

# THE MERITS OF MERIT SELECTION

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America has almost as many different ways of selecting state judges as it has states.<sup>1</sup> Over the past two centuries, most states have coalesced around fairly uniform requirements, term lengths, and election dates for executive and legislative officials.<sup>2</sup> But no “consensus” method of choosing judges has developed; indeed, each decade of the last century has brought more disparity between the States, not less.<sup>3</sup>

In many states, the debate rages as fiercely as ever over whether judges should be “appointed” or “elected,” identified by party affiliation or prohibited from any partisan activity, subject to a contested race for re-election or merely an up-or-down “retention” referendum, bound by the same ethical and electoral rules as other public officials, or treated as wholly distinct from the political branches. Even at the federal level, proposals for fixed judicial terms are periodically suggested, espe-

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1. See AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2008), <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf> (surveying judicial selection methods).

2. See, e.g., Project Vote Smart, General Information About the Governors' Offices, <http://www.votesmart.org/pdf/govtable.pdf> (last visited Dec. 14, 2008) (demonstrating almost uniform four-year terms for state governors with a majority of states imposing a limit of two consecutive terms). The one modern change to popular-branch elections has been the adoption in recent decades of term limits for legislators and executive officials in many states. Interestingly enough, only in Nevada was there a serious proposal to extend this reform to the judiciary: In the 1996 general election, voters imposed term limits on state and local officials, but by a separate vote declined to impose them on the judiciary. NEV. ASS'N OF COUNTIES, TERM LIMITS AND NEVADA: A BRIEF HISTORY OF TERM LIMITS AND THEIR APPROACHING IMPACT TO GOVERNMENT IN NEVADA 12, available at [http://www.nvnaco.org/pdf\\_files/termlimits.pdf](http://www.nvnaco.org/pdf_files/termlimits.pdf).

3. See *infra* Part I.B. and accompanying text.

cially for the Supreme Court,<sup>4</sup> and popular election of the federal judiciary has been mooted on occasion since Jefferson.<sup>5</sup>

Because an equal and independent judiciary was not merely the great original contribution of American government, but also has been that aspect of our system most frequently emulated around the world,<sup>6</sup> one would think that in America, if anywhere, a consensus on how to choose judges would have emerged. Why has it not?

One possibility is that, although the American people and the American States all support an overarching commitment to an equal and independent judiciary, they disagree on what that commitment really means. No doubt, because of the power judges hold to change public policy through both constitutional and common-law rulings, their actions have periodically provoked marked controversy. In current parlance, this debate centers around whether justice is best served when courts seek a “just” result regardless of literal text or controlling precedent, or when judges merely apply the law as they find it, regardless of their personal preferences or their intuition regarding contemporary popular sentiment. For example, in the final national television debate between John McCain and Barack Obama during the 2008 presidential campaign, Senator McCain pledged to appoint judges with “a history of strict adherence to the Constitution” and “not legislating from the bench,” while then-Senator Obama responded that “the most important thing in any judge is their capacity to provide fairness and justice to the American people.” By way of example, he explained that “the kind of judge I want” is “that if a woman is out there . . . trying to support her family, and is being treated unfairly, then the court has to stand up, if nobody else will.”<sup>7</sup>

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4. See Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467 (Roger C. Cramton & Paul D. Carrington eds., 2006).

5. See Letter from Thomas Jefferson to Samuel Kercheval (June 12, 1816) (“It has been thought that the people are not competent electors of judges *learned in the law*. But I do not know that this is true . . .”), available at <http://www.teachingamericanhistory.org/library/index.asp?document=459>.

6. See William Rehnquist, U.S. Chief Justice, Remarks at American University’s Washington College of Law (Apr. 9, 1996), available at <http://www.law.cornell.edu/supct/justices/rehnau96.htm>.

7. Comm’n on Presidential Debates, Debate Transcript: The Third McCain-Obama Presidential Debate (Oct. 15, 2008), available at <http://www.debates.org/pages/trans2008d.html>.

Indeed, the debate over the proper nature of the judicial process, which might be little more than an arcane professional schism in some countries, is an integral part of public political discourse in America. A 2008 poll showed a remarkable degree of agreement between the respective candidates and their supporters on judicial philosophy. According to a Rasmussen Poll released September 5, 2008, “[w]hile 82% of voters who support McCain believe the justices should rule on what is in the Constitution, just 29% of Barack Obama’s supporters agree.”<sup>8</sup> Conversely, “[j]ust 11% of McCain supporters say judges should rule based on the judge’s sense of fairness, while nearly half (49%) of Obama’s supporters agree.”<sup>9</sup> Indeed, one of the principal reasons for creating the Federalist Society a generation ago was to elevate and sharpen this debate among the American bar, particularly among the advocates of judicial restraint.<sup>10</sup> And versions of this debate occur every year in state judicial elections and confirmation battles, particularly for seats on state supreme courts.

But, as important as this issue is, in the past scholars have not been able to detect any correlation between a particular selection system and a particular judicial philosophy. No doubt, a snapshot of a particular time or place might reveal instances where “most appointed judges are liberal” or “elected judges are activist,” but these isolated observations have not, taken as a whole, produced a consistent pattern.<sup>11</sup>

Nonetheless, a distinct pattern may now be emerging. Some recent studies suggest that contested elections produce judges with less institutional independence and more result-oriented jurispru-

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8. Rasmussen Reports, Supreme Court Update (Sept. 5, 2008) (on file with the Harvard Journal of Law & Public Policy).

9. *Id.*

10. See The Federalist Society for Law and Public Policy Studies, About Us, <http://www.fed-soc.org/aboutus/> (last visited Oct. 5, 2008) (stating that “The Federalist Society . . . is founded on the principle[] . . . that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.”).

11. See Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 43–45 (1994) (citing Victor E. Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 33–35 (1979)) (discussing various studies’ failures to link methods of selection with judicial voting or decision making); Jerome O’Callaghan, *Another Test for the Merit Plan*, 14 JUST. SYS. J. 477, 484 (1991); see also Jason J. Czarnezki, *A Call for Change: Improving Judicial Selection Methods*, 89 MARQ. L. REV. 169, 173–74 nn.24 & 25 (2005) (collecting studies).

dence.<sup>12</sup> Recent developments in the conduct of judicial elections might produce more pronounced differences in judicial behavior based on the way judges obtain and retain their benches.

## I. TRANSITIONS IN JUDICIAL SELECTION METHODS

The wide disparity in judicial selection systems can be explained largely by history. The type of system a state has depends largely on the date it adopted that system. Each successive wave of judicial selection methods has arisen in response to popular clamour for more professional, less political judges.

### A. *From Appointment to Election*

In the original states, judges were chosen in one of two ways: by the executive—appointment either by the governor himself or the governor’s council—or by the legislature.<sup>13</sup> None of the original states seriously considered popular judicial elections, although isolated jurisdictions did experiment with elective judges at some levels.<sup>14</sup>

Between 1846 and the outbreak of the Civil War, however, more than two-thirds of the states moved to an elective judiciary at all levels of courts.<sup>15</sup> What caused such a rapid change? There are at least three reasonable explanations.

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12. See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 287–88 (2008) (discussing research finding that elective judges favor in-state litigants, are more likely to rule in ways that are consistent with public opinion, and become more punitive in criminal cases as reelection approaches). Pozen also argues that “elected state supreme courts are associated with lower overall rates of litigation than appointed ones (the theory being that appointed judges’ greater political independence generates more uncertainty about litigation outcomes).” *Id.* at 288–89 (citing F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205, 232 (1999)).

13. See Goldschmidt, *supra* note 11, at 5 & n.6.

14. Vermont, admitted to the Union in 1791, was the first state to provide for the election of some lower court judges. See ROGER K. WARREN, *STATE JUDICIAL ELECTIONS: THE POLITIZATION OF AMERICA’S COURTS* 3 (2006). In 1810, Georgia made “justices of the inferior courts and justices of the peace” elective. FLETCHER M. GREEN, *CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776–1860*, at 202 (1930). In 1832, Mississippi became the first state to elect its entire judiciary. ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 9 (1974).

15. See Larry C. Berkson, *Judicial selection in the United States: A special report*, 64 JUDICATURE 176, 176 (1980) (“By the time of the Civil War, 24 of 34 states had established an elected judiciary with seven states adopting the system in 1850 alone.”).

First, judicial decisions favoring landlords and creditors in the wake of the 1819 and 1837 Panics caused outrage in many states and structural alterations in some.<sup>16</sup> Popular elections were perhaps a delayed reaction to these unpopular rulings, although little in constitutional convention debates or other historical records suggests such a relationship.

