

# PUBLIC FUNDING OF JUDICIAL CAMPAIGNS: THE NORTH CAROLINA EXPERIENCE AND THE ACTIVISM OF THE SUPREME COURT\*

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In recent years, the problem of selecting judges to sit on the highest state courts has become a national crisis. North Carolina remains among the states whose constitutions require competitive elections of all its judges. Presently, all candidates for its judicial offices must first compete for election in a non-partisan primary, a system motivated by the desire to maximize the power of the state's citizen-voters to choose their judges and hold them accountable for their fidelity to the law.<sup>1</sup> Some observers have continued to celebrate such judicial elections as an honorable democratic empowerment,<sup>2</sup> while others have not.<sup>3</sup> The disagreement has continued for almost two centuries, but has encountered new impediments over the last half century and especially in the last decade, largely as a result of decisions of the Supreme Court of the United States extending the meaning and application of the First Amendment to the Constitution of the United States far beyond the expectations of those who wrote or ratified it, or many who have since proclaimed its virtue and importance.

There are four enduring problems with electing judges. These are (1) candidates' campaign promises, which may, if they are elected, impair their independence to make future decisions on the law and

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1. In a non-partisan primary, the top two vote-getters move on to the general election, regardless of political affiliation. Such a primary is required when the number of candidates is more than double the number of the available seats. In 1996, the General Assembly enacted a law requiring superior court judges to be elected in this way. Act of Aug. 2, 1996, ch. 9, § 7-20, 1996 N.C. Sess. Laws 2d Extra Sess. 536, 541-44 (codified as amended at N.C. GEN. STAT. § 163-321 (2009)). In 2001, similar legislation was passed for district court judges. Act of Sept. 6, 2001, ch. 403, sec. 1, § 163-321, 2001 N.C. Sess. Laws 1548, 1548 (codified as amended at N.C. GEN. STAT. § 163-321 (2009)). And in 2002, the same was passed for the state supreme court and court of appeals. Act of Oct. 10, 2002, ch. 158, sec. 7, § 163-321, 2002 N.C. Sess. Laws 615, 626 (codified as amended at N.C. GEN. STAT. § 163-321 (2009)); see *History of Reform Efforts: North Carolina, Formal Changes Since Inception*, AMERICAN JUDICATURE SOCIETY, [http://www.judicialselection.us/judicial\\_selection/reform\\_efforts/formal\\_changes\\_since\\_inception.cfm?state=NC](http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=NC) (last visited Aug. 25, 2011). On earlier reforms, see James C. Drennan, *Judicial Reform in North Carolina*, in *JUDICIAL REFORM IN THE STATES* 19, 19-24 (Anthony Champagne & Judith Haydel eds., 1993).

2. *E.g.*, Michael DeBow et al., *The Case for Partisan Judicial Elections*, FEDERALIST SOCIETY (Jan. 1, 2003), <http://www.fed-soc.org/publications/detail/the-case-for-partisan-judicial-elections> (arguing that judicial elections are preferable to other methods of choosing judges).

3. See, *e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726-29 (1995); Margaret H. Marshall, *Threats to the Rule of Law: State Courts, Public Expectations and Political Attitudes*, DAEDALUS, Fall 2008, at 122, 126-27.

the evidence presented by the parties; (2) other actions by candidates and their supporters who raise funds for campaign advertising may resemble or constitute corruption; (3) voter inattention and disinformation may result in poor popular choices; and (4) candidates' opportunity and temptation to engage in unwarranted degradation of rival candidates may diminish respect for prevailing candidates and thus for the law they administer. All four problems have been magnified by decisions of the Supreme Court of the United States extending the application of the First Amendment of the Constitution to empower candidates seeking election to judicial offices, without regard for constraints imposed by state law:

- (1) to disparage rival candidates;<sup>4</sup>
- (2) to promise specific decisions in future cases;<sup>5</sup> and
- (3) to seek and accept campaign contributions from litigants in pending or future cases, including even from immortal business corporations not entitled to vote but who have stakes in legal questions that the elected judges might some day be required to decide.<sup>6</sup>

The Court has also disabled state governments from limiting the expenditures of a candidate's own personal funds if one should choose to buy the office with advertising, as some candidates in other states have.<sup>7</sup> And the Court has also now prohibited states from discouraging large campaign contributions to, or expenditures of, judicial candidates by protecting their rivals with matching funds.<sup>8</sup>

The gravity of the perils to judicial independence created by these Supreme Court activist extensions of the First Amendment has been exhibited in many states. In no state has the effort to meet the challenge to its system of selecting judges been more vigorous than in North Carolina. The device of the non-partisan primary, introduced in North Carolina in 1996, alleviates none of these problems,<sup>9</sup> but some had been reduced by the scheme of public funding, introduced six years later in 2002.<sup>10</sup> This Article provides an account of that effort

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4. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 264, 270–71 (1964).

