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Judicial Selection Methods: Judicial Independence and Popular Democracy

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JUDICIAL SELECTION METHODS: JUDICIAL INDEPENDENCE AND POPULAR DEMOCRACY

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I. INTRODUCTION

The debate over selecting and retaining judges is long standing and reflects a fundamental disagreement regarding a judge's political and social role.[1] There exists a tension between a judge's dual role as a law-maker and interpreter of existing law.[2]

One view, functionalism, maintains that the courts serve as an institutional check on the legislative and executive branches[3] and that judicial independence is essential for the judiciary to protect the rule of law.[4] To function effectively, judges must be free from the influence of the electorate, the executive, and the legislature.[5]

In tension with the idea of judicial independence is the need for judicial accountability.[6] Judges must be aware of the majority's political, social, economic and ethical views when interpreting and applying the law.[7] Furthermore, accountability advances democratic principles by legitimizing popular vote.[8]

The second part of this paper outlines various ideologies regarding a judge's proper political and social role when exercising power and engaging in decision making. The third part discusses the three primary selection and retention methods currently used and the effects of Political Action Committees ("PACs") on campaign expenditures. The final sec-

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1. *See* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 2 (1995). *See also* Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Elections*, 40 SW. L.J. 31, 34 (1986) (stating that the selection and retention of judges reflects contradictory ideas of the role of the courts).

2. *See* Webster, *supra* note 2, at 2.

3. *See* Dubois, *supra* note 1, at 34.

4. *See* Harold See, *Comment: Judicial Selection and Decisional Independence*, 61 LAW & CONTEMP. PROBS. 141, 142 (1998).

5. *See* Dubois, *supra* note 1, at 34.

6. *See* Webster, *supra* note 2, at 3.

7. *See* Dubois, *supra* note 1, at 34.

8. *See* Webster, *supra* note 2, at 11.

tion of the paper asserts that an election system better serves democratic principles.

Rather than replacing election systems with either appointment or merit systems, meaningful reforms must be instituted. Lengthening judicial terms, reforming campaign financing, eliminating constraints on judicial speech, and increasing voter education are a few reforms that will increase voter participation, add legitimacy to the institution, and decrease the negative effects that are associated with current elections.

II. JUDICIAL THEORY AND JUDICIAL SELECTION AND RETENTION: DIFFERING VIEWS REGARDING THE COURT'S ROLE IN AMERICAN SOCIETY

The debate over the judiciary's proper role dates to the nation's founding.[9] The argument about whether a selection method should serve judicial accountability or independence is limited to the state arena and does not extend into the federal sphere.[10] Judicial independence is interpreted to mean that judicial decisions will be decided fairly, impartially, and in good faith without outside considerations[11] and without judicial accountability to the electorate for judicial conduct.

Central to the debate on whether a selection system should preserve judicial independence[12] or accountability[13] is what political and social role a judge should play. If it is believed that a judge applies a well-established body of legal rules and principles, then accountability to the electorate is of secondary concern.[14] A judge is better able to make fair and impartial judicial decisions in the absence of outside influences and pressures.[15]

A particular candidate's training and legal knowledge is the key in the selection process with professional peers or other judges considered to be the most qualified to assess and recognize a particular judicial can-

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9. *See id.* at 2

10. Federal judges are appointed to a life tenure with removal for cause. Therefore, popular criticism will not affect the judge's independence. *See* Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROBS. 59, 59 (1998).

11. *See id.* at 61.

12. There are two aspects to judicial independence: (1) institutional independence: judicial independence from executive and legislative branch control; and (2) decisional independence: the theory that judges should decide a case on the merits free from outside pressures and influences. Webster, *supra* note 1, at 4. *See also,* Erwin Chemerinsky et al., *What is Judicial Independence? Views from the Public, the Press, the Profession, and the Politicians*, 80 JUDICATURE 73, 74 (1996) (defining judicial independence similarly).

13. Accountability is used to denote accountability to the majority of the electorate.

14. Judicial accountability is seen as less of a concern if a judge exercises no discretion or independent power but is viewed as society's conscience. *See* Dubois, *supra* note 1, at 36-37.

15. A judge should be free from public pressure but should also be free from his or her own personal, social, political, or economic views. *See id.* at 36.

didate's qualifications.[16] Under this system, judicial peers select and retain judges and conduct periodic performance reviews.[17] Essential to true independence are life tenure, salary protection, and removal for cause subject to a constitutionally adequate procedure.[18] Institutional appellate review and peer pressure serve as a check on judicial discretion and erroneous decisions.[19]

Other commentaries believe that a judge's social and political role is expansive and that there are no institutional constraints on judicial discretion and decision-making. Because judges are, in fact, vested with partisan political authority and judicial acts and decisions are influenced in a politically partisan manner, then judges should be democratically accountable to the electorate.[20] Direct political accountability to an electorate is a check on unlimited judicial discretion.[21]

A third view in determining a judge's political and social role focuses on the jurisdictional level of the court.[22] Because a trial and intermediate appellate court judge is engaged in applying a well-established body of legal rules and principles, judicial discretion and decision-making is limited and constrained by the job's intrinsic nature.[23] Judicial discretion is inherently limited because creating new law is a very small part of what a judge actually does.[24] A judge will be acting in a legislative capacity only when engaging in statutory interpretation.[25] Greater independence is allowed and direct political accountability to the electorate is unnecessary because statutory interpretation is a minute part of the judge's judicial duties.[26] Institutional appellate review, constitutional amendment, or legislative action are checks on unpopular judicial decisions and the development of new law.[27]

A fourth view of a judge's political and social role is a formalism approach. The belief is that a judge's purpose is to protect individual

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16. *See* Webster, *supra* note 1, at 5.

17. *See, e.g.*, Harold J. Laski, *The Techniques of Judicial Appointment*, 24 MICH. L. REV. 529, 538 (1926).

18. *See* Irving R. Kaufman, *Chilling Judicial Independence*, *in* THIRTY-FOURTH ANNUAL BENJAMIN N. CARDOZO LECTURE 17-18 (The Assoc. of the Bar of the City of New York, 1979).

19. *See id.* at 31.

20. *See* Ray M. Harding, *The Case for Partisan Election of Judges*, 55 A.B.A. J. 1162, 1163 (1969).

21. *See id.*

22. *See* Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1974-76 (1988).

23. *See* Dubois, *supra* note 1, at 36-37.

24. Under this view there are two types of judiciary created law. The first is modifying, extending or contracting the common law. The second type is statutory interpretation as a gap filler where a statute is ambiguous or silent regarding the case before the court. *See* Webster, *supra* note 1, at 6.

25. *See id.* at 6-7.

26. *See* Lawrence A. Alexander, *Legal Theory and Judicial Accountability: A Comment on Seidman*, 61 S. CAL. L. REV. 1601, 1605 (1988).