Second, the watchword of Jacksonian Democracy, “Let the People Rule,”<sup>17</sup> led to a dramatic expansion of suffrage<sup>18</sup> and a marked increase in the variety of officials chosen directly by the voters. For example, in addition to judicial elections, many states and municipalities abandoned a cabinet type of executive government in favor of individually elected department heads.<sup>19</sup> As one exasperated delegate to the Kentucky constitutional convention complained, “We have provided for the popular election of every public officer save the dog catcher, and if the dogs could

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16. In Kentucky, the legislature responded to the state constitution’s prohibition on the removal of judges for less than criminal activity by repealing the act that created the Court of Appeals. The legislature then created a new court with different members. See 5 JOHN BACH MCMASTER, *A HISTORY OF THE PEOPLE OF THE UNITED STATES: FROM THE REVOLUTION TO THE CIVIL WAR 162–66* (1901). The new court, however, was short-lived. See *id.* at 166. In Alabama, as a result of the supreme court’s unpopular decision in *Jones v. Watkins*, 1 Stew. 81 (Ala. 1827) (holding that borrowers could not avoid a contract they signed voluntarily, high interest rate was not per se evidence of fraud, and statute of limitations barred suit), three of the court’s judges were charged and tried before the Alabama Senate under the state constitution’s removal-by-address provision, which provided that “judges could be removed for ‘wilful [sic] neglect of duty, or other reasonable cause’ even though the grounds were not sufficient for impeachment.” Howard P. Walthall, Sr., *A Doubtful Mind: Understanding Alabama’s State Constitution*, 35 CUMB. L. REV. 7, 29 (2005) (alteration in original) (quoting ALA. CONST. of 1819, art. V, Judicial Department § 13). Although the judges were exonerated, the state soon thereafter adopted an amendment to the constitution reducing judicial terms to six years. See *id.*

17. See WILLIS MASON WEST, *THE STORY OF AMERICAN DEMOCRACY: POLITICAL AND INDUSTRIAL 454* (1922).

18. See Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1348–52 (2003) (discussing, in particular, black enfranchisement and absentee voting, and effects thereof).

19. See George W. Liebmann, *The New American Local Government*, 34 URB. LAW. 93, 108 (2002) (stating that by “1954, 356 cities operated under this plan”) (citing HAROLD F. ALDERFER, *AMERICAN LOCAL GOVERNMENT AND ADMINISTRATION 296–98* (1956) and *MANAGEMENT POLICIES IN LOCAL GOVERNMENT FINANCE 4* (J. Richard Aronson & Eli Schwartz, eds., 4th ed. 1996)); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 207 (1993).

vote, we should have that as well.”<sup>20</sup> That the movement started with the New York constitutional convention of 1846, dominated by Jacksonian acolytes, lends credence to this theory.<sup>21</sup> If true, the change was not so much a philosophical reaction to particular judges or particular decisions as it was a logical result of an underlying philosophy of government.

A third reason, emphasized by some scholars as the most decisive, was a pervasive belief by leading lawyers that both governors and legislators had degraded the bench by appointing partisan hacks and political cronies.<sup>22</sup> Under this theory, political reformers and legal elites combined to elevate the independence, integrity, and importance of the judiciary by eliminating their dependence on the good graces of the political branches. Enhanced public accountability, if a factor at all, was little more than an incidental by-product.<sup>23</sup>

### B. *From Partisan to Non-Partisan Elections*

Popular elections seem to have worked well at first. Because each state had only a handful of judges, voters were capable of evaluating all the candidates, often from personal knowledge. Running for office required little preparation or even premeditation: There were no filing fees or deadlines, and no official ballots.<sup>24</sup> Campaigning was almost as simple—at most, it involved

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20. Nelson, *supra* note 19, at 207 (citing Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 HISTORIAN 340–41 (1983)).

21. See MARTHA DERTHICK, *DILEMMAS OF SCALE IN AMERICA’S FEDERAL DEMOCRACY* 101–03 (1999).

22. See Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 661 (2002) (“[R]esearch into the [state] constitutional convention histories found that, ‘delegates from across the ideological spectrum criticized the party-directed distribution of [judicial] offices whether by the executive or the legislative branch[es].’” (quoting Hall, *supra* note 20, at 346–47)).

23. See *id.* at 659–60 (stating that judicial elections were chosen “to elevate the judiciary and make it more independent of other branches so that it could better render justice”). *But see, e.g.*, Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966) (arguing that judicial elections were “not particularly designed for improving justice but [were] simply another manifestation of the populism movement”).

24. In most states, voters in the nineteenth century voted by ballot, but in a few the voting was oral—so-called *viva voce* voting. See 1 CHARLES SEYMOUR & DONALD PAIGE FRARY, *HOW THE WORLD VOTES: THE STORY OF DEMOCRATIC DEVELOPMENT IN ELECTIONS* 246–47 (1918). But this was not a modern ballot; it was “a motley variety” of printed or written papers, prepared by political parties, candidates, or indi-

penning a few letters to the editor and “treating” thirsty voters to adult beverages.<sup>25</sup>

Population growth, changes in electoral processes, and the rise of party organizations soon rendered the old “friends and neighbors” system of high-salience judicial elections obsolete. In urban centers, voters chose multiple judges from among candidates they did not know. Detailed election regulations increased the length and expense of campaigns. And political parties began endorsing and even selecting judicial candidates.<sup>26</sup> Partisanship and anonymity caused the defeat of several renowned jurists in the late nineteenth century, most notably Thomas Cooley in Michigan.<sup>27</sup> By the end of the nineteenth century, a popular outcry arose against the bench being populated by—*déjà vu* all over again—partisan hacks and political cronies. This sentiment was most memorably captured in Roscoe Pound’s famous warning to the 1906 meeting of the American Bar Association that “[p]utting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench.”<sup>28</sup>

Judicial reform was a priority of the Progressive Movement.<sup>29</sup> Some Progressive enthusiasms, like the recall of judicial decisions or judges themselves, failed to carry the day.<sup>30</sup> Others,

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vidual voters, with “no rule for the size and color of the ballot.” *Id.* at 247. The “Australian,” or official printed ballot, was not adopted anywhere in America until 1888, TRACY CAMPBELL, *DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742–2004*, at 97, 115 (2005), but by 1892 it had spread to thirty-two states. *See id.* at 96–97; 1 SEYMOUR & FRARY, *supra*, at 250.

25. *See* MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* 54–56 (rev. & expanded ed. 1987).

26. *See* Nathan Richard Wildermann, Casenote, *Bought Elections: Republican Party of Minnesota v. White*, 11 *GEO. MASON L. REV.* 765, 767 (2003) (noting early control of judicial elections by political parties). In Texas, for example, the State Democratic Convention began endorsing state’s rights candidates as political philosophies hardened. Sam Houston, the leading opponent of the Democratic establishment in Texas, said of the State Democratic Chair: “[O]ne drop of his blood would freeze a frog.” A.W. Terrell, *Recollections of General Sam Houston*, 16 *SW. HIST. Q.* 113, 120 (1912).

27. *See* Kathleen M. Sullivan, *Republican Party of Minnesota v. White: What Are the Alternatives?*, 21 *GEO J. LEGAL ETHICS* 1327, 1336–37 (2008).

28. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 *J. AM. JUDICATURE SOC’Y* 178, 186 (1937).

29. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 *N.Y.U. L. REV.* 1383, 1393–94 (2001).

30. *See From Arizona to New York*, *N.Y. TIMES*, Feb. 12, 1911, at 10 (discussing a “concerted effort” to put a recall provision into the constitution of New York, but noting that “[w]e do not expect that the recall device will be put into the Constitu-

such as requiring an extraordinary majority for a court to declare a statute unconstitutional, survive in a few jurisdictions.<sup>31</sup> But nonpartisan judicial elections, perhaps the least ambitious item on the Progressive judicial agenda, survive in a number of states.<sup>32</sup> At last, the reformers believed, judges would be both independent and accountable.

### C. From Non-Partisan Elections to Merit Selection

But non-partisan elections had their own disadvantages. An absence of political affiliation meant virtual public anonymity. With no partisan cue on the ballot, and no partisan apparatus to help build a grassroots campaign, judges had few practical means to reach a generally apathetic electorate.<sup>33</sup> All too often, a familiar name trumped education, experience, and establishment support at the polls.<sup>34</sup>

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tion"); *President Vetoes the Statehood Bill*, N.Y. TIMES, Aug. 16, 1911, at 3 (discussing President Taft's veto of the bill to make Arizona a state as a result of its "pernicious" constitutional provision allowing judicial recall). Nevertheless, Arizona reinserted the provision after receiving statehood. See ARIZ. CONST. art. 8, pt. 1, § 1.

31. See, e.g., N.D. CONST. art. VI, § 4 (requiring an extraordinary majority vote of the supreme court to declare a statute unconstitutional).

32. See AM. JUDICATURE SOC'Y, *supra* note 1.

33. See Nancy Marion, Rick Farmer & Todd Moore, *Financing Ohio Supreme Court Elections 1992–2002: Campaign Finance and Judicial Selection*, 38 AKRON L. REV. 567, 574 (2005) (noting that "[p]olitical parties educate voters" and "campaign literature increases partisan awareness and information levels about judicial candidates").