5. See *Republican Party of Minn. v. White*, 536 U.S. 765, 787–88 (2002).

6. See *Citizens United v. Fed. Election Comm'n.*, 130 S. Ct. 876, 913 (2010).

7. See *Davis v. Fed. Election Comm'n.*, 554 U.S. 724, 740–41 (2008).

8. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011).

9. Act of Aug. 2, 1996, ch. 9, sec. 7, § 163-322, 1996 N.C. Sess. Laws 2d Extra Sess. 536, 541 (codified as amended at N.C. GEN. STAT. § 163-322 (2009)).

10. Act of Oct. 10, 2002, ch. 9, sec. 1, § 163-278.61, 2002 N.C. Sess. Laws 615, 616 (codified as amended at N.C. GEN. STAT. § 163-278.61 (2009)).

and of a reform currently advanced by the North Carolina Bar Association that is responsive to the excesses of the Supreme Court. This Article will trace the history of judicial elections, both in North Carolina and around the nation, in order to better analyze the current system in North Carolina.

Part I focuses on the nineteenth century development of state judicial elections as a means to solve corruption and create judicial independence, specifically highlighting the developments in North Carolina. Part II discusses the progressive reforms of judicial elections that occurred in some, but not all, states during the twentieth century. Part III discusses the enduring problems of judicial elections and how those problems have been magnified by national politics and Supreme Court rulings during the past half-century. Part IV reviews North Carolina's legislation, which attempts to ensure independence in a system of judicial elections. Lastly, Part V discusses the problems that are left unaddressed by the North Carolina legislation and proposes additional reform. The Article concludes that reasonable citizens of North Carolina have no choice but to recognize that the Court's "activist" decisions have rendered unworkable the provisions of their state constitution governing the election of judges, even while demonstrating the case for a political system holding high court judges accountable for their political decisions.

#### I. THE ENIGMA OF JUDICIAL INDEPENDENCE IN A DEMOCRACY

The central issue in these matters is judicial independence that is indispensable to the integrity of law but also a potential source of abuse. In 1912, President William Howard Taft, while campaigning for re-election, proclaimed that he loved judges and loved courts. "They are my ideals," he said, "that typify on earth what we shall meet hereafter in heaven under a just God."<sup>11</sup> Alas, would that it were so! Judges of all ranks and jurisdictions are afflicted with the usual array of human failings.<sup>12</sup> Even the best and most professional judges, who carefully read and faithfully enforce legal texts, are

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11. Jeffrey B. Morris, *What Heaven Must Be Like: William Howard Taft as Chief Justice, 1921-1930*, 1983 SUP. CT. HIST. SOC'Y Y.B. 80, 80. For the speech that President Taft delivered on judicial administration, see generally William H. Taft, *The Delays of the Law*, Address Before the Virginia Bar Association (Aug. 6, 1908), in 18 YALE L.J. 28 (1908) (discussing "the delays and inequalities in the administration of justice").

12. For an account of the many human failings of judges, see Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1120-21 (2009).

inevitably influenced by the moral and political values they bring to the task and by their emotional conditions, including those underlying their moral and political values. And even the best judges are not immune to self-centered concerns for their professional reputations, personal effectiveness in influencing public affairs, continued employment, or possible promotion to a higher office.<sup>13</sup> Indeed, it has been aptly said that jurors are the only public officials lacking ambition.

We hope that our judges will suppress consideration of such personal interests. But somewhat inconsistently, we all prefer that our judges bring our own shared values to the tasks of interpreting and enforcing legal texts. Given the human failings that our judges share with the rest of us, the conflicting values that shape their and our understandings of what legal texts mean, and also given the large political role acquired by high courts in the American constitutional scheme, the selection of judges is an extraordinarily sensitive task for which no very good method has yet been found. Indeed, this author once heard an eminent jurist from a western state proclaim “there is no way to pick judges that is worth a Goddamn.”

The Founders who drafted the eighteenth century state and federal constitutions reflected only briefly on the problem of judicial independence and integrity. For the federal judiciary, they simply agreed to a system resembling that established by the English Parliament for the judges selected by the Crown who sat in the common law courts.<sup>14</sup> The Founders preferred the eighteenth century model English judge to their colonial judges selected by the Privy Council, who had served at its pleasure. Many of the colonial judges had been dutifully hostile to the War for Independence and had fled the country when that war was over. As a group, they were so mistrusted by the revolutionaries as to be the subject of protest in the

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13. For recent reflections on the self-indulgence of Justices of the Supreme Court of the United States, see generally DAVID R. DOW, *AMERICA'S PROPHETS: HOW JUDICIAL ACTIVISM MAKES AMERICA GREAT* (2009); DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* (2009); ROBERT F. NAGEL, *UNRESTRAINED: JUDICIAL EXCESS AND THE MIND OF THE AMERICAN LAWYER* (2008); H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* (2008). Frank Cross provides a formidable empirical demonstration that “[j]udicial decision making clearly involves a mix that includes some ideological influence, considerable legal influence, and undoubtedly other factors.” FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 177 (2007).