27. *See* Grodin, *supra* note 22, at 1976.

liberties and minority rights from encroachment by the electorate majority.[28] Judicial independence and discretion are essential when minority and individual rights conflict with the majority's will.[29] Accordingly, judges are seen as activists and are expected to change the law in order to protect individual and minority rights.[30] Because of tension between the majority and minority, changes in the law may be unpopular with the electorate or other government branches.[31] Judicial independence and freedom from majority retaliation is critical in order for a judge to perform effectively. As Alexander Hamilton stated, "Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their [judge's] necessary independence." [32] The court in *Chisom v. Roemer*,[33] echoes this view:

> public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment. The Framers of the Constitution had a similar understanding of the judicial role, and as a consequence, they established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection.[34]

However, judicial independence from accountability to other government branches or the electorate may not be practically or factually accurate. First, judicial independence does not guarantee that judges will, in fact, protect individual liberties or minorities' rights.[35] Second, state judges may not require the same degree of independence as federal judges because most civil rights cases are brought in federal court not state court.[36] Third, the judicial independence argument assumes that the

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28. As Hamilton put it:

> This independence of judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, at 231 (Alexander Hamilton) (Roy P. Fairfield ed., 1966). Additionally, Hamilton expressed a structuralist view of judicial independence. Judges need to be free from influence and encroachment by the legislative and executive branch. *Id.*

29. *See* Grodin, *supra* note 22, at 1979.

30. *See* Webster, *supra* note 2, at 7.

31. *See* Kaufman, *supra* note 18, at 9.

32. THE FEDERALIST NO. 78, *supra* note 29, at 232.

33. 501 U.S. 380 (1991).

34. *Chisom*, 501 U.S. at 400.

35. *See* Dubois, *supra* note 1, at 39.

36. As a result, state courts will rarely decide cases involving minority rights or individual liberties, thus decreasing the need for judicial independence. *See* Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2055-56 (1988).

democratic electoral process inherently corrupts judges.[37] This author believes that an individual possesses a corrupt nature and it is the individual, not the system, which guides individual choice.

A judicial independence argument also contains the correlated argument that a perception of judicial independence and propriety must be maintained.[38] Judicial authority, judicial legitimacy, and judicial effectiveness are products of public support and respect for the judiciary. Public respect for the institution is produced by the belief that judicial decisions are made fairly and impartially based on the merits of a particular case, and not from outside influences.[39] Therefore, even if judges remain free from outside pressure, there may be a perception that a judicial decision was influenced by political considerations[40] and the institution as a whole is devalued.[41] Respect for the institution and the rule of law is needed for voluntary compliance with the law. If people believe that judges are deciding cases because of outside influences then people will fail to voluntarily comply with the law or use the courts to solve problems.[42] Additionally, public perception of a biased and unfair system is prevalent among minorities holding a belief that there is unequal treatment in the justice system.[43] Furthermore, the lack of confidence in the legal system is evidenced by an increase of *pro se* litigants particularly in the area of family law.[44]

Independence supporters argue that election systems are more likely to produce perceptions of influence and corruption.[45] Political campaigning and fundraising create the impression that judicial decisions are exchanged for votes.[46] As a result, public confidence in the institution is diminished and judicial decisional independence is constrained.

Additionally, it is claimed that judges should remain independent and unaccountable to the electorate because judges are unique and do not

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37. *See id.* at 2056-57.

38. *See* Webster, *supra* note 1, at 9-10.

39. Outside influences can include special interest groups or popular opinion. *See* Abner J. Mikva, *How Should We Select Judges In a Free Society?*, 16 S. ILL. U. L.J. 547, 555 (1992).

40. Political is used in the sense that the decision will most likely result in the judge continuing to hold office. A judge will be more concerned in making a decision that will keep him employed.

41. *See* Webster, *supra* note 1, at 9-10.

42. *See* Wood R. Foster Jr., *The MSBA and the Courts,* Bench and Bar of Minn. (Mar. 2000), *available at* http://www2.mnbar.org/benchandbar/2000/mar00/prezpage_3-00.htm.

43. *See id.*

44. *Id.* However, the increase of *pro se* litigation may be the result of more than the erosion of public confidence in judges and may be the result of a lack of confidence in attorneys, the increased ease of *pro se* divorces, and attorney fees.

45. *See id.*

46. *See* Robert Moog, *Campaign Financing for North Carolina's Appellate Courts*, 76 JUDICATURE 68, 70 (1992).

act in a legislative capacity.[47] Judicial accountability to the electorate is unnecessary because judges apply but do not make law.[48] The need for representation and democratic accountability is lessened because courts do not act in a representative capacity and are legally prohibited from having constituents.[49]

Accountability addresses a number of practical concerns. First, judges function in a legislative capacity and make policy when engaging in statutory interpretation or departing from prior case law.[50] Judicial policy decision-making is in opposition to the democratic principles upon which the nation was founded.[51] Second, judges are human and can make mistakes. Therefore, they should be accountable to the electorate for erroneous decisions.[52] Third, elections contribute to judicial accountability, increase voter awareness and interest, and produce better judges.[53]

III. METHODS OF SELECTION AND RETENTION

A. Appointment

In the majority of states, regardless of the selection system used, initial judicial selection is made by gubernatorial appointment to fill unexpired terms.[54] Six states and the federal government use appointments as the exclusive selection method.[55] Selection procedures vary among the states.[56] Current methods are appointment by the legislature, the governor, and merit selection through nominating committees.[57]

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47. *See* Robert P. Davidow, *Judicial Selection: The Search for Quality and Representiveness*, 31 CASE W. RES. L. REV. 409, 420-25 (1981) (discussing differences between judges and legislators concerning accountability).

48. *Id.* at 420-22.

49. *See* John L. Hill, Jr., *Comments on Thompson and Observations Concerning Impartiality*, 61 S. CAL. REV. 2065 (1988). *See also*, Norman Krivosha, *In Celebration of The 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990) (reviewing Missouri's merit system).

50. See Webster, *supra* note 2, at 6.

51. *See* Edward Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1988 (1988).

52. *See* Webster, *supra* note 1, at 11.

53. *See* Mark Hansen, *A Run for the Bench, The Taint of Big Money in Judicial Elections is Moving Reformers to Find a Middle Ground Between Free-Spending Campaigns and Merit Selection*, A.B.A. J., Oct. 1998, at 70.

54. *See* Philip L. Dubois, *State Trial Court Appointments, Does the Governor Make a Difference?*, 69 JUDICATURE 20, 20 (1985). In Minnesota, almost ninety percent of the judges obtained their seats through appointment. *See* Barbara L. Jones, *High Court Races are off to a Running Start*, 2000 MINN. LAW., 2-3 (2000), *available at* http://www.minnlawyer.com/story.asp?storyid+1045.

55. *See* PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 177 (1990) (explaining that Maine, New Hampshire, New Jersey, Rhode Island, South Carolina, and Virginia use appointments); U.S CONST. art II, § 2, cl. 2.

56. In Maine, the governor appoints, subject to legislative confirmation, supreme and superior court judges for a 7-year term with re-appointment for 7-year terms. McFadden, *supra* note 56, at 181. The New Hampshire governor, with the approval of a five member executive council, appoints

Proponents of the appointment system to select and retain judges argue that judicial independence is guaranteed because judges are insulated from criticism and threats of removal and do not have to rely on popular approval for their decisions. Democratic principles are served by indirect accountability to the public through the elected appointing authority.[58]

Appointment advocates are concerned with the negative effects that campaign financing, fundraising, and conduct has on judicial performance.[59] Fundraising and election contests by judicial candidates create public distrust of judicial fairness, independence and competence.[60] Candidates not having to compete in contested, contentious, and raucous elections maintain the appearance of judicial propriety and independence.[61] In order to maintain independence, judges must be appointed to long or life terms of office,[62] be ensured salary protection, and must be removed only for cause.[63]

Supporters also contend that the appointment process results in better-qualified judges.[64] First, because negative campaigning costs are not

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supreme and superior court judges. *Id.* at 183. The judges hold office until age 70. *Id.* In New Jersey, the governor, with advice and consent of the senate, appoints supreme court, appeals court and superior court judges for 7-year terms. *Id.* The governor, with advice and consent, may re-appoint until age 70. *Id.* Rhode Island's Supreme Court justices and superior court judges are appointed for life. *Id.* at 185. South Carolina's legislature appoints supreme court justices for a 10-year term and court of appeals and circuit court judges for a 6-year term. *Id.* The legislature can re-appoint for additional terms. *Id.* Virginia Supreme Court justices are appointed by the legislature for 12-year terms, and the court of appeals and circuit court judges for 8-year terms. *Id.* at 187. The legislature can reappoint for the same terms. *Id.*

57. *See* William M. Pearson & David S. Castle, *Alternative Judicial Selection Devices: An Analysis of Texas Judges' Attitudes*, 73 JUDICATURE 34, 34 (1989).