34. See Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 854 (2002) (noting that name recognition was "hardly better than party affiliation as an indicator of a judge's qualifications for office"). For example, in 1990, Washington Chief Justice Keith Callow lost to attorney Charles Johnson, who shared his name with a television anchor. See Robb London, *For Want of Recognition, Chief Justice is Ousted*, N.Y. TIMES, Sept. 28, 1990, at B16; Steve Miletich, *Johnson and Smith—What's In a Name?*, SEATTLE POST-INTELLIGENCER, Oct. 15, 1996, at B2; Jim Simon, *Upset Victor is Settling Into Court—'He's Not the Oddball I Thought He Was,'* SEATTLE TIMES, Aug. 25, 1991, at B1. And in 2006, highly-regarded Los Angeles Superior Court judge Dzintra Janavs was ousted by a "bagel-shop owner who only recently reactivated her license to practice law." Andrew Cohen, *Bagels on the Bench a Bad Idea*, WASH. POST, June 13, 2006, [http://blog.washingtonpost.com/benchconference/2006/06/bagels\\_on\\_the\\_bench\\_a\\_bad\\_idea.html](http://blog.washingtonpost.com/benchconference/2006/06/bagels_on_the_bench_a_bad_idea.html); see also Joel Achenbach, *Juris Impuris*, MIAMI HERALD TROPIC, Aug. 28, 1988, available at <http://www.tropicfan.com/juris%20impuris%20by%20joel%20achenbach.htm> (discussing political consultants in Miami who tell candidates to change their names in order to win elections, and consultants who line up "floaters" with good names to run against judges who decline to hire the consultants).

One observer has noted that voters like "color" names, such as Green, Brown, White, and Black. See Rick Casey, *How judge candidates waste money*, HOUS. CHRON., Oct. 24, 2008, at B1. ("'People seem to like colors,' Harris County [De-

The most widespread response to these problems was a hybrid plan known as “merit selection.” Originally advanced by Albert Kales of the American Judicature Society in 1914,<sup>35</sup> the method was first adopted by Missouri in 1940 for statewide and selected urban courts.<sup>36</sup> The “merit selection” or “Missouri Plan” attempts to emphasize the best and minimize the worst of all existing judicial selection methods.<sup>37</sup> When a vacancy arises, a select but diverse committee screens potential nominees and sends several names to the governor.<sup>38</sup> In most states, the governor must choose a judge from this list, sometimes with an option to request alternative or additional names. In some states, the appointee takes office immediately; in others, confirmation by the governor’s council or the legislature is required.<sup>39</sup> At the end of each term, every judge runs against his own record

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mocratic] chairman Gerry Birnberg told me . . . Sure enough, [after party affiliation the] second most important factor in Harris County for putting people in black robes seems to be whether they had the foresight to acquire—through birth, marriage or legal action—a last name that appears on a palette.”).

Of course, the same problem exists in partisan states that choose judicial nominees in party primaries. For example, in 1976 an unknown Houston lawyer, Don Yarbrough, defeated a well-regarded appellate judge in the Democratic primary for an open seat on the Texas Supreme Court when voters confused him with Don Yarbrough, a three-time gubernatorial candidate. See Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 435–36 (2007). Justice Yarbrough resigned in July 1977 after facing numerous ethics charges and being caught on tape plotting to kill a former business associate. See *id.* at 436; see also Anthony Champagne, *Coming to a Judicial Election Near You: The New Era in Texas Judicial Elections*, 43 S. TEX. L. REV. 9, 9–10 (2001).

35. See Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 96 n.119 (1998).

36. See Berkson, *supra* note 15, at 177. Six years earlier, California voters adopted a system of gubernatorial appointments, confirmation by a commission, and retention elections for appellate judges. See DEBORAH KILEY, MERIT SELECTION OF CALIFORNIA JUDGES 4–5 (1999), available at [www.mcgeorge.edu/documents/centers/government/ccglp\\_pubs\\_merit\\_selection\\_pdf.pdf](http://www.mcgeorge.edu/documents/centers/government/ccglp_pubs_merit_selection_pdf.pdf). Because the governor did not choose names from a commission-screened list, however, credit for initiating “merit selection” is generally given to Missouri.

37. MO. CONST. art. V, § 25. See generally James E. Lozier, *The Missouri Plan a/k/a Merit Selection: Is it the Best Solution for Selecting Michigan’s Judges?*, 75 MICH. B.J. 918, 918–20 (1996) (discussing the history of merit selection); Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQ. L. REV. 61 (1968).

38. See Robert A. Schroeder & Harry A. Hall, *Twenty-Five Years’ Experience with Merit Judicial Selection in Missouri*, 44 TEX. L. REV. 1088, 1091 (1966).

39. See, e.g., *id.*; Shira J. Goodman & Lynn A. Marks, *A View from the Ground: A Reform Group’s Perspective on the Ongoing Effort to Achieve Merit Selection of Judges*, 34 FORDHAM URB. L.J. 425, 447–48 (2007) (“[S]even states with a commission-based, merit selection system . . . require legislative confirmation . . .”).

in a “retention” election.<sup>40</sup> A judge who receives more “yes” than “no” votes stays in office. If the judge dies, resigns, declines to stand again, or receives more “no” than “yes” votes, the process starts anew.<sup>41</sup>

Beginning in the 1950s, primarily in the course of adopting new constitutions, eighteen states adopted merit selection plans for most or all of their judgeships.<sup>42</sup> Other states seemed on the verge of adopting this reform, and it looked as though it would sweep the nation just as surely as contested elections had a century before. At last, seemingly to general approbation, the nation’s cadre of state judges appeared ready to be more professional and less political than ever before.

#### *D. Alternatives to Merit Selection*

But several events, largely unrelated to judicial performance, converged to halt the spread of merit selection. First, increasing controversy over single issues like abortion or right-to-work made constitutional conventions increasingly fractious, and hence increasingly uncommon.<sup>43</sup> Even if neither legislators nor voters were particularly satisfied with their courts, they were not sufficiently concerned to enact a separate, stand-alone constitutional amendment.<sup>44</sup> Second, beginning in the 1960s, the Kennedy Assassination, the Vietnam War, Watergate, and various social and demographic changes caused a marked decline in public confidence in public and private institutions. This cynicism made merit selection vulnerable to populist appeals like, “Don’t let them take away your vote.” Third, the reality of the merit system sometimes fell short of its promise. The supposedly independent and high-minded merit commissions were subject

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40. See Schroeder & Hall, *supra* note 38, at 1091–92.

41. See *id.* at 1092. Illinois and New Mexico’s merit selection systems require a supermajority for retention. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT 11 n.19 (2006), available at <http://www.du.edu/legalinstitute/pubs/sharedexpectations.pdf>.

42. See G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1445 (2003).

43. See Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285, 1323–24 & n.342 (2001).

44. See *Nonpartisan elections not enough to solve problem*, MOBILE REG., May 7, 1999, at A (“[T]he ordinary voter understands little about judicial selection.”).

to regulatory capture, most often by the Governor<sup>45</sup> or a faction of the bar.<sup>46</sup> Fourth, as state courts decided ever-larger business and personal injury cases and became more enmeshed in controversial social issues, those with a vested interest in any particular status quo became vigorous and committed opponents of change.<sup>47</sup> Taken together, these factors essentially halted the trend to merit selection by the mid-1980s.<sup>48</sup>

This is not to say that judicial selection is completely static. In the last three decades, about half the Southern states have switched from partisan to non-partisan elections,<sup>49</sup> for political as well as good-government motives.<sup>50</sup> Some jurisdictions—several Southern states and Cook County, Illinois—have also switched from at-large to sub-district elections for urban trial court judgeships, prodded by challenges under Sections 2 and

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45. See, e.g., Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 521 (1978) (describing the means governors frequently use to control the appointment process for their own political ends).

46. See *id.* at 528 (noting that bar associations' representatives on nominating commissions thwart the reform of the judicial selection process because they are "preoccupied with the decisional propensities of potential judges").

47. See Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 56–57 (2003) (noting that reform of judicial selection is unlikely because "[t]oo many vested interests like the current system[,] and they are in a strong position to thwart any movement toward merit selection by appointment").

48. American Judicature Society, *Voters in Four Jurisdictions Opt for Merit Selection* on November 4, [www.ajs.org/selection/sel\\_voters.asp](http://www.ajs.org/selection/sel_voters.asp) [hereinafter American Judicature Society, *Voters*] (last visited Dec. 14, 2008) (noting that decision of a fifth Missouri county to adopt merit selection for local judges in 2008 "marks the first time since 1985 that a jurisdiction has moved from contestable elections to merit selection"). Prior to that, voters had rejected merit selection in Ohio in 1987 and had declined to extend merit selection from appellate to trial courts in Florida in 2000 and South Dakota in 2004. See American Judicature Society, *Chronology of Successful and Unsuccessful Merit Selection Ballot Initiatives*, [http://www.judicialselection.us/uploads/documents/merit\\_selection\\_chronology\\_1e233BS002692.pdf](http://www.judicialselection.us/uploads/documents/merit_selection_chronology_1e233BS002692.pdf) (last visited Dec. 14, 2008).

