judiciary should not strike this law down as a violation of the Fifth Amendment’s prohibition on double jeopardy. The issue only arises when an act of the politically branches is “arguably unconstitutional.” See Lino A. Graglia, It's Not Constitutionalism, It's Judicial Activism, 19 HARV. J.L. & PUB. POL'Y 293, 296 (1996). (stating that “[b]y judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit”).


\(^{119}\) Cf. Furman v. Georgia, 408 U.S. 238, 328 (1972) (Rehnquist, J. dissenting) (stating that “democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of
designed to adjudicate problems with only two possible outcomes: guilty or not guilty; objection sustained or overruled; judgment for plaintiff or defendant; decision reversed or affirmed.\textsuperscript{120}

Contrast the typical problem confronted by the judiciary with the typical problem confronted by the legislature. A typical judicial case, even a case of constitutional significance, involves only two parties seeking an answer to an issue which they have framed as a binary question. The early Supreme Court at least implicitly acknowledged its own inability to decide open ended policy questions, as the early Court has phrased its “Questions Presented” sections in it opinions as binary questions with “yes or no” answers.\textsuperscript{121} By contrast, the legislature balances a variety of competing interests and objectives to determine policy. For example, in setting tax policy, the legislature must determine the optimal tax rate or tax structure within a broad, practically infinite, spectrum of potential outcomes. Therefore, some argue, policy decisions such as these are best left to be decided in the forum that is designed to handle open-ended policy questions.\textsuperscript{122}

\textsuperscript{120} Of course, this list of binary decisions is over simplified. Federal courts have been engaged in crafting equitable remedies that would often resemble issues typically confronted by the legislative or executive branches. For example, following the school desegregation cases, federal courts used their broad equitable discretion to supervise the desegregation of school districts across the south. Joel Wm. Friedman, \textit{Desegregating the South: John Minor Wisdom’s Role in Enforcing Brown’s Mandate}, 78 Tul. L. Rev. 2207, 2269 (2004).

\textsuperscript{121} See Chisolm v. Georgia, 1 U.S. 419, 419 (1793) (beginning the opinion by listing four binary questions answerable by an affirmative or negative response).

\textsuperscript{122} States' Rights vs. the Nation, 15 NEW REPUBLIC 194, 194 (1918) (attacking the Supreme Court’s child labor decisions for having “disregarded their own wise cautions in the past that legislative motive or policy is a matter for the legislative conscience and not for Court review”).

35
It is important to distinguish between these first two different, although related, criticisms of judicial activism. The first criticism is that it is counter-majoritarian. In other words, the courts should not substitute their judgment for the will of the majority because the courts are not anymore qualified than the majority and the practice is inherently undemocratic. The second criticism is that the judiciary, by its design, is not capable of making open-ended policy choices. While the first criticism turns on the judiciary’s legitimacy as a policymaker, the second focuses on judiciary’s capability and competency to make multi-faceted decisions.

A third criticism of judicial activism is that it leads to inconsistent and incongruous decisions. This is criticism is especially apt when judges are accused of blatantly ignoring precedent, whether that precedent is vertical or horizontal in nature. There are numerous reasons why a society would seek consistent outcomes from the

---


124 See Nelson Lund, Retroactivity, Institutional Incentives, and the Politics of Civil Rights, 1995 PUB. INT. L. REV. 87, 88 (1995) (arguing that the judicial activism may undermined the basic distinctions between judicial and legislative acts); Jeremy Waldron, The Core of the Case Against Judicial Review, 115 YALE L.J. 1346, 1376 (2006) (noting that “[s]ome claims of right have the character of the sort of binary issue that courts might be competent to address; others have a multifaceted character that has usually been regarded as inappropriate for decision in a judicial structure”).

125 These two criticisms are related, and, one can get lost in cyclical reasoning behind the criticisms. In essence, the legislature is the more legitimate branch to decide many policy questions because it represents the will of the majority and serves as the facilitator of public debate on policy.


When that new rule overturns precedent or ignores the most plain meaning of a statutory text, it may be applied to parties who relied on the earlier law or most evident interpretation in planning their affairs. In these situations judicial activism results in decisions that are not consistent with a rule that had been predetermined and preannounced…)

127 Id.
It seems that, as a matter of policy, it is preferable to have a judiciary that issues consistent results over a judiciary where one cannot accurately predict the results of most cases.

This criticism is also apt when judges depart from generally accepted methods of interpretation. The methods of interpretation are likely to be relied upon by parties as often as prior substantive law. Therefore, any sudden shift in the judicial method of interpretation will raise the same issues that a sudden change in substantive law would raise.