58. *See* Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 58 (1986); *see also* HENRY J. ABRAHAM, THE JUDICIAL PROCESS 33-34 (6th ed. 1993) (arguing that executive appointment is better than a system where judges are in politics and the electorate has to become familiar with judges' adjudicatory history).

59. *See* Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw The Baby Out With the Bathwater?*, 44 WAYNE L. REV. 367, 369 (1998). Advocates are also concerned with the real and perceived negative effects on judicial functioning. *See* Maura A. Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 842-43 (1994).

60. *See* Schoshinski, *supra* note 60, at 839-40.

61. *See* Laski, *supra* note 18, at 531-32.

62. "As to the tenure by which judges are to hold their places...all judges who may be appointed by the United States are to hold their offices *during good behavior*..." THE FEDERALIST, No. 78, at 226 (Alexander Hamilton) (Roy P. Fairfield ed., 1966). *See also*, ABRAHAM, *supra* note 59, at 21-22 (arguing that judges are ideally impartial and must be given independence, security and tenure).

63. *See* Webster, *supra* note 2, at 9.

64. It should be noted that there is also disagreement on the training and experience needed to produce the most qualified candidates. Some believe that judges should be those who possess a great deal of trial experience. Others argue that judicial candidates should include a broad base of experiences such as academicians, government and corporate attorneys, and those without litigation experience. *See* Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L. REV. 281, 319 (1995).

present in the appointment system, the most qualified lawyers will seek judicial posts. Second, the electorate is incapable of making an informed decision on judicial qualifications[65] and is more likely to be influenced by political or personal considerations. As a result, the populace elects judges who are not the most qualified but rather the easiest to elect. Third, a committee or individual possessing a greater knowledge of judicial qualifications and responsibilities is responsible for selecting judicial candidates.[66] Therefore, judges will be selected on merit and not from emotional or political considerations.

Appointment methods may also promote diversity in the judiciary's composition. Commentators argue that the judicial independence from the electorate results in more women and minority judges than elective systems.[67]

The appointive system's greatest strength is also its greatest weakness. There is no guarantee that judicial decisions will be decided fairly and impartially even though judges are free from all limits on their decision-making. There is no substantive check on judicial decision-making and discretion after the initial appointment.[68] The trade off for judicial independence is the risk that judges will pursue personal agendas that are in conflict with their judicial responsibilities.[69]

Furthermore, political considerations are not absent in the appointment system. Gubernatorial and legislative appointments are often based on political considerations[70] rather than on judicial qualifications.[71] Generally, judicial appointments are more likely to embrace the same political principles as the appointing authority.[72] Additionally, former legislators are more likely to be judicial appointments in systems where the legislature is the appointing agency.[73] As a result, the appointment

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65. "Given the nature of the judicial elections, voters lack clues to gage [sic] the merits of individual candidates, such as party affiliations, committee assignments, voting records, press releases or policy positions." *The Price of Justice: A Los Angeles Area Case Study in Judicial Campaign Financing*, Frontline, *at* http://www.pbs.org/wgbh/pages/frontline/shows/justice/que/studies.html (last visited Oct. 1, 2001) (discussing the findings of a survey conducted by the 1995 California Commission on Campaign Financing).

66. *See*, ABRAHAM, *supra* note 59, at 25-27.

67. *See* Nicholas Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCI. Q. 315, 315 (1990).

68. *See* Champagne, *supra* note 59, at 58.

69. *See* Webster, *supra* note 2, at 42 n.67.

70. The appointing authority may be concerned with ideology, party loyalty, and friendship. *See* Champagne, *supra* note 59, at 58.

71. *See* Dubois, *supra* note 55, at 25.

72. *See id. See also* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, COMMISSION ON STATE JUDICIAL SELECTION STANDARDS, STANDARDS ON STATE JUDICIAL SELECTION 16 (July 2001) (asserting that executive branch officials choose candidates with similar political leanings).

73. *See* John J. Korzen, Comment, *Changing North Carolina's Method Of Judicial Selection*, 25 WAKE FOREST L. REV. 253, 274 (1990).

method may not lessen partisan politics, but instead may play a significant role in appointing judges.[74]

Also, appointment methods do not guarantee that money will not play a factor in influencing a candidate's selection.[75] Large amounts of money were spent to defeat Judge Bork's nomination to the United States Supreme Court[76] and to support Clarence Thomas during the confirmation hearings.[77]

B. The Merit selection system and Missouri Plan[78]

The Missouri Plan is a combination of appointment and election systems. There are three elements to the Missouri Plan:

1. A nonpartisan commission nominates qualified individuals.
2. The governor or executive appoints a nominee to a judicial post.
3. Retention elections follow the initial term.[79]

The Missouri plan is the archetype for reforming state judicial election processes.[80] Approximately 34 states and the District of Columbia use a form of merit selection.[81] Six states use a combination of commissions and retention elections.[82] Ten other states use merit selection for some judges.[83] In Missouri, merit selection is used for appellate court judges and some of the circuit courts,[84] which resulted from a distrust of the elective and appointment systems.[85] The goal of the merit selection system is to obtain an "intelligent and impartial" judiciary, eliminate the

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74. "If the power of making them [periodic appointments] was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either..." THE FEDERALIST, NO. 78, *supra* note 29, at 232.

75. *See* Harold See, *supra* note 5, at 146.

76. *See id.*

77. *See id.* at 146-47.

78. Although there is a difference between merit systems and the Missouri plan, commentators also use the designations interchangeably. *See e.g., id.* at 143-144.

79. *See* James E. Lozier, *The Missouri Plan A/K/A Merit Selection is the Best Solution for Selecting Michigan Judges*, 75 MICH. BUS. L.J. 918, 920 (1996).

80. *See* Brauer, *supra* note 60, at 379.

81. *See* Lozier, *supra* note 80 at 918-920.