49. See, e.g., Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1262 (2008); see also Janie L. Shores & Robert Martin Schaefer, *The Judicial Article as Amended and Adopted in 1973*, 33 CUMB. L. REV. 319, 335 (2003) (discussing non-partisan elections in eighteen states, including Georgia, Mississippi, and Florida).

50. See Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1414 (2003) (discussing North Carolina, where Republicans claimed that because they had recently increased their share of judgeships, the Democratic legislature's shift to nonpartisan elections was "ironically partisan").

5 of the Voting Rights Act.<sup>51</sup> Finally, two states—North Carolina and New Mexico—have recently experimented with public financing schemes for appellate courts.<sup>52</sup> But, despite the controversy surrounding judges and their selection, little else has been done. Most of the country is, therefore, in an unfortunate period of dissatisfied stasis: People are not particularly pleased with their current method of choosing judges, but they are not sufficiently outraged to demand any change.<sup>53</sup>

## II. THE CHALLENGE TO JUDICIAL INDEPENDENCE FROM JUDICIAL ELECTION CHANGES

Today, judicial elections suffer from new, unprecedented challenges. The common denominators are campaign money and special-interest agitation, making judicial elections “nastier, noisier, and costlier” than ever before.<sup>54</sup> These new, high-octane campaigns threaten judicial independence as surely as mediocre appointments in the nineteenth century or anonymous elections in the twentieth century ever did.<sup>55</sup> The more partisan, the more

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51. See generally Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, 62 U. CIN. L. REV. 823 (1994); Pasquale A. Cipollone, Comment, *Section 2 of the Voting Rights Act and Judicial Elections: Application and Remedy*, 58 U. CHI. L. REV. 733 (1991); Kristen Lundguard Izatt, Note, *The Voting Rights Act and Judicial Elections: Accommodating the Interests of the States Without Compromising the Goals of the Act*, 1996 U. ILL. L. REV. 229; Anna M. Scruggs, et al., *Recent Voting Rights Act challenges to judicial elections*, 79 JUDICATURE 34 (1995).

52. See George W. Soule, *The Threats of Partisanship to Minnesota’s Judicial Elections*, 34 WM. MITCHELL L. REV. 701, 726 (2008). Wisconsin offers limited public financing for judicial and other races, but candidates capable of raising substantial campaign funds have rejected public financing and its accompanying spending restrictions. See *id.* at 726–27.

53. See Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 144–46 (2003) (discussing the results of a 2001 survey).

54. Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1081 (2007).

55. See William C. Cleveland III, *Money and Judicial Elections*, 68 DEF. COUNS. J. 393, 393 (2001) (citing various studies, including an examination of Louisiana district court elections finding that “70 percent of contested elections are won by the candidate who spent the most money”; an Ohio citizens’ committee finding “that nine of 10 Ohioans believe that judicial decisions are affected by political contributions”; and a Pennsylvania commission’s findings that “59 percent of Pennsylvania voters felt that too much money was spent on judicial campaigns, . . . 88 percent thought judges’ decisions were influenced at least some of the time by campaign contributions, . . . [and] 37 percent thought it was most or all of the time”).

frequent, and the more easily contestable the elections are, the more susceptible they are to these unfortunate influences.

Why the sudden interest in judicial elections, long seen as “about as exciting as a game of checkers . . . [p]layed by mail”?<sup>56</sup> Three factors seem to predominate.

A. *The Explosion of Large Campaign Contributions*

First, wealthy individuals and groups with economic interests in various public policy questions realized that an individual judge can have a far greater impact on their fortunes than an individual legislator. Although judges face far more constraints in basing their official actions on their personal philosophical predilections than do legislators, few would insist that personal philosophies never affect judicial behavior. Personal injury trial lawyers in Texas were probably the first to discover that increased gifts to judicial campaigns could make a big difference in electoral outcomes, and pay big dividends in more favorable judgments.<sup>57</sup> Business and professional groups countered by supporting their own judicial candidates, especially after state courts invalidated key tort reform laws.<sup>58</sup> These battles were swiftly replicated in other states, particularly California and Alabama.<sup>59</sup> By 2000, these local battles had essentially been nationalized, with national trial lawyer and consumer groups battling business-oriented groups in multiple jurisdictions each

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56. Schotland, *supra* note 50, at 1405 (alteration in original) (internal quotation marks omitted) (quoting William C. Bayne, *Lynchard's Candidacy, Ads Putting Spice into Judicial Race: Hernando Attorney Challenging Cobb*, COM. APPEAL, Oct. 29, 2000, at DS1).

57. See Carrington, *supra* note 35, at 105–06.

58. See *id.*; Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 *FORDHAM URB. L.J.* 907, 915 (2002) (noting that, during the 1998 Texas Supreme Court campaign, the Texas Medical Association donated over \$181,000 in direct contributions and encouraged doctors to donate at least \$250,000 after the court had earlier struck down certain tort-reform laws).

59. See Anthony Champagne, *Tort Reform and Judicial Selection*, 38 *LOY. L.A. L. REV.* 1483, 1484–85 (2005) (noting that the intense politicization of Alabama's supreme court elections following the Court's partial invalidation of Alabama's tort reform legislation led one scholar to conclude that these elections had become “a battleground between businesses and those that sue them” (internal quotation marks omitted)); see also Glenn C. Noe, Comment, *Alabama Judicial Selection Reform: A Skunk in Tort Hell*, 28 *CUMB. L. REV.* 215, 232–33 (1998) (noting that, following a ten million dollar campaign, three justices of the California Supreme Court were defeated in their 1986 retention elections as a result of public response to the justices' position on the constitutionality of the death penalty).

election cycle.<sup>60</sup> Increasingly, these groups tried to influence the vote through independent expenditures, largely eschewing the candidates' individual campaigns.<sup>61</sup> The advertisements purchased by these groups often feature "slash and burn" messages crafted to trigger a vote against a candidate or slate of candidates, not to enhance support for anyone or anything.<sup>62</sup> Such potent phrases and images often overwhelmed the candidates' own messages, which touted boring factoids involving qualifications, experience, and community ties. Perversely, many of these independent campaigns feature dueling charges over which candidate's record is the most "soft on crime," even though the funders themselves care only about civil jurisprudence.<sup>63</sup>

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60. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1398–99 (2001) (discussing U.S. Chamber of Commerce's efforts to support election of pro-business judges in Alabama, Illinois, Michigan, Mississippi, and Ohio by both direct campaign contributions and issue advertising). In the 2000 election cycle, for example, "[private] individuals constitute[d] the largest source of campaign money in congressional elections, giving approximately \$567.7 million . . . to all primary and general election candidates in the . . . House and Senate elections." Paul S. Herrnson & Kelly D. Patterson, *Financing the 2000 Congressional Elections*, in FINANCING THE 2000 ELECTION 106, 121 (David G. Magleby ed., 2002). By contrast, in that same year, state supreme court candidates raised \$45.6 million for their campaigns, with lawyers, business interests, and political parties contributing more than half of all campaign funds. See Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597, 616 & nn.162–63 (2005).

61. See Roy Schotland, *New Challenges to States' Judicial Selection*, *supra* note 54, at 1080 ("The sea change came in 2000, when judicial candidates' campaign spending soared and interest groups were dimensionally more active than ever before, even dominating some races.").

62. See, e.g., DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 17, 21–24 (2002), available at <https://www.policyarchive.org/bistream/handle/10207/5936/20020201.pdf> (reproducing negative storyboards from television ads funded by independent groups); see also Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 476–78 (1988) (suggesting that imposing limits on contribution size may give an advantage to wealthy candidates because candidates can still fund their own campaigns, and that absolute prohibitions against large contributions may prevent well-qualified but unknown candidates from getting recognition).