A fourth criticism of judicial activism is that, by legislating from the bench, judges are crafting government policy. Some critics charge that even if the resulting policy is sound policy, the judicial activism that “legislated” policy is incorrect. The criticism

---

128 See Payne v. Tennessee, 501 U.S. 808, 827 (1991) (stating: [s]tare decisis is the preferred course, because it promotes the evenhanded, predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. Nevertheless, when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. Stare decisis is not an inexorable command; rather it is a principle of policy and not a mechanical formula of adherence to the latest decision.)

129 The rules of interpretation of statutes are hardly standard or accepted. Keenan D. Kmiec, Comment, The Origin and Current Meaning of “Judicial Activism,” 92 CAL. L. REV. 1441 (2004). The differences in the methods of interpretation are readily apparent in the current Supreme Court. Keenan D. Kmiec, Comment, The Origin and Current Meaning of “Judicial Activism,” 92 CAL. L. REV. 1441 (2004). Justice Thomas is an ardent originalist, so he would approach a hypothetical constitutional case by asking one question: “Was the practice in question acceptable at the time the constitutional provision was ratified?” Id. Justice Breyer, by contrast, would likely use a broader set of tools to interpret the Constitution. Id.

130 Keenan D. Kmiec, Comment, The Origin and Current Meaning of “Judicial Activism,” 92 CAL. L. REV. 1441, 1473 (2004) (stating “[i]ndividual cases can result in favorable consequences or set desirable precedents despite being improper exercises of the judicial function.” One of the potential ironies of this criticism is that the legislature may not actually be the institution that most aggressively criticizes legislating from the bench. It is even possible that some legislatures do not want to handle particularly thorny issues and welcome the courts’ intervention. Justice Powell, in a school desegregation case, noted
is obviously even more apt when the resulting policy is complicated or unmanageable. For example, Justice Powell used this criticism to attack the majority holding in the school desegregation case *Columbus Board of Education v. Penick*.\(^\text{131}\) In his lengthy discussion on judicial activism, Justice Powell argued that “[t]he time has come for a thoughtful re-examination of the proper limits of the role of courts in confronting the intractable problems of public education in our complex society.”\(^\text{132}\) Justice Powell was concerned by the complexities that inevitably accompany the judiciary’s legislation and supervision of “wide-ranging decrees.”\(^\text{133}\)

Finally, critics often attack the judiciary’s results when judges engage in outcome-oriented decision making. The critics often attack both the result of such decision-making and the tainted process by which the decision was reached. One of the most frequent targets of such criticism is the Supreme Court’s opinion in *Bush v. Gore*.\(^\text{134}\) One commentator has noted that “how many truly believe that the conservatives would have voted the same way had the candidates been reversed?”\(^\text{135}\) The harsh criticism in the

---

*\(^\text{131}\) Columbus Board of Education v. Penick, 443 U.S. 449, 487-88 (1979) (Powell, J., dissenting).\(^\text{132}\) Id.\(^\text{133}\) Id.\(^\text{134}\) 531 U.S. 98 (2000). This article is not the appropriate forum to delve into the intricacies of *Bush v. Gore*, however, a brief summary of the case is required to establish context. In *Bush v. Gore*, the Supreme Court of the United States issued a decision in favor of George W. Bush, reversing a decision of the Florida Supreme Court. The decision was 5-4 to cease all recounts. The traditionally conservative Justices, Kennedy, O’Connor, Rehnquist, Scalia and Thomas were in the majority. The traditionally more liberal Justices, Breyer, Ginsburg, Souter, and Stevens opposed the ruling. For a detailed account of *Bush v. Gore*, and the effects it has had on the American’s public’s perception of the judiciary, see Bea Ann Smith, *Alarming Attacks on Judges: Time to Defend our Constitutional Trustees*, 80 OR. L. REV. 587 (2001).\(^\text{135}\) William P. Marshall, Conservatives and the Seven Sins of Judicial Activism, 73 U. COLO. L. REV. 1217, 1247 (2002). Marshall elaborated on his point that:

Part of the partisan activism claim rests on the grounds of the decision. Under any reading, the decision offers a dramatic expansion of equal protection law in voting; rejects federal-state court comity in favor of federal court intrusion; rejects jurisdictional limitations of standing,
wake of *Bush v. Gore* is an example where accusations of judicial activism have undermined public confidence in the judiciary.\textsuperscript{136}

V. The Criticism of Judicial Activism Does not Apply to Contested Elections

Despite the frequency and ferocity of the criticisms of judicial activism, charges of judicial activism do not apply to the judiciary’s greater role in contested elections. None of the four major criticisms of judicial activism\textsuperscript{137} noted above should deter courts from adopting an active role in overseeing contested elections.