82. Alabama, Colorado, Florida, Iowa, Nebraska, Utah, and Wyoming. *See id.*

83. Arizona, Florida, Indiana, Kansas, Maryland, Missouri, New York, Oklahoma, South Dakota, and Tennessee. *See id.*

84. *See* Lozier, *supra* note 80, at 920. The plan is used in 5 out of the 45 metropolitan circuit courts. *Id.* These circuit courts include the most populated counties of St. Louis and Jackson County. *Id.*

85. *See id.*

chaotic results of the election system, and alleviate judicial candidates from campaign pressures.[86]

The distinguishing feature of the merit system is nonpartisan nominating committees.[87] Nonpartisan nomination committees insulate gubernatorial political influences from an initial selection committee.[88] Attorneys, judges, and lay people serve on the committee for a six-year staggered term.[89] The staggered six-year terms were designed to keep the commission free from domination by the appointing executive.[90] The governor must select from a list of three candidates that the committee recommends.[91] The candidate is initially appointed to a one-year term.[92] After the initial term, the judge runs in an uncontested retention election for a six-year term if a trial judge or a twelve-year term if an appellate judge.[93] Voters cast a yes or no ballot when asked if the judge should remain in office.[94] If the majority votes not to retain the judge in office then another candidate is selected and the process begins anew.[95]

Merit selection advocates argue that the system assures a competent judiciary free from political affiliation,[96] while allowing popular accountability in a retention election.[97] Proponents argue that choosing judges according to professional standards will produce a better-qualified candidate.[98] The problem with the claim that a merit system produces a more professional judge is that it is difficult to define and evaluate the qualities that make a good judge.[99] Also, other factors beside the method of selection and retention affect the quality of the judiciary.[100]

Advocates argue that judicial stability is advanced because there is little turnover in retention elections.[101] Stability is increased because

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86. *See* John M. Scheb, II, *State Appellate Judge's Attitudes Toward Judicial Merit Selection and Retention: Results of a National Survey*, 72 JUDICATURE 170, 170 (1988).

87. *See* Lozier, *supra* note 80, at 920.

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See* Honorable Jay A. Dougherty, *The Missouri Nonpartisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 318 (1997). The judge must receive at least 50% of the votes cast. *Id.*

94. *See* Lozier, *supra* note 80, at 920.

95. *See id.*

96. *See* Brauer, *supra* note 60, at 379.

97. *See* Lozier, *supra* note 80, at 921.

98. *See* Scheb, *supra* note 87, at 170.

99. *See* Dubois, *supra* note 2, at 33.

100. Formal qualifications such as age and length of practice, salaries and benefits, pension plans, retirement laws, length of terms, judicial discipline procedures, and the court's physical environment are all factors that affect the makeup and quality of judicial candidates. *See id.*

101. *See* Dougherty, *supra* note 94, at 317, 320.

judges are less likely to be disciplined or removed.[102] Supporters also argue that retention elections lessen the appearance of judicial corruption[103] because retention election costs are low, reducing the risk that judges are selling decisions for votes.[104] In addition, judges are freed from the campaigning distractions of contested elections.[105]

However, the reality is that large sums of money are spent in retention elections in order to influence the outcome of particular elections.[106] In California, opponents raised over seven million dollars to defeat California Supreme Court Justice Rose Bird.[107] Furthermore, Justice Bird and two incumbent California Supreme Court justices spent over four million dollars in the same election.[108]

Some supporters argue that judges selected from this system are less political than judges from other selection systems.[109] However, in reality, the retention system is not devoid of political influences.[110] "The political aspects of the process are transferred from an elected and accountable official to a committee that is not elected by the people."[111] There is also a greater chance for political patronage because a committee recommends to the Governor who then appoints the candidate.[112]

Additionally, "the organized bar asserts too great an influence in the selection process."[113] In the federal selection process the American Bar Association's influence in selecting federal judges was perceived as too great and as a result there is discussion of removing the ABA from the initial screening process.[114] Commentary surrounding the President's decision highlighted the political aspects of the selection process.[115]

Appointed officials can be influenced by threats of removal, impeachment, or requests for resignation in cases where a judge rendered an unpopular decision.[116] Judge Harold Baer's pro-defendant suppression

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102. *See* Lozier, *supra* note 80, at 923.

103. *See* Scheb, *supra* note 87, at 170.

104. *See* Lozier, *supra* note 80, at 921.

105. *See id.*

106. *See* Harold See, *supra* note 4, at 146.

107. Paul Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 83 (1998).

108. *Id.* at 83.

109. *See* Scheb, *supra* note 87, at 174 (defining the term "political" as holding elective public office before joining the appellate courts).

110. *See* Brauer, *supra* note 60, at 379.

111. Lozier, *supra* note 80, at 921.

112. *See* Brauer, *supra* note 60, at 379.

113. Scheb, *supra* note 87, at 172.

114. *See* Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998).

115. *See* Michael J. Slinger et al., *The Senate Power of Advice and Consent on Judicial Appointments: An Annotated Research Bibliography*, 64 NOTRE DAME L. REV. 106 (1989).

116. Jerome B. Meites et al., *Justice James D. Heiple: Impeachment and the Assault on Judicial Independence*, 29 LOY. U. CHI. L.J. 741 (1998).

ruling in *United States v. Bayless*[117] led to Senator Dole threatening impeachment if Judge Baer did not reverse his ruling.[118] President Clinton intimated that he might request Judge Baer's resignation if the ruling remained the same.[119] In a Motion for Reconsideration, Judge Baer subsequently ruled for the government stating that the search was justified as a result of additional evidence produced by the government.[120]

The merit selection system is also undemocratic. Merit selection insulates judges from the electorate and decreases accountability.[121] Judges are selected from a small group of candidates, and the nomination process is done in secret.[122] Voter apathy and ignorance about qualifications is demonstrated by low voter turnout in retention elections.[123] Furthermore, retention elections allow for lifetime tenure since few candidates are defeated in retention elections.[124]

C. *Elections*[125]

Approximately 82% of state appellate court judges and 87% of state trial court judges run in some type of election.[126] Thirty percent of trial judges have initial terms of four years or less.[127] Initial terms for 28% of appellate judges are two years or less.[128]

Although the majority of judicial elections are uncontested, elections are becoming more contentious and malicious.[129] Single issues such as the "death penalty, criminal law enforcement, and reproduction choices have assured controversial elections."[130] The dominant issues in elections systems are the effect of judicial accountability to the elector-

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117. 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated on reconsideration by* 921 F. Supp. 211 (S.D.N.Y. 1996) (ruling that under the Fourth Amendment police officers did not have reasonable suspicion of criminal activity for an investigative stop of the defendant's automobile and as a result suppression of the videotaped confession and $4 million in drugs was warranted).

118. Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*, 60 MD. L. REV. 59, 74 (2001).

119. *Id.*

120. United States v. Bayless, 921 F.Supp. 211, 216-17 (S.D.N.Y. 1996).

121. *See* Dougherty, *supra* note 94, at 322.

122. *Id.* at 319.

123. *See id.* at 322.

124. *See* Champagne, *supra* note 59, at 62. Only one percent of judges were defeated in retention elections. *Id.*

125. *See* Harold See, *supra* note 4, at 142 (defining popular elections as the direct and contested election by the populace).

126. *See* Report and Recommendation of the American Bar Association Task Force on Lawyer's Political Contributions, Part III, at 3 n.1 (July 1998), *at* http://www.abanet.org/scripts.asp.

127. *Id.* at 4 (increasing to 44% when mid-term vacancies are included).

128. *Id.* (increasing to 69% when judges are appointed to mid-term vacancies are included).

129. *See id.*

130. *See* Kathryn Abrams, *Some Realism About Electorism: Rethinking Judicial Campaign Finance*, 72 S. CAL. L. REV. 505, 512 (1999).

ate, the appearance of judicial impropriety, and corruption resulting from skyrocketing campaign costs and fundraising.