63. See B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431–37 (2001) (describing judicial election campaigns in Tennessee, California, and Nebraska in which judges lost their seats on the court when they were portrayed as being "soft on crime"); see also DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A "TIPPING POINT" — AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL 10 (Jesse Rutledge, ed. 2004), available at <http://brennan.3cdn.net/>

B. *The Emergence of Special Interest Group Participation*

Second, politically-oriented social-issue groups have discovered that judicial campaigns can highlight “hot-button” issues that may excite and energize their “base” and enhance turnout for the entire election. As in the tort wars, most of these groups rely on independent efforts, working outside any candidate’s particular campaign organization. Normally, they rely less on paid media than on grassroots networking, which can be hard for an outsider even to detect, much less to respond to effectively. Chief Justice Randall Shepard of Indiana noted that the presence of a gay marriage ban on the ballot inadvertently affected Ohio’s judicial elections by influencing which voters showed up at the polls. He explained that when such issues are at the forefront, “judges are not the target at all, we’re just roadkill . . . for some other venture.”<sup>64</sup>

C. *The Retreat of State Regulation of Judicial Campaign Speech*

1. *The Holding of Republican Party of Minnesota v. White*

Third, the landscape of judicial races changed abruptly in 2002 when the United States Supreme Court decided *Republican Party of Minnesota v. White*.<sup>65</sup> The decision was itself unremarkable, merely striking down an isolated, obscure section of the Minnesota Code of Judicial Conduct which stated that a “candidate for a judicial office, including an incumbent judge[,] . . . shall not . . . with respect to cases, controversies or issues that are likely to come before the court, make pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of the office.”<sup>66</sup> Although the holding—that because the Announce Clause applied to speech only in a campaign context it was too

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dd00e9b682e3ca2f17\_xdm6io68k.pdf (“[In 2004 i]n Illinois, the Justice For All Political Action Committee, a trial lawyer and labor group, ran an ad criticizing Republican Judge Lloyd Karmeier as ‘lenient’ because he ‘gave probation to kidnappers who tortured and nearly beat a 92-year-old grandmother to death.’”).

64. Randall T. Shepard, Chief Justice of Indiana, Panel Discussion at the Georgetown University Law Center & American Law Institute’s Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 29, 2006), available at <http://www.law.georgetown.edu/news/documents/CoJ092906-panel5.pdf>.

65. 536 U.S. 765 (2002).

66. MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (2000).

underinclusive to survive strict scrutiny<sup>67</sup>—was quite narrow, portions of the Court’s discussion en route to that holding seem dismissive of the entire conduct code regime.

## 2. State Codes of Judicial Conduct

Judicial codes of conduct are hardly a rash or novel experiment. For many years, states have regulated the balance between judicial independence and public accountability through these codes, generally promulgated through the exercise of inherent power by the state’s highest court.<sup>68</sup> Most of the codes derive from a common source: the American Bar Association’s Model Code of Judicial Conduct.<sup>69</sup> First promulgated in 1972,<sup>70</sup> then re-issued in 1990 and revised several times since,<sup>71</sup> the Model Code contains several provisions constraining the speech and conduct of judges.<sup>72</sup> Through lawyer disciplinary rules, these restrictions generally extend to judicial candidates as well.<sup>73</sup> For the bench and bar as a whole, however, it was simply an article of faith, perhaps not too closely examined, that the state’s interest in a fair and impartial judiciary was sufficiently compelling to justify virtually any such restriction. But not everyone agreed, as suits from time to time challenged code provisions as violating the First Amendment. These cases met with mixed results, until *White* caused a paradigm shift in the debate.

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67. *White*, 536 U.S. at 780, 788.

68. See Geyh, *supra* note 49, at 1267.

69. See, e.g., Stephanie Cotilla & Amanda Suzanne Veal, Note, *Judicial Balancing Act: The Appearance of Impartiality and the First Amendment*, 15 GEO. J. LEGAL ETHICS 741, 742 (2002) (noting that “nearly all states have adopted standards of judicial conduct modeled after the ABA Model Code of Judicial Conduct”).

70. The ABA Model Code was promulgated in 1972. Soon, the judicial discipline systems in most states became primarily responsible for enforcing the code provisions in their respective jurisdictions. See Adam R. Long, *Keeping Mud Off the Bench: The First Amendment and the Regulation of Candidates’ False or Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 795–96 (2001).

71. See MODEL CODE OF JUD. CONDUCT (2007).

72. See *id.* Canon 4 (setting restrictions on the speech and conduct of judges and judicial candidates).

73. See, e.g., WIS. SUP. CT. RULE 20:8.2(a)–(b) (providing that a “lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . or of a candidate for election or appointment to judicial or legal office,” and affirming that any “lawyer who is a candidate for judicial office shall comply with the applicable provisions in the code of judicial conduct”).

### 3. *The Post-White World*

After *White*, new challenges to other code provisions have arisen. At least five distinct challenges have cast some doubt on the viability of any state regulation of judicial campaign behavior.

#### *a. Promises and Commitments by Judicial Candidates*

Several federal district courts have enjoined enforcement of the so-called Pledges or Promises Clause, which forbids judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”<sup>74</sup> Although some decisions have upheld the clause,<sup>75</sup> or at least postponed resolving the issue,<sup>76</sup> candidates in the affected states can no longer point to the code in dismissing questions about their prospective behavior as the judge. Unlike the Announce Clause, the Pledges or Promises Clause has been included in most states’ codes of judicial conduct.

#### *b. Commit Clause*

Another common canon that has been subject to repeated successful attack is the Commit Clause, which provides that judicial candidates shall not “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”<sup>77</sup> Several federal courts have enjoined enforcement of the canon,<sup>78</sup> although some courts have declined to enjoin its enforcement.<sup>79</sup> Some have dismissed complaints for lack of stand-

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74. *Bauer v. Shepard*, No. 3:08-CU-196-TLS, 2008 WL 1994868 (N.D. Ind. May 6, 2008); *Duwe v. Alexander*, 490 F. Supp. 2d 968 (W.D. Wis. 2007) (enjoined as applied, not on a facial challenge); *Ind. Right to Life v. Shepard*, 463 F. Supp. 2d 879 (N.D. Ind. 2006); *N.D. Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005); *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004).

75. *See Pa. Family Inst., Inc. v. Celluci*, 521 F. Supp. 2d 351 (E.D. Pa. 2007); *Wolfson v. Brammer*, No. CIV 06-2357, 2007 WL 2288024 (D. Ariz. Aug. 8, 2007).

76. *See Kan. Judicial Watch v. Stout*, 440 F. Supp. 2d 1209 (D. Kan. 2006); *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005), *vacated as unripe*, 504 F.3d 840 (9th Cir. 2007).

77. MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii) (1997).

78. *See Bauer*, 2008 WL 1994868; *Duwe*, 490 F. Supp. 2d 968 (enjoining clause as applied); *Ind. Right to Life*, 463 F. Supp. 2d 879; *Family Alliance*, 361 F. Supp. 2d 1021; *Family Trust Found.*, 345 F. Supp. 2d 672.

79. *See Wolfson*, 2007 WL 2288024.

ing.<sup>80</sup> Armed with those decisions holding that candidates and voters alike have a First Amendment right to discuss issues, inquiring minds among the press, political parties, special interests, and the voting public are pressing for specific answers to pointed questions about performance in office. Some groups now send identical questionnaires to both judicial candidates and aspirants for executive or legislative office.<sup>81</sup> For example, gun rights groups might now ask judges directly “Do you believe that the Second Amendment prohibits any restrictions on handgun ownership?” rather than posing indirect “attitudinal” questions such as “How many deer heads are mounted in your den?” or “How many times did you take your children to the shooting range last month?”

*c. Partisan Activity by Judicial Candidates*

Third, the safeguards installed in certain states to keep contested or retention elections truly non-partisan have been compromised by the circuit opinion on remand in *White*. It held that the First Amendment permits judicial candidates to claim party affiliation, to attend political gatherings, and to seek, accept, and advertise endorsements from partisan organizations.<sup>82</sup> The experiences of Michigan and Ohio, where parties dominate the nominations of and campaigns for technically non-partisan candidates, may become the norm in those states which have chosen non-partisan ballots because they believe that party interference compromises both the appearance and reality of judicial impartiality.

*d. Solicitation Clause*

Fourth, the traditional boundaries between judicial candidates and their financial supporters have been weakened or eradicated by the decisions of two federal circuit courts. Until recently, all but a handful of states prohibited judicial candi-

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80. *Pa. Family Inst., Inc. v. Black*, 489 F.3d 156 (3d Cir. 2007); *Carey v. Wolnitzek*, No. 3:06-36-KKC, 2006 WL 2916814 (E.D. Ky. Oct. 10, 2006); *Wells v. Hardin*, No. 04-2585, 2006 WL 1586565 (E.D. La. May 26, 2006).

81. See, e.g., T.C. Brown, *Judicial Hopefuls Reluctant to Give Stances on Issues*, CLEVELAND PLAIN DEALER, Sept. 23, 2002, at A1 (criticizing candidates for refusing to respond to a questionnaire about their views on political issues).

82. *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005) (en banc), cert. denied, 546 U.S. 1157 (2006).

dates from personally soliciting or accepting contributions from donors, instead requiring them to raise funds through campaign committees.<sup>83</sup> On remand in *White*, the Eighth Circuit held that Minnesota's Solicitation Clause was unconstitutional with regard to solicitations to "large groups."<sup>84</sup> Several years earlier, the Eleventh Circuit on its own motion struck down Georgia's Solicitation Clause in its entirety.<sup>85</sup> The personal contact between candidate and donor clearly changes the dynamic of a judicial campaign, making it more like any other electoral campaign, and thus enhancing the possibility that the public will perceive justice as being influenced by contributions.