The first criticism of judicial activism, that it results in overruling the will of the political majority, or at least the will of the political branches elected to represent the majority,\textsuperscript{138} does not apply to the courts’ intervention in contested elections for several reasons.

A. The Judiciary is More Accountable to the Electorate than the Boards of Elections.

Most litigation challenging the results of an election will be seeking to overrule the decision of the State Board of Elections, a County Board of Elections, or a Local

\textsuperscript{136} See Bea Ann Smith, *Alarming Attacks on Judges: Time to Defend our Constitutional Trustees*, 80 OR. L. REV. 587, 588-89 (2001) (stating, “when judges are considered impartial and independent, the public will trust their decisions, and this confidence is essential to a well-ordered society”).

\textsuperscript{137} See Part IV supra.

\textsuperscript{138} See notes 114-17 supra.
Board of Election. The State, County, and Local Boards of Elections, however, are not institutions that represent the political will of the majority of the electorate. In fact, one could argue that the Maryland Court of Appeals is more accountable to the electorate than the State Board of Elections. The State Board of Election consists of five members appointed by the Governor for four year terms, with the advice and consent of the Senate of Maryland. The Governor may remove a member of the State Board of Elections for “incompetence, misconduct, or other good cause.” A member of the State Board of Elections may not serve more than three consecutive four-year terms. Judges on the Maryland Court of Appeals are subject to appointment in the identical way of that of Members of the State Board of Elections. The Governor appoints the judges with the advice and consent of the Senate.

Unlike members of the State Board of Elections, however, judges appointed to serve on the Maryland Court of Appeals are immediately accountable to the electorate. A judge on the Maryland Court of Appeals is subject to a retention election “at the next general election following the expiration of one year from the date of the occurrence of the vacancy which he was appointed to fill.” In addition, a judge on the Maryland Court of Appeals is required to stand for a retention election every ten years. Because judges on the Maryland Court of Appeals are actually accountable to the electorate, one

---

139 For example, in Fowler, suit was brought against the Board of Supervisors of Elections for Prince George’s County. 259 Md. 615, 270 A.2d 660. In Seat Pleasant, the plaintiff was challenging a decision of the Seat Pleasant City Board of Supervisors of Elections, a local entity. Seat Pleasant, 364 Md. 663, 774 A.2d 1167.
140 MD CODE ANN., ELEC. LAW § 2-101.
141 Id.
142 MD Constitution, Art. 4, § 5A.
143 Id.
144 Id.
could argue that they are actually more representative of the majority of voters than the members of the State Board of Elections.\footnote{145}

Similarly, the County and Local Boards of Elections are not representative of the voting majority. The major party central committees of a particular county, upon the Governor’s request, submit a list of four nominees for appointment to the County Board of Election.\footnote{146} The Governor then may appoint a nominee to the County Board of Elections or reject the list of nominees and request a new list.\footnote{147} Each appointment is subject to confirmation by the Senate.\footnote{148} Although the selection of members of local boards of elections varies from city to city, they are typically appointed in a similar manner. For example, in the City of Seat Pleasant,\footnote{149} members of the local board of elections are appointed by the Mayor with the approval of the City Council.\footnote{150} The members of the local board never stand for election by the general voting populace.\footnote{151} Because the Maryland Court of Appeals judges are more accountable to the electorate than the members of the State, County, and local Boards of Elections, an interventionist approach by the courts does not wrongly usurp authority left to the majoritarian institutions.

\textbf{B. A Proper Application of the ART would not be Substituting the Judgment of the Judiciary for the Judgment of the Majority.}

\footnote{145} It should be noted, however, that members of the State Board of Elections serve shorter terms than judges on the Maryland Court of Appeals and are subject to term limits. Judges on the Maryland Court of Appeals are only subject to an age limit. A Maryland “appellate court judge shall retire when he attains his seventieth birthday.” MD Constitution, Art. 4, § 5A.
\footnote{146} MD. CODE ANN., ELEC. LAW § 2-201.
\footnote{147} \textit{Id.}
\footnote{148} \textit{Id.} In Caroline, Dorchester, and Kent counties, if there is no resident Senator from the particular county, the confirmation required shall be from the Maryland House of Delegates.
\footnote{149} The City involved in the contested election in \textit{Seat Pleasant}, discussed \textit{supra}.
\footnote{150} Charter of the City of Seat Pleasant, Prince George’s County, Maryland. Article VI, § C-603.
\footnote{151} \textit{Id.}
Critics cannot accuse the court of interfering with areas of law left to the majoritarian branches because the judiciary would merely be trying to determine “what” the will of the majority is, not attempting to invalidate or circumvent the will of the majority. This distinction is crucial. Under the proper application of the ART, judges are only seeking to determine if the results of the election actually reflect the majority of those who intended to vote. If the judiciary was to uphold election results that it knew did not reflect the will of the majority, it would be favoring the minority’s policy preferences over that of the majority’s. Nothing could be more activist than substituting one’s preferred electoral outcome for that of the actual election. Yet, if the judiciary does not closely examine the election results in a contested election, that is exactly what would occur. Therefore, if the courts refuse to address the majority’s political intent, the judiciary would be engaging in the very type of judicial activism that critics implore the judiciary to avoid. One can argue that this type of activism is what occurred in Bradley v. Perrodin, where the trial judge transferred votes from the loser of the election to the winner of the election. The trial judge then installed the loser as mayor, substituting his judgment for the expressed will of the majority.