1. Partisan Elections[131]

Partisan elections resulted from the popular democracy period during Andrew Jackson's presidency and were a reaction to appointment methods.[132] "Wealthy landowners needed to control the judiciary because they were constantly engaged in landlord-tenant disputes."[133] Elections were instituted to promote "Jacksonian Democracy" and break landowner judicial control.[134]

The popular sentiment was that the appointment method produced corrupt, elitist, and arrogant judges because judicial discretion was unconstrained by the majority's will.[135] Popular opinion was that appointed judges "invalidated laws enacted by democratically elected legislatures."[136] As a result, "elections allowed the judiciary to unite popular support to counter legislative and executive power."[137] Currently, eight states use partisan elections as a judicial selection method[138] "with 33.9% of state judges running in contested partisan elections."[139] Partisan elections serve democratic and constitutional principles and promote participation[140] by ensuring judicial accountability.[141] There is a public expectation that judges should be answerable for misconduct.[142] Incompetent judges can be removed by facing the electorate for periodic elections. Since judges, through interpreting statutes, act like legislators and

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131. *See* Harold See, *supra* note 5, at 142 (defining partisan election as a judicial candidate being identified with a political party).

132. *See* Webster, *supra* note 1, at 16. The original 13 colonies had 3 appointment systems: appointment by the legislature, by the governor and a council, and appointment by the governor with council approval. *Id.* at 13.

133. Lozier, *supra* note 80, at 918. *But see* Dubois, *supra* note 1, at 35 (explaining that partisan elections were influenced by moderate Whig, Republican and Democratic lawyers and judges).

134. *See* Berkson, *supra* note 82, at 71.

135. *See id.* at 71 n.78.

136. *See* Lozier, *supra* note 80, at 918.

137. Dubois, *supra* note 1, at 35.

138. Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 134 (1998). Alabama judges are reelected every 6 years. MCFADDEN, *supra* note 55, at 178. Illinois appellate court judges are elected for an initial 10-year term and retention elections every 10 years thereafter. *Id.* at 180. Circuit court judges are elected to an initial 6-year term and then retention elections every 6 years. *Id.* All North Carolina judges are elected for 8-year terms of office. *Id.* at 184. In Pennsylvania, all judges are elected for 10-year terms and then subject to retention elections every 10 years. *Id.* at 185. In Texas, appellate judges are elected for 6-year terms and district court judges for 4-year terms. *Id.* at 186. West Virginia appellate judges are elected every 12 years and circuit court judges for 8-year terms. *Id.* at 187.

139. Chemerinsky, *supra* note 139, at 136.

140. *See* Hansen, *supra* note 54, at 70.

141. *Id.*

142. *See* Lubet, *supra* note 11, at 60.

make new law and public policy, they should be responsible to the electorate for their decisions.[143]

Party identity simplifies fund raising efforts and increases judicial campaign contributions.[144] Identity with a particular party may aid a candidate in garnishing votes for those who vote by party identification.[145] However, party identity can also hurt particular candidates and result in party candidates being defeated if voters are reacting against a specific party, particularly in off-year elections.[146]

Opponents argue that current campaign elections and "fundraising practices are a serious threat to judicial independence."[147] Elections create concerns about judicial corruption and impartiality.[148] The view is that current elections and campaign financing create an impression of impropriety, bringing into question a judge's ability to impartially interpret and apply laws and administer justice.[149] "There is also a concern that if judges can be influenced by campaign contributions then they will be unable to resist the difficulties that a judge faces through friendships and associations that come before the court."[150]

One reason for the high costs of judicial campaigns is the use of television and radio to educate the public about judicial elections.[151] "Commercial slate mailers have also increased the costs of election campaigns because positions are often sold to the candidate who can pay the most."[152]

It is further argued that "judicial decision-making will be influenced by the fear that the electorate will retaliate for unpopular decisions."[153] Judicial decisions protecting constitutional rights, the environment, and consumer interests are producing visible and controversial judicial actions resulting in more contentious and costly judicial elections.[154] It is argued that the fear of removal by the electorate pressures a judge to "neutralize or avoid criticism" by tempering judicial decisions and re-

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143. *See* Harding, *supra* note 20, at 1163.

144. *See* Brauer, *supra* note 60, at 372. Currently, Minnesota's Code of Judicial Conduct, Canon 5, forbids party endorsement. However, there is a case currently pending in the Eighth Circuit to allow endorsements. *Id.*

145. *See* Harold See, *supra* note 5, at 142-43.

146. *See id.*

147. Chemerinsky, *supra* note 139, at 134.

148. *See* Brauer, *supra* note 60, at 374.

149. *See id.*; Chemerinsky, *supra* note 139, at 138.

150. Thomas R. Phillips, *Comment*, 61 LAW & CONTEMP. PROBS. 127, 136-37 (1998).

151. Abrams, *supra* note 130, at 525.

152. *Id.*

153. Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 540 (1999).

154. *See* Roy A. Schotland, *Statement of Roy A. Schotland Before the Joint Select Committee on the Judiciary of the Texas Legislature*, 72 JUDICATURE 154, 155 (1988).

ducing the judge's willingness to protect minority rights and individual liberties.[155]

However, judicial activism should rarely occur in state trial courts. Trial court decisions generally apply legal rules to facts. Rarely does a trial court engage in constitutional issues or statutory interpretation, which are the two largest areas that produce judicial activism and controversial decisions. Additionally, appellate courts serve as an institutional check on judicial activism in trial courts.

One commentator argues that since popular sentiment plays no role in judicial decision-making or function it is inappropriate "to hold judges accountable to the will of the people."[156] However, this view is dependent on a belief that a judge simply applies law to a particular case and does not engage in policy making.[157] This argument is weakened when judicial decisions affect the greater populace. Furthermore, this argument does not take into account that a positive image of the judiciary is needed for the people to voluntarily obey the rule of law and not resort to self-help techniques.

Election rivals argue that judicial neutrality or the appearance of neutrality is threatened because contributors are attorneys, special interest groups, or litigants who appear before the judge.[158] It is feared that judges will not be able to render a decision in a case against those who are past or future contributors.[159] There is an additional concern that litigants, lawyers or others will actively campaign against a judge in retaliation for an unpopular decision.[160]

Attorney contributions are not as sinister as election rivals argue. First, attorneys rarely comprise greater than 50% of the contributors of a particular campaign.[161] Second, lawyers who are more frequently exposed to judges should know which judges are worthy of support and which are not.[162]

Opponents argue that the appearance of impropriety resulting from elections will erode public confidence in the judicial system.[163] The alarm is sounded that "no matter what, the appearance inevitably will be that the judges' rulings were bought and paid for."[164] High cost campaign fundraising and contentious elections discourage qualified judicial can-

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155. *See* Chemerinsky et al., *supra* note 13, at 76.

156. Krivosha, *supra* note 49, at 132.

157. *See id.* (defining "judging" as the act of deciding on the merits of a matter).

158. *See* Chemerinsky, supra note 139, at 138.

159. *Id.* at 134, 138.

160. *See id.*

161. *See* Schotland, *supra* note 155, at 155.

162. *See id.*

163. "[L]itigants and the public will perceive that decisions were influenced by money." Chemerinsky, *supra* note 139, at 138.