*e. Recusal*

Finally, a number of challenges have been brought to state recusal rules that require judges to step aside from cases when they have, for example, made pledges or promises, committed to a position on an issue, affiliated with a party, or solicited from a donor such that "in any proceeding . . . the judge's impartiality might reasonably be questioned."<sup>86</sup> To date, only one court has enjoined such a recusal provision. In *Duwe v. Alexander*, the federal district court held that Wisconsin's recusal provision was unconstitutionally overbroad and vague in providing that:

[A] judge shall recuse himself or herself in a proceeding when . . . the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to any of the following: 1. An issue in the proceeding. 2. The controversy in the proceeding.<sup>87</sup>

The court reached this holding despite Justice Kennedy's suggestion in *White* that states were free to "adopt recusal stan-

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83. See Alan B. Morrison, *Judges and Politics: What To Do and Not Do About Some Inevitable Problems*, 28 JUST. SYS. J. 283, 286 (2007) (noting that "[v]irtually every state except Texas recognizes the special problem of a sitting judge or candidate for judicial office making a direct request for a contribution to a supporter.")

84. *White*, 416 F.3d at 763–67.

85. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (holding that the canon prohibiting judicial candidates from personally soliciting campaign contributions violated First Amendment).

86. MODEL CODE OF JUD. CONDUCT Canon 2(A) (2007).

87. *Duwe v. Alexander*, 490 F. Supp. 2d 968, 970 (W.D. Wisc. 2007).

dards more rigorous than due process requires, and censure judges who violate these standards.”<sup>88</sup>

D. *The Cumulative Effect of New Developments*

One should not overstate the impact of large contributors, special interest groups, or *White* and its progeny on judicial election behavior. Many states still have quiet elections, or at least their highly-charged campaigns have been limited to those for their highest courts. Most candidates have moved cautiously, if at all, away from the old Marquis of Queensbury rules of decorum.<sup>89</sup> But the big money, hot-button issue, post-*White* campaign landscape certainly facilitates a “race to the bottom” mentality in closely contested races. When large contributors make huge media buys, or interest groups bring their organizational talents to judicial campaigns, many candidates and their supporters find it hard to behave with perfect equanimity.<sup>90</sup> Bitter, nasty races have occurred often enough to raise serious concerns among many who believe the judiciary’s traditional norms of behavior have contributed to the widespread, longstanding support for the role of law and the judicial branch in America.<sup>91</sup> If future elections continue to reinforce the idea that judges are mere political players, very serious consequences could ensue: The basic notion that we are a nation of laws, interpreted and applied by judges but ultimately made by the people themselves through the democratic instruments (constitutions and ballot propositions), by their chosen representatives (statutes and executive

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88. *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

89. See Schotland, *supra* note 54, at 1096–97.

90. See Owen G. Abbe & Paul S. Herrnson, *Campaigning For Judge: Noisier, Nastier?*, CAMPAIGNS & ELECTIONS, Apr. 1, 2002, at 43 (“[A] growing number of judicial elections are competitive and involve substantial campaign spending and significant campaign activity by outside groups. . . . [M]ore and more judges are turning to political consultants for help with their campaigns,” and in turn, interest groups targeting judges hire staff including media consultants, pollsters, and researchers.).

91. See Sandra Day O’Connor, Letter to Conference Participants, Sandra Day O’Connor Project on the State of the Judiciary, 2008 Conference: Our Courts and Corporate Citizenship (on file with author) (“The perception, or the reality, that justice can be ‘bought’ is bad for the legitimacy of our courts, and bad for democracy.”); see also Owen G. Abbe & Paul S. Herrnson, *How Judicial Election Campaigns Have Changed*, 85 JUDICATURE 286, 287 (2002) (“[J]udicial elections can no longer be characterized as inexpensive, quiet, uncompetitive affairs.”). The authors surveyed 261 judicial candidates from twenty-nine states, concluding that “judicial elections are even more competitive than elections for the U.S. House of Representatives and most state legislatures.” *Id.* at 289.

orders), by their representatives' agents (rules and regulations), or by a formal and highly structured process of gradual accretion (common law), would sustain a terrible blow.<sup>92</sup>

### III. AN OLD ANSWER SOLVES NEW PROBLEMS: ADVANTAGES OF MERIT SELECTION OVER CONTESTED JUDICIAL ELECTIONS

In view of all these developments, a profound pessimism might seem to be in order. After all, big-dollar, high stakes judicial politics is no respecter of systems; it has affected states choosing judges in straight partisan elections (for example, Alabama and Texas), initial partisan elections with retention re-elections (Illinois and Pennsylvania), pure non-partisan elections (for example, Washington and Wisconsin), non-partisan elections with candidates selected by political parties (Michigan and Ohio), gubernatorial appointment with retention election systems (California appellate courts), pure merit selection systems (Tennessee Supreme Court), and even legislative elections (South Carolina).

In the face of all these problems, old and new, the Missouri merit selection plan, for all its flaws, is the best option for maintaining dignity, stability, and accountability in the judiciary. In theory, merit selection should produce more judges who will respect their proper role in the governmental process. In practice, merit selection has worked well most of the time in most places. Taken together, these benefits should be sufficient to command support from the bench, the bar, and a concerned public in general, and from the active and informed lawyers who belong to the Federalist Society in particular.

Much of merit selection's appeal lies in the defects that inhere in other systems, particularly given the new pressures discussed above. These problems are especially endemic in contested elections.

#### A. *Turnover and Recruitment*

Contestable election systems undercut the stability of the judiciary. The concern about partisan sweeps that caused reformers to

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92. See James Michael Scheppele, Note, *Are We Turning Judges into Politicians?*, 38 LOY. L.A. L. REV. 1517, 1528 (2005) ("By contributing to a judge's campaign, persons and entities are essentially 'lobbying' the judiciary in a fashion similar to lobbying the legislature.").

push for non-partisan elections more than a century ago is an even bigger problem today. In Texas, for example, well over one third of all opposed judges have been defeated since 1980, generally because of straight-ticket voting.<sup>93</sup> But the extremely low salience of non-partisan judicial election contests make them little better. A person with an unusual name probably has a better chance of being elected President of the United States than state judge on an urban non-partisan ballot.<sup>94</sup> The retention rate for judges in merit systems, in contrast, has been remarkably stable—and consistently high—over many decades in many different states.<sup>95</sup>

Moreover, the occasional “no” victories in retention elections typically follow a scandal or widespread disgust with a judge’s perceived judicial philosophy. Interestingly, no state supreme court justice in America has *ever* been defeated in a retention election because he or she was perceived as too conservative, too closely aligned with big business, too devoted to precedent, or too faithful to the literal words of a constitution, statute, or rule. To the contrary, *all* seven supreme court justices rejected in retention elections lost because they were perceived—rightly or wrongly—as too liberal,<sup>96</sup> because they wrote an unpopular

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93. See Michael Grabell, *Democrats short on courtroom recognition: But new judges may have more skills than they’re given credit for*, DALLAS MORNING NEWS, Nov. 9, 2006, at 18A; Michael Grabell & Gromer Jeffers, Jr., *Dozens of judges lose seats in Democratic tidal wave: Victories reflect general shift as GOP loses grip in Dallas County*, DALLAS MORNING NEWS, Nov. 8, 2006, at 15A; see also Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 780 (1995) (“Republican straight-ticket voting [in 1994] contributed to the defeat of nineteen Democratic judges and a Republican sweep of all but one of the forty-two contested races for countywide judgeships in Harris County, Texas, which includes Houston.”).

94. In 2008, Democrats won twenty-two of twenty-six countywide contested judicial races in Harris County, Texas. Despite expensive campaigns mounted by individual candidates, party organizations, and independent groups, all evidence is that these efforts made no impact. The four Republicans who won shared one common link: Their opponents had unusual names. The defeated were Mekisha Murray, Goodwille Pierre, Andreas Pereira, and Ashish Mahendru. See Mary Flood & Brian Rogers, *Election defeat stuns incumbent Harris Co. judges*, HOUS. CHRON., Nov. 6, 2008, <http://www.chron.com/dispatch/story.mpl/hotstories/6097733.html>.

95. Of the 3912 elections between the years 1964 and 1994 in the ten states that used the retention election system, only fifty judges were defeated. Twenty-eight of those defeats occurred in Illinois, which required a judge to get 60% of the vote to remain on the bench. Dann & Hansen, *supra* note 63, at 1430 (citing Larry Aspin & William K. Hall, *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 3, 8–10 (2000)).

96. Wyoming’s Walter Urbigkit lost following concerns that he was too lax on criminals. See CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CON-

opinion,<sup>97</sup> or because of voter outrage over state government in general.<sup>98</sup> Although few would defend all these outcomes as admirable or fair, they were rational, not random—which is all an electoral system can hope to achieve.