C. A Proper Application of the ART Actually Enhances the Legitimacy of the Elected, Political Branches of Government.

An interventionist court actually enhances the legitimacy of the political branches of government. If a contested election withstands a challenge in which the judiciary closely examines the results to determine the correct outcome, all parties involved can be confident that the results accurately reflect the will of the majority. This in turn will

152 131 Cal.Rptr.2d 402 (Cal. Ct. App. 2003), discussed supra note 60 and accompanying text.
enable the newly elected officials to claim a mandate to govern.\textsuperscript{153} Therefore, the newly elected officials will be able to govern with both actual and perceived legitimacy.

D. The Judiciary is Capable of Handling the Questions Posed under a Proper Application of the ART.

Similarly, the criticism that the judiciary is not equipped to handle difficult policy questions is inapplicable to the judiciary’s intervention in contested elections.\textsuperscript{154} Under a proper application of the ART, the judiciary would be deciding one \textit{binary} question. The only relevant question is whether the election results reflect the will of the majority of voters that intended to vote. This question can be answered in only two ways, affirmatively or negatively. Under this test, the courts will only be asked to intervene after the election. The only possible answers to the plaintiff’s complaint are to dismiss the complaint or to order a new election.

Courts often struggle with questions that are not properly framed for judicial review. Examples of these difficult questions include “what is a reasonable action” or “how should ballots be handled.” Because these questions cannot be answered in the affirmative or in the negative, and implicate multiple policy considerations, courts will struggle with these types of questions. A proper application of the ART requires only one question and only one policy consideration. If the election results fail to indicate the will of the majority of voters, a new election should be ordered.

\textsuperscript{153} \textit{Cf.} Ky Fullerton, Comment, \textit{Bush, Gore, and the 2000 Presidential Election: Time for the Electoral College To Go?}, 80 Or. L. Rev. 717, 753 (2001) (arguing that a “system that does not include direct expression of the voice of the people undermines the principle of a government with the consent of the governed”).

\textsuperscript{154} For discussion of this criticism, see notes 119-24 \textit{supra} and accompanying text.
E. Any Judicial Errors in Ordering a New Election will be Corrected by the New Election.

All errors by the judiciary in applying the ART are self-correcting. Judicial legal or factual error is a real possibility in any case. The effects can be devastating to the parties of the public at large. In this case, however, the effects on the public and parties will be minimized by the new election. If the judiciary incorrectly orders a new election while the actual will of the majority was correctly reflected in the original election results, no harm will occur. The majority of the voting public will correct the judiciary’s ruling by voting once again. The correct leaders will take office, now free from any stigma or implication that they are not the legitimate leaders of the government. The error from the judiciary’s ruling will have been corrected in a very short time frame, and there are no lasting policy effects.

VI. Conclusion

In conclusion, the Maryland courts are authorized by statute to order a new election when an illegality “may” have altered the outcome of an election. The courts, however, have been reluctant to order new elections, even when the outcome of the election is clearly in doubt. This is solely a result of the Maryland courts’ judicial philosophy, and not a lack of statutory authority.

The Maryland courts should adopt the Accurate Reflection Test (ART) in contested elections cases. The ART asks: Do the election results accurately reflect the
will of the majority of those who voted or attempted to vote? If the answer to this question is no, the Maryland courts should order a new election.\textsuperscript{155}

\textsuperscript{155} The Maryland courts appear to be content to let any election stand in absence of fraud, even if they are aware that the majority of voters intended a different result. As long as a fraud-free election occurs, the Maryland courts are satisfied.

The opposite view of the elections process is the more correct view. The election result, not just the fact that an election was held, is integral to our democracy. Elections are the opportunity for the majority of voters to determine the substantive policy of the government. The ultimate goal of an election should not only be to determine a winner but should be to determine the right winner.