164. *Id.*

didates from running or seeking re-election.[165] Few competent lawyers are willing to surrender a successful legal career to engage in rigorous and expensive political campaigning.[166] Election antagonists further argue that judges are distracted from their jobs and instead focus on campaigning.[167] It is believed that voter apathy and ignorance results in voting along party lines and name recognition, and not on qualifications.[168]

However, it should be noted that opponents offer no empirical evidence that campaign fundraising actually affects judicial decision-making[169] or the existence of actual widespread judicial corruption.[170] In fact, a judge may have decided in a particular manner, regardless of a donation's source and size.[171] Additionally, judges are guided by a judicial code of conduct that limits improper behavior[172] by requiring recusal when a judge has a possible monetary outcome in a particular case.[173] However, one commentary cites evidence that questions a judge's impartiality in particular cases where a litigant is also a contributor.[174]

In Minnesota, judicial election behavior is limited by Canon 5 of the Judicial Code of Conduct, as well as the Fair Campaign Practices Act.[175] Canon 5 prohibits a candidate from personally soliciting campaign contributions.[176] Additionally, judicial candidates are expected to maintain a barrier between themselves and contributors by not knowing who contributed to their campaigns.[177] Furthermore, the Minnesota Ethics in Government Act[178] requires disclosure of campaign contributions.[179]

Elections also serve as a check on judicial discretion. Where there is a clear rule of law, a judge should apply the rule of law regardless of the

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165. *See* Webster, *supra* note 1, at 22.

166. *See* Lozier, *supra* note 80, at 921.

167. *See* Hill, *supra* note 49, at 2065-67.

168. *See* Dubois, *supra* note 1, at 45; *See also* Anthony Champagne, *Judicial Reform in Texas, in* JUDICIAL REFORM IN THE STATES 93, 97 (Anthony Champagne & Judith Haydel eds., 1993) (explaining how voters with limited knowledge rely on party labels to cast their votes).

169. *See* Chemerinsky, *supra* note 139, at 134, 138.

170. *See* Karlan, *supra* note 154, at 540.

171. *See id.*

172. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 1-5 (1999).

173. *See id.* at Canon 3E(1)(c); *see also* Judiciary and Judicial Procedure, 28 U.S.C. §§ 144, 455(b)(4) (1994) (applying to federal judges).

174. *See* Phillips, *supra* note 151, at 137.

175. *See* MODEL CODE, *supra* note 154, at Canon 5; *See also* Fair Campaign Practices, MINN. STAT. ANN. §§ 211B.01-.21 (West 1992 & Supp. 2001) (creating a criminal statute that restricts the written activity of elections; requires a county attorney to investigate any violations; and forbids campaign activities by public employees, undue influence, corporate contributions or bribery).

176. *See* MODEL CODE, *supra* note 154, at Canon 5C(2).

177. *See id.*

178. Ethics in Government, MINN. STAT. ANN. §§ 10A.01-.37 (West 1997 & Supp. 2001).

179. *Id.* at § 10A.20(3)(c). For example, a contribution of $2,000 or more from one source to an appellate court candidate or greater than $400 to a trial court judge must be reported within 48 hours, as well as disclosure of contributions of $100 or more. *Id.* at § 10A.20(5).

popularity of the law or the litigant.[180] Also, voter retaliation should be minimal or non-existent when judicial decisions are decided according to the unambiguous rule of law.[181] However, the electorate should be able to remove a judge when there is no clear rule of law and judicial discretion is at a maximum.[182]

Texas is the most frequently cited example of the evil of judicial elections. Candidates for Texas Supreme Court elections are spending millions of dollars.[183] In 1986, attorneys accounted for 80 to 90 percent of the total campaign funds, in three out of four campaigns, for three Texas Supreme Court seats.[184] In another case, one individual contributed more than 90% of the funds to an unsuccessful Texas Supreme Court candidate's campaign.[185]

Jack Hampton, a Texas District Court Judge, demonstrates the viability of the election system. Judge Hampton imposed a 30-year sentence, rather than life imprisonment, to a murderer of two gay men.[186] Hampton publicly justified the sentence with homophobic remarks.[187] The State Commission on Judicial Conduct censured Hampton, but did not remove him from office.[188] In 1992, gay rights groups organized to defeat his election for the Texas Court of Appeals.[189] This demonstrates that the election system and voter accountability is a viable selection method when the political apparatus fails to adequately address judicial misconduct.

There is little electorate interference with judicial independence.[190] Individual decisions are generally not known or examined by the electorate.[191] Lengthy terms of office ensure that unpopular decisions will lose their negative impact by the next election term.[192] Furthermore, most judicial incumbents are re-elected without opposition.[193]

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180. *See* Karlan, *supra* note 154, at 541.

181. *See id.*

182. *See id.*

183. For example, in 1994 and 1996, over $9 million was raised between seven candidates seeking Texas Supreme Court positions. *See* Hansen, *supra* note 53, at 70.

184. *See* Schotland, *supra* note 155, at 155.

185. *See* Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 149 (1988).

186. Lisa Belkin, *Report Clears Judge of Bias in Remarks About Homosexuals*, N.Y. TIMES, Nov. 2, 1989, at A25.

187. "I don't care much for queers cruising the streets picking up teen-age boys." *Id.*

188. *See Judge Is Censured Over Remark On Homosexuals*, N.Y. TIMES, Nov. 29, 1989, at A28.

189. *See Gay Rights Groups Hail Defeat of Judge in Texas*, N.Y. TIMES, Dec. 4, 1992, at B20.

190. *See* Karlan, *supra* note 154, at 543.

191. *See* Chemerinsky et al., *supra* note 12, at 76.

192. *See* Karlan, *supra* note 154, at 543.

193. *See id. But see* Webster, *supra* note 1, at 18 (arguing that contested judicial elections have increased, are more heated, and are generating more voter interest).

2. Political Action Committee ("PAC") [194] Contributions and Judicial Elections

North Carolina is an example of PACs' influence on judicial elections.[195] North Carolina judges are elected in partisan elections with PACs having great influence.[196] Thus, PACs are considered the major reason for escalating judicial election costs in North Carolina.[197]

There is a difference between PACs' influence in general political elections versus judicial elections. In general elections, PAC contributors expect to impact political decisions; however they do not expect to influence judicial decision-making.[198] Judicial codes of ethics governing campaign activities are responsible for the different expectations by insulating judicial candidates.[199] For example, Codes of Conduct often prohibit judicial candidates from making campaign promises other than faithfully executing their duties.[200]

Although the reality is that PACs have limited impact on judicial decision-making, there is a perception that judicial *quid pro quo* is occurring in secret between judicial candidates and PACs.[201] However, this perception is less significant in states where there are non-partisan elections, such as Michigan.[202]

D. Non-Partisan Elections

Currently, twelve states use non-partisan elections for judicial selection and retention.[203] Terms vary among the states from four to ten years.[204] Non-partisan judicial elections remove partisan political consequences while ensuring judicial accountability.[205] Such elections are more likely to produce a higher number of qualified judicial candidates than

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194. BLACK'S LAW DICTIONARY 1133 (7th ed. 1999); *see also Political Action Committee (PAC)*, MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA 2001 (Sept. 6, 2001), *at* http://encarta.msn.com (defining PACS and their role of soliciting campaign contributions).

195. *See* Brauer, *supra* note 60, at 381.

196. *See* Traciel V. Reid, *PAC Participation in North Carolina Supreme Court Elections*, 80 JUDICATURE 21, 29 (1996).

197. *See* Brauer, *supra* note 60, at 381.

198. *See* Reid, *supra* note 197, at 24.