One criticism of merit selection has been that too many undesirable judges are retained because voter ignorance or voter apathy permits all but the very worst judges to retain their jobs. Many merit selection states have recognized this problem, however, and are initiating new and more rigorous judicial evaluation programs to give voters a comprehensive picture of each judge's performance in office.<sup>99</sup> When voters have access to this information, interested voters have a much better chance of casting an intelligent vote in a yes-or-no election than in an open race among two or more names on a ballot. If the public does its job, good judges will stay in office and bad judges will go.

### B. Campaign Contributions

Retention campaigns also have the advantage of being neither as nasty nor as expensive as contested campaigns. The exceptions are few and well-known: The 1986 defeats of three California Supreme Court justices remain, after more than two decades, by far the most expensive and notorious retention election battles. The rapid escalation of multi-million dollar races in states with contested elections has simply not occurred in retention election campaigns.<sup>100</sup>

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TROVERSIES AND HISTORICAL PATTERNS 169 (G. Alan Tarr ed., 1996). Similarly, California's Chief Justice Rose Bird, Justice Cruz Reynoso, and Justice Joseph Grodin were defeated in a 1986 retention election after being portrayed as soft on crime. See Dann & Hansen, *supra* note 63, at 1431–32.

97. See Patrick Emery Longan, *Judicial Professionalism in a New Era of Judicial Selection*, 56 MERCER L. REV. 913, 915–17 (2005) (attributing Tennessee Justice Penny White's defeat to her failure to impose the death penalty in a case involving the rape and murder of an elderly woman).

98. See Laura Parker, *Judges pay when their salaries tied to lawmakers': Raises entangled in political issues, re-election jitters*, USA TODAY, Sept. 24, 2007, at 4A (noting that Pennsylvania Justice Russell Nigro lost his seat due to public outcry following an unpopular decision to raise the salaries of various government officials, including Nigro's).

99. See Rebecca Love Kourliss, *Judicial Independence and Independent Judges*, 80 DENV. U. L. REV. 746, 749–50 (2003).

100. See Jordan M. Singer, *Knowing is Half the Battle: A Proposal for Prospective Performance Evaluations in Judicial Elections*, 29 U. ARK. LITTLE ROCK L. REV. 725, 729–30 (2007) ("In 2000, candidate spending in the twenty states with supreme court races rose to almost \$45.5 million, a 61% increase over the prior high, and spending set records in ten states. That year, interest groups in five states alone (Ala-

By contrast, the lamentable public perception of a justice system selected by high-dollar, contested elections is well documented.<sup>101</sup> Although I am convinced that most judges are never influenced, at least consciously, by contributions, I do recognize the inevitable problem of persuading the public otherwise. Mayor Fiorello LaGuardia is said to have explained that contributions never influenced his conduct because “I’m an ingrate.” But, unlike the Little Flower, state judges seldom enjoy a platform to convince the public at large of their personal rectitude. Instead, defeated political parties, disappointed interest groups, and press reports all feed on natural suspicions that the recipients of substantial campaign contributions must be beholden to somebody.<sup>102</sup> It is hard to persuade a losing litigant whose opponent gave a lot of money to the judge that his or her case was resolved solely on the merits. For our system to thrive, justice must seem to be done, as well as actually be done.<sup>103</sup>

This natural suspicion is exacerbated when big donors, like trial lawyers and business associations, fund “scholarly” studies showing that judges they do not support have been “bought off” by their opponents’ contributions.<sup>104</sup> In short, these big donors

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bama, Illinois, Michigan, Mississippi, and Ohio) collectively spent \$16 million on hotly contested supreme court elections.” (footnotes omitted)).

101. See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 54–55 (2003).

102. See Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 931–32 (2002) (On December 6, 1987, “the national television news program *60 Minutes* featured the Texas Supreme Court in a story titled ‘Is Justice for Sale?’ The program questioned whether Texas judges were being exposed to undue influence by deep pocket interests contributing heavily to candidates friendly to their views. Current Chief Justice Tom Phillips concedes that the story ‘had a tremendous impact on Texas judicial politics,’ while his predecessor, John Hill, has argued that the ‘news reports only reflect a growing belief among many citizens of Texas that [the] state’s legal system no longer dispenses evenhanded justice.’”).

103. See *Offutt v. United States*, 348 U.S. 11, 14 (1954) (“[J]ustice must satisfy the appearance of justice.”).

104. Compare AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2 (2007), available at <http://www.atra.org/reports/hellholes/report.pdf> (“Trial lawyer contributions make up a disproportionate amount of donations to locally elected judges. A poll found that 46 percent of judges said donations influenced their judicial decisions.”), with EMILY GOTTLIEB, CHAMBER OF HORRORS: THE HIJACKING OF THE 2004 ELECTIONS BY THE U.S. CHAMBER OF COMMERCE 10, available at <http://www.centerjd.org/archives/studies/ChamberWhitePaper.pdf> (“Despite fundamental constitutional concerns, corporate front groups like the Chamber’s Institute for Legal Reform (ILR) have broadened their efforts to strong-arm judges into voting their way and tried to defeat judges who don’t.”).

either win the election or they lose the election and begin a press battle to undermine the authority of those who prevailed. The result is a perceptible decline in public confidence.<sup>105</sup>

### C. Enhanced Accountability

Contrary to popular belief, merit selection enhances the judicial accountability that elections are supposed to achieve. Opponents of merit selection have done well with the populist cry, “Don’t let them take away your vote!” This hits the right emotional buttons, but it makes little rational sense. Perhaps because the age, educational, and professional requirements for serving as a judge are so stringent, far fewer judicial races are contested than are races for political office.<sup>106</sup> Whether a judge draws opposition seems to depend not so much on the judge’s performance in office as on the likelihood that he or she can be defeated, either because of an unpopular party label or an unfortunate ballot name. Some ostensibly “elected” judges have never drawn an opponent, having been initially appointed to fill an unexpired term and then having run unopposed for each succeeding term.<sup>107</sup> These statistics seem more likely to have come from a Middle Eastern oligarchy than from the birthplace of popular sovereignty.

In contrast to the hit-or-miss reality of contestable elections, the powerful truth of merit selection is that every judge will be subject to the vote of every voter. If, as election enthusiasts maintain, the campaign itself makes judges more courteous, punctual, or humble, then the retention election seems designed to improve the performance of every judge—not only those who draw an opponent in contested elections.

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105. See Mark A. Behrens & Carv Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL’Y 273, 283 (2002) (A 1998 study sponsored by the Texas Supreme Court found that 83% of Texas adults, 69% of court personnel, and 79% of Texas attorneys believed that campaign contributions influenced judicial decisions ‘very significantly’ or ‘fairly significantly.’”).

106. In Texas, about two thirds of all judicial elections since 1980 have been unopposed. See Elizabeth Ames Jones, Editorial, *Remove the partisanship, money from judicial races*, SAN ANTONIO EXPRESS-NEWS, Nov. 9, 2003, at 5H (noting that 65% of Texas judges run in unopposed elections).

107. See *id.* (“[A]bout [fifty] percent of all [Texas district and appellate] judges are initially appointed by the governor. . . . [Twenty] percent of sitting judges have never had an opponent.”).

D. *Merit Selection's Proven Record of Success*

The proof of merit selection's success is that the people have never repealed merit selection in any state or part of a state where they have ever adopted it, although one state is now in the process of allowing it to expire.<sup>108</sup> Efforts have been mounted in Missouri, Arizona, Colorado, and elsewhere, with no success.<sup>109</sup> In fact, in 2008 voters extended merit selection in Missouri to another county.<sup>110</sup>

E. *Failure of Less Ambitious Reforms*

Efforts to cure the defects of contested elections while preserving the system have generally been as bad as the disease. Single-member judicial electoral districts may shrink the size of the ballot, but they make judges seem more like ward-heelers and less like learned dispensers of impartial justice.<sup>111</sup> Contribution limits may curb some of the worst excesses, but they need to be carefully calibrated if they are to achieve a positive effect. If they are too high, they will merely breed public cynicism. If they are too low, they will either result in an even more uninformed electorate, or they will drive more contributions to independent groups. And public funding, which logically should represent the next "wave" of reform after merit selection,<sup>112</sup> has attracted only isolated support for judicial contests.<sup>113</sup>

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108. Editorial, *Three Gavels for Tennessee*, WALL ST. J., May 27, 2008, at A20 (noting that Tennessee's decision to allow its merit selection system to expire "marked the first time a merit selection plan ha[d] been ousted in any state").

109. See *id.* (noting that no other states have done away with merit selection).

110. See American Judicature Society, *Voters*, *supra* note 48 (noting that in 2008 Greene County became the fifth Missouri county to adopt judicial merit selection).

111. See Ronald W. Chapman, *Judicial Roulette: Alternatives to Single-Member Districts as a Legal and Political Solution to Voting-Rights Challenges to At-Large Judicial Elections*, 48 SMU L. REV. 457, 468 (1995) ("The smaller the group a judge serves, the greater the likelihood that constituents will expect a judge to be responsive to their special needs." (quoting Mary T. Wickham, Note, *Mapping the Morass: Application of Section 2 of the Voting Rights Act to Judicial Elections*, 33 WM. & MARY L. REV. 1251, 1281-82 (1992) (internal quotation marks omitted))).

112. See Thomas R. Phillips, *Keynote Address: Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 146-47 (2003) (noting that public financing, at least for state supreme court elections, has received strong public support as reflected by polling data).

113. See, e.g., Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1478-80 (2001) (discussing the hurdles to adoption of a public financing system); Editorial, *Judges and their donors*, CHI. TRIB., Mar. 19, 2007, at 16 (noting that public financing does not eliminate the influence of trial

F. *Philosophical Objections to the  
Popular Election of Judges*

Perhaps the biggest concern with judicial elections is how the electoral process itself influences the successful candidate.<sup>114</sup> When a judge is elected on the same ballot, by the same means, and under the same rules as a candidate for Congress or city council, might not the judge begin to think like a political official?<sup>115</sup> Might not he regard his supporters as his constituents, his campaign rhetoric as his platform, and his party leaders as his allies?<sup>116</sup> Might not such a judge, as a seasoned veteran of the campaign trail, think he or she understands the pressing problems of the hour and the public policy solutions better than some legislator from a single, isolated district?

A system that treats judges differently from other officials helps remind both the public and the judges that they do something very different. A system that encourages good judges to stay and encourages bad judges to go serves all of us well. And a system that lets judges spend most of their time on the bench or in the library, rather than dialing for dollars or riding in parades, delivers justice more efficiently. Right now, the Missouri Plan could best meet those needs in most of our states.

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lawyers and business organizations, which can “still spend as much as they want airing their own ads”).

114. See JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 11 (2008), [http://www.brennancenter.org/content/resource/-fair\\_courts\\_setting\\_recusal\\_standards](http://www.brennancenter.org/content/resource/-fair_courts_setting_recusal_standards) (“In a 2002 written survey of 2,428 state lower, appellate, and supreme court judges, over a quarter (26%) of the respondents said they believe campaign contributions have at least ‘some influence’ on judges’ decisions and nearly half (46%) said they believe contributions have at least ‘a little influence.’ The survey also revealed that 56% of state court judges believe ‘judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign.’” (quoting GREENBERG QUINLAN ROSNER RESEARCH & AMERICAN VIEWPOINT, JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5, 11 (2002), [http://www.gqrr.com/articles/1617/1411\\_JAS\\_judges.pdf](http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf))).

115. See George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1592 (2008) (“Neutrality in the conduct of a trial requires a decision maker who is not subject to pressure from the parties or, a fortiori, from the public at large. There is something contrary to this ideal in the notion of an adjudicator campaigning on how he or she is going to adjudicate. The existence of political ‘debts,’ especially campaign contributions, ‘owed’ to parties who then litigate before the debtor raises the same concerns.” (footnotes omitted)). Professor Brown also raises the possibility that as a result, “federal court distrust of politicized state courts will affect relations between the two systems.” *Id.*

116. *See id.*

Some say that merit selection is just a poor cousin to the real reform of purely appointed judges. But only a few Eastern states, plus Hawaii, have genuine appointive systems.<sup>117</sup> I do not think the States are going to embrace purely appointed judges, for reasons of history, if for nothing else. Moreover, the one appointive system with which every American is familiar—the federal system—has not inspired much confidence in recent decades. Certainly lifetime judges are insulated from campaign contributions and partisan sweeps, but the federal appointment and confirmation process has its own significant problems. Not only have recent Administrations come under increasing pressure to appoint men and women whose performance in office can be “safely” predicted, but some recent Senate confirmation battles have been as nasty and as misleading as any election contest. For example, one senator voted against confirming Chief Justice Roberts because he declined to answer questions about a particular legal issue “as a son, a husband, a father” and because he declined to commit to a particular vote if another issue were to come before the Court.<sup>118</sup> Supporters and opponents have run multi-million dollar media campaigns to support or oppose confirmation of Supreme Court and even circuit nominees.<sup>119</sup>

Like it or not, the central role of the judicial system is not going to wither away, or even recede. As George F. Will observed, “As traditional sources of social norms—families, schools,

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117. Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia employ appointive judicial selection methods. See Roy A. Schotland, *Judicial Elections*, in *GUIDE TO POLITICAL CAMPAIGNS IN AMERICA* 391–92 (Paul S. Herrnson et al. eds., 2005) (“Thirty-nine states have judicial elections, and eleven states are strictly appointive. In twenty states, all or some judges run in nonpartisan elections; in sixteen all or some run in partisan elections; and in nineteen all or some face ‘retention’ elections in which the voters either keep or fire an incumbent judge.” (citation omitted)).

118. Sheryl Gay Stolberg, *Panel Approves Roberts, 13-5, As 3 of 8 Democrats Back Him*, N.Y. TIMES, Sept. 22, 2005, at A1 (discussing Senator Feinstein’s reasons for opposing John Roberts).

119. For example, presidential candidates use barely-disguised code words in telling voters what kind of judges they will appoint. See, e.g., David G. Savage, *John McCain: Two visions of the Supreme Court*, L.A. TIMES, May 19, 2008, at A8 (quoting both McCain and Obama discussing “activist judges,” McCain discussing the “clear meanings of the Constitution,” and Obama discussing judges’ “empathy”). Both sides of the political spectrum have created cottage industries that raise millions of dollars to support or oppose nominees for the Supreme Court and even some courts of appeals. See Debra Rosenberg, *Bush’s Choice: His judicial record is limited, his credentials unquestioned. That makes John G. Roberts a tough target.*, NEWSWEEK, July 20, 2005, <http://www.newsweek.com/id/50355/output/print>.

churches—weaken, law seeps into the vacuum.”<sup>120</sup> Courts may have lost some of their autonomy in devising the common law,<sup>121</sup> but they are more involved than ever before in the real problems of real people, such as child education and welfare,<sup>122</sup> employment discrimination,<sup>123</sup> marriage,<sup>124</sup> students’<sup>125</sup> and prisoners’ rights,<sup>126</sup> and so on. As advances in information and biological technology raise new issues of personal privacy, personal autonomy, and perhaps even what it means to be a human being, the courts will be even more significant in every American’s life.

Our courts are simply too important to be left to benign neglect. As future leaders of the bar, your ideas on how judges are selected, and how they perform once in office, will be heard and respected. If, in the course of your professional careers, you can give the American people a better judicial system, you will have, in your own way, “[l]ived greatly in the law.”<sup>127</sup>

120. George F. Will, *The Tangle of Egos and Rules*, NEWSWEEK, July 26, 1993, at 60.

121. See generally John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1270–73 (2008) (discussing how tort law has often been codified).

122. See generally Daniel E. Witte & Paul T. Mero, *Removing Classrooms from the Battlefield: Liberty, Paternalism, and the Redemptive Promise of Educational Choice*, 2008 BYU L. REV. 377, 405–06 (2008) (discussing a recent California Court of Appeals decision which held that parents do not have a constitutional right to home school their children and that parents who do home school their children may be guilty of a criminal infraction (citing *In re Rachel L.*, 73 Cal. Rptr. 3d 77 (Ct. App. 2008))). Note that *In re Rachel L.* was superseded by a grant of rehearing, and was reversed in part by *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571, (Ct. App. 2008).

123. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (holding that Title IX, which prohibits sex discrimination in schools, provided a cause of action for retaliation to a male high school girls’ basketball coach who received negative work evaluations and was ultimately removed after complaining that his team was not receiving equal funding).

124. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding a Massachusetts law denying marriage to same-sex couples unconstitutional).

125. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) (holding a Texas high school’s tradition of sanctioning student-led prayer at football games unconstitutional); *Bush v. Holmes*, 919 So. 2d 392, 415 (Fla. 2006) (Bell, J., dissenting) (rejecting the Florida Supreme Court’s holding that the public school system “is the exclusive means set out in the constitution for the Legislature to make adequate provision for the education of children,” because such an exclusivity requirement is neither expressed in the constitution nor necessarily implied (internal quotation marks omitted)).

126. See *Johnson v. California*, 543 U.S. 499, 509 (2005) (ruling that a California prison policy that segregated prisoners by race, apparently for security purposes, was constitutionally suspect).

127. OLIVER WENDELL HOLMES, *The Profession of Law: Conclusion of a Lecture to Undergraduates of Harvard University* (Feb. 17, 1886), in *COLLECTED LEGAL PAPERS* 29, 30 (Harcourt, Brace & Co. 1920).