199. *See id.*

200. *See* Brauer, *supra* note 60, at 381.

201. *See id.* at 382.

202. *See id.*

203. Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Oregon, Washington, and Wisconsin. SARA MATHIAS, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 142 (American Judicature Society ed., 1990).

204. *See* MCFADDEN, *supra* note 56, at 180-87.

205. *See* Webster, *supra* note 1, at 25 (explaining that candidates do not have to be loyal to party ideology or party factions); *See also* Champagne, *supra* note 59, at 63 (discussing how candidate merit, not party affiliation, drives non-partisan elections).

partisan elections.[206] The non-partisan election system allows for democratic participation while reducing judicial turnover, which ensures stability.[207]

Non-partisan election opponents argue that voter ignorance is prevalent in non-partisan elections.[208] Because of the absence of party identity it is believed that in non-partisan elections, voters are more likely to vote based on name recognition and ballot position than based on information.[209] However, one study suggests that voter awareness differs according to the type of election.[210] Voters in primary elections are more civic minded and knowledgeable than general election voters.[211]

It is believed that attorneys will have a greater influence over non-partisan elections.[212] Voters being less aware of judicial qualifications will rely more on expert advice from the legal community in electing candidates.[213]

As in partisan elections, opponents argue that increased non-partisan elections have eroded public confidence in the impartiality, dignity and independence of judges.[214] First, non-partisan elections are often cited for exorbitant campaign costs.[215] Second, opponents argue that candidate's are becoming more aggressive in elections by attacking their opponents, stating their personal views on legal and political issues, and soliciting support from PACs and special interest groups.[216]

Ohio judicial elections are a combination of partisan and non-partisan elements. Partisan committees nominate candidates, candidates compete in partisan primaries and are elected in non-partisan elections.[217] The Ohio Supreme Court in 1995 enacted campaign financing and fund-raising rules to fight the negative perception of partisan influences.[218] These regulations limit contributions by individuals, PACs, and political

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206. *See* Champagne, *supra* note 59, at 63 (explaining that votes in a non-partisan election are cast on a candidate's qualifications, rather than party association).

207. *See* Thomas E. Brennan, *Nonpartisan Election of Judges: The Michigan Case*, 40 SW. L.J. 23, 26 (1986) (discussing how judicial stability is aided because incumbents in non-partisan elections are often unopposed in reelection campaigns).

208. *See* Champagne, *supra* note 59, at 64.

209. *See* Lozier, *supra* note 80, at 920.

210. Charles H. Sheldon & Nicholas P. Lovrich Jr., *Voter Knowledge, Behavior and Attitudes in Primary and General Judicial Elections*, 82 JUDICATURE 216, 218 (1999).

211. *See id.*

212. *See id.*

213. *See id.*

214. *See Initial Report on Judicial Elections and Ethics*, 83 MARQ. L. R. 129 app.d at 131 (1999).

215. *See* Brauer, *supra* note 60, at 368, 376.

216. *See Initial Report*, *supra* note 214, at 131.

217. *See* Brauer, *supra* note 60, at 380.

218. *See* Nicole C. Allbritain, *One Step Closer to Merit-Based Judicial Selection: Ohio's New Limitations on Judicial Campaign Contributions and Expenditures*, 64 U. CIN. L. REV. 1323, 1324 (1996).

parties.[219] Additionally, non-uniform expenditure limits were imposed depending on the court and the size of the population in the court's district.[220] Regulations were also adopted limiting the time frame for which campaign contributions could be raised.[221] The campaign finance reform's goal was to strengthen the judiciary's legitimacy by enhancing judicial independence and accountability.[222]

Whether campaign reforms will have an impact remains to be seen. Current election rhetoric still focuses on whether elections serve democratic principles and if judges are impartial.

Although it is still too early to measure the practical effects of Ohio's reform laws, the courts are testing the law's constitutionality.[223] Ohio state court judges sought an injunction, alleging the expenditure limits violated their First Amendment rights of free speech.[224] Relying on *Buckley v. Valeo*,[225] the District Court stated that "a statute may constitutionally restrict campaign finances to prevent corruption or the appearance of corruption."[226] The court rejected the argument that judicial election is different from legislative election speech because of the uniqueness of judicial office.[227] The Court upheld the constitutionality of campaign contributions, but enjoined the imposition of the expenditures.[228] *Suster's* ruling is important when trying to draft reform proposals to curb the negative effects of large campaign expenditures. Unless the court allows limits on expenditures, expensive elections will continue.

However, it should be noted that the United States Supreme Court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*,[229] recently held that coordinated party expenditure limits were not unduly burdensome to political parties and as a result passed First Amendment constitutional scrutiny.[230] The Court relied on the argument that party expenditures will result in influence and corruption of candidates.[231] The Court reasoned that coordinated party expenditures "perform functions more complex than simply electing candidates...they

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219. *See* OHIO JUDICIAL CODE OF CONDUCT CANON 7(C)(5)(a) (West Supp. 2001).

220. *See id.* at Canon 7(C)(6)(d) and 7(C)(8). Canon 7(C)(6)(d) limits expenditures for a candidate for the court of common pleas to $75,000.

221. *See id.* at Canon 7(4)(a)-(c).

222. *See* Allbritian, *supra* note 218, at 1341.

223. *See* Suster v. Marshall, 951 F. Supp. 693 (N.D. Ohio 1996), *aff'd*, 1998 FED App. 0228P (6th Cir.).

224. *Suster*, 951 F. Supp. at 696.

225. 424 U.S. 1 (1976) (holding that campaign expenditures burdened core political speech and therefore must be narrowly tailored to serve a compelling state interest).

226. *See Suster*, 951 F. Supp. at 697.

227. *See id.* at 698-99.

228. *See id.* at 695.

229. 2001 WL 703912 (June 25, 2001).

230. *Federal Election Commission*, 2001 WL 703912, at *10.

231. *See id.* at *12.

act as agents for spending on behalf of those who seek to produce obligated officeholders."[232] It should be noted that *Federal Election Committee* applies to coordinated party expenditures to political candidates and does not apply to individual candidate expenditures.[233] As a result, in judicial elections candidates receiving money from political parties will be affected, but candidates will still be allowed to expend large amounts of money in elections.

IV. RECOMMENDATIONS FOR CHANGE IN ELECTION SYSTEMS

In order to adequately satisfy the competing concerns of judicial accountability and independence there must be reforms in all systems. Rather than replacing elective systems with appointment or merit systems, reforms should be instituted that increase voter participation, and eliminate concerns of judicial corruption.

Elections provide an aspect of judicial accountability and popular democracy that is absent in lifetime appointment systems. However, concerns of judicial impropriety and corruption need to be addressed. Term length, campaign financing, and campaign conduct are three areas where reforms must be instituted.

To address these concerns and allow for greater independence, judicial terms should be lengthened.[234] One recommendation is a minimum eight-year term for all judges.[235] Longer terms add to the attractiveness of a judicial position by enhancing job security and decreasing competition for judicial seats.[236] Longer terms also allow a judge to focus more on applying the law rather than on fundraising and campaign efforts.[237] Additionally, longer terms will decrease the influence that campaign costs have on judicial elections. Furthermore, longer terms promote judicial accountability and aid voter awareness. Voters will better be able to evaluate a candidate's judicial record and professional behavior.[238] However, longer terms can also isolate judges from community sentiments.[239] In order to prevent judicial isolation, terms should be limited to no longer than 6 to 8 years.

Short terms subject judges to the political pressures of the electorate or the appointing authority more often. The problem associated with shorter terms is the need for judges to run more often and increasing the appearance of impropriety and corruptibility associated with campaign

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232. *Id.*

233. *See id.* at *17.

234. Report and Recommendation of the American Bar Association, *supra* note 127 at 4.

235. *See id.* These minimum terms apply to all judges whether they are elected or appointed.

236. *See id.* at 5.

237. *See id.*

238. *See id.* However, this is dependent on voters having access to disciplinary procedures that may have been instituted against a judge.

239. *See id.*

financing.[240] Additionally, shorter terms discourage qualified candidates from initially running and promote instability since incumbents will not run for re-election.[241] Electorate participation is thereby promoted.[242]

Campaign financing concerns also need to be addressed. Another recommendation for improving the elective system is to provide public funding for political candidates.[243] However, there is a debate on the scope of public funding to political candidates. Some argue that there should be modest public funding while another view is there should be complete funding thereby assuring impartiality.[244] One method would be for state legislatures to fund campaigns.[245] The legislature would establish a fund to be split among all candidates or guarantee a particular dollar amount per candidate.[246] This second alternative would allow a candidate to better plan campaign expenditures. It would be difficult for a candidate to effectively budget in a pool arrangement since the ultimate dollar amount would vary according to the number of candidates and legislative expenditures which could not be known before budgeting and spending.

Another reform measure is to provide equal funding among all candidates.[247] However this raises constitutional concerns. The United States Supreme Court in *Buckley v. Valeo*[248] held that limits on campaign expenditures violated a candidate's First Amendment rights.[249] A reform measure that provides for equal funding to all candidates is simply an expenditure limit in disguise. However, given the Court's *Federal Election Commission* decision, expenditures by a group could be limited and as a result reduce the perception of influence and corruption produced by elections.

Rather than limiting expenditures, there should be reasonable limits on campaign contributions and establishment of mandatory disclosure. Campaign contribution limits and full disclosure requirements will eliminate public perception that judicial decisions are being bought and paid for. Full disclosure will allow the electorate to determine who is giving what amounts to which judges, and adjust their political philosophy accordingly.

Furthermore, less expensive advertising means must be employed to educate the public.[250] One alternative is for candidates to use free voter

240. *See id.* at 4.
241. *See id.*
242. *See id.*
243. *See* Phillips, *supra* note 151, at 135.
244. *See id.* at 135-136.
245. *See* Brauer, *supra* note 60, at 388.
246. *See id.*
247. *See id.* at 389-390.
248. 424 U.S. 1 (1976).
249. *Buckley*, 424 U.S. at 58-59.
250. *See supra* notes 152-53 and accompanying text.

pamphlets if they agree not to use slate mailers.[251] Internet access to voter pamphlets could also provide low cost alternatives.[252]

Additionally, eliminating limits on judicial speech during elections will provide for alternative methods of communication. The elimination of constraints on judicial speech will serve First Amendment values, democratic principles, and allow for a more informed body politic. The United States Supreme Court in *New York Times v. Sullivan*[253] stated that there is "a profound national commitment to a principal that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[254] Judges should not be immune from criticism simply because reputations may be injured.[255] Rather than limiting speech, the Court recognized that the counter to negative or damaging speech is to allow more speech.[256] In this context, judges should be allowed to counter negative campaign rhetoric by engaging in more speech.

However, the Eighth Circuit Court of Appeals upheld restrictions on judicial candidate speech determining that the restrictions do not violate the First Amendment.[257] The court reasoned that there is an inherent difference between the legislative and executive branches and the judiciary.[258] The court determined that in executive and legislative elections "the public has the right to know the details of the programs that candidates propose to enact into law and administer."[259] However, the court stated that the judicial system is different as it is "based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government."[260] The court further reasoned that states may regulate judicial speech because a "judicial candidate simply does not have a First Amendment right to abuse his office."[261]

The argument that judges may be buying votes by promising to decide a certain way in particular matters is unlikely. First, appellate review serves as a check on judicial abuse of discretion. Second, the true value of campaign speech will allow a candidate to counter rhetoric that attacks a judge's particular decision. A candidate, through the allowing of greater speech will be able to explain the basis for a particular decision.

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251. *See* Abrams, *supra* note 131, at 526.
252. *See id.*
253. 376 U.S. 254 (1964).
254. *Sullivan*, 376 U.S. at 270.
255. *See id.* at 273.
256. *See id.* at 304.
257. Republican Party of Minnesota v. Kelly, 247 F.3d 854 (8th Cir. 2001).
258. *Kelly*, 247 F.3d at 862.
259. *Id.*
260. *Id.*
261. *Id.*

Judicial candidates will be able to respond and neutralize single issue groups attacking and defeating judicial candidates.

Additionally, eliminating restrictions on speech educate the body politic.[262] Through campaign speeches, candidates can inform the public as to the functions of a judge and the system.[263] Candidates need to be able to tell the public why an issue is important, resulting in institutional respect and legitimacy. Finally, in order to create a more informed voting public, voting guides should be printed and distributed.[264]

Reforming the election system will not address all the concerns with the perception of impropriety that is inherent in the debate. The lack of respect for the legal profession lends to the decreased respect for judges. Popular culture is currently replete with shows about attorneys' and judges' misconduct.[265] The People's Court, Judge Judy, Judge Mills Lane to mention a few come into people's homes on a daily basis. As popular culture, these shows reflect current popular beliefs and attitudes.

These shows may be an individual's only contact with the judicial system and therefore, the only information that serves as a basis for an individual's beliefs. In order to gain viewers and increase ratings the judges on these shows must create drama and controversy. The judges on these shows frequently fail to maintain decorum through lecturing the litigants and refusal to hear all the evidence. This negative perception of the judicial system is perhaps the most difficult perception to neutralize when attempting to influence voters and win elections. However, this is not a failure of the election system but rather a failure of the institution as a whole to win the people's respect and confidence.[266]

V. CONCLUSION

The tension between judicial accountability and independence is an ongoing debate that encompasses concerns of a judge's social and political role and democratic principles. Furthermore, judges must maintain an appearance of fairness and impartiality in order to foster respect for the institution that legitimizes the judiciary in the public's eye. The founding

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262. *See* Harold See, *supra* note 5 at 141-42.

263. *See id.*

264. *See id.*

265. Inside the Law Specials on Lawyers and Democracy: The Legal Profession, *available at* http://www.abanet.org/litigation/programs/inside.html (last visited June 27, 2001). One survey showed that one out of every five Americans have no respect for the legal profession. *Id.*

266. *See* 1999-2000 Public Opinion of the Courts Study Final Report, *available at* http://www.courts.state.mn.us/cio/docs/public_opinion.htm (last visited Aug. 7, 2001). It should be noted that a survey in Minnesota showed that seventy-eight percent of respondents had either "*a great deal* or *some confidence* in the Minnesota State Courts." *Id.* While thirteen percent had "*only a little* or *no confidence at all* in the Minnesota State Courts and twelve percent had little or no confidence in the United States Supreme Court. *Id.*

fathers recognized that states had election systems for state judges and did not suggest that states abandon the established system.

Although campaign costs have increased significantly in recent years, the solution is not to abandon elections. Instead election systems must address concerns and make substantive reforms. Campaign contributions must be limited, and candidates need to engage in greater speech in order to educate the electorate.