14. See, e.g., Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.). For an account of its role in England, see generally I. Namani Tarkow, *The Significance of the Act of Settlement in the Evolution of English Democracy*, 58 POL. SCI. Q. 537 (1943) (tracing the influence of the Act of Settlement throughout history and the courts).

Declaration of Independence.<sup>15</sup> The roles of federal judges would be narrowly confined, and so they could be selected by the President and confirmed by the Senate (in lieu of appointment by the King) and, like common law judges, would hold office “during good [b]ehaviour.”<sup>16</sup>

Imperfections in this federal scheme were almost immediately exposed. Two of President Washington’s appointments, Judge John Pickering and Justice Samuel Chase, were appointed as a favor to their senators. In each case, the senator’s nomination was made to win the approval of fellow citizens who wished to be rid of the judge in question. Citizens of New Hampshire wished to be relieved of the services of the alcoholic Judge Pickering.<sup>17</sup> And, citizens of Maryland wished to be relieved of the services of Justice Chase, who was widely regarded as corrupt.<sup>18</sup> The House of Representatives later impeached both; Pickering was removed from the federal bench,<sup>19</sup> but Chase narrowly survived removal.<sup>20</sup>

Meanwhile, John Marshall invented the novel “opinion of the Court” to replace the individual oral responses of judges to arguments, which had been the practice of the common law judges on whom the federal officers were modeled.<sup>21</sup> The signed opinion of the court, especially when employed to resolve detected ambiguities in constitutional texts, was a lawmaking device that transformed the political role not only of the Supreme Court of the United States, but

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15. See THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (“He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.”).

16. U.S. CONST. art. III, § 1.

17. Efforts had been made to remove Pickering from his position as Chief Justice of New Hampshire for reasons of insanity perhaps associated with alcoholism. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 70 (1971). His appointment to the federal bench where the workload was light apparently compromised the matter.

18. See JAMES HAW ET AL., *STORMY PATRIOT: THE LIFE OF SAMUEL CHASE* 162–76 (1980).

19. ELLIS, *supra* note 17, at 69–75; 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–1815*, at 211–15, 234–38 (1981).

20. Richard E. Ellis, *The Impeachment of Samuel Chase*, in *AMERICAN POLITICAL TRIALS* 57–78 (Michael R. Belknap ed., 1981); HAW ET AL., *supra* note 18, at 240.

21. The first appearance of the “opinion of the Court” came in the first decision rendered after the appointment of Marshall. See 2 HASKINS & JOHNSON, *supra* note 19, at 383–87. There was a precedent for such a device in the opinions of the Privy Council giving advice to the Crown, but the Council was not primarily a judicial institution. See generally John P. Dawson, *The Privy Council and Private Law in the Tudor and Stuart Period: II*, 48 MICH. L. REV. 627 (1950) (distinguishing the Privy Council from lower courts by their lack of appellate review).

also of the high courts of states that adopted that same instrument of lawmaking. Whose moral and political tastes would be reflected in the constitutional and other law made in their published opinions? Diverse groups had reason for concern.

For many decades, the political role of the federal courts remained a relatively minor issue. Those courts, whose dockets were largely devoted to diversity and admiralty cases, seldom decided matters of great public concern, and devices were found to undo those few Supreme Court decisions that were widely disapproved.<sup>22</sup> State courts were otherwise. The Kentucky legislature set the standard for others in 1824 by abolishing its highest court in order to punish its judges' tendency to favor creditors against debtors, but that action was only a sequel to earlier feuds over who should control the judicial power of that commonwealth.<sup>23</sup> Issues of debtor-creditor relations were unpleasant everywhere because economic deflation impeded the repayment of debt. These issues tended to divide Whigs, who often favored the protection of the interests of creditors, from Democrats, who often sought to protect improvident debtors from losing their farms and homes. Other legislatures were more constrained but were under continuing pressure to take steps in the same direction.<sup>24</sup> And governors empowered to nominate citizens to judicial office were surely exposed to similar public mistrust of their willingness and ability to pick judges who would faithfully enforce the law.

One reason for popular mistrust of judges appointed by politicians was the state of the legal profession. During the century following the Revolution, the profession was generally unregulated. And it was open in many states to anyone who was politely introduced to a local judge by a local lawyer. Abraham Lincoln<sup>25</sup> and Thomas Cooley,<sup>26</sup> perhaps the two most eminent American lawyers of the nineteenth century, were admitted to the profession with no formal educational credentials whatsoever. Both the inherited English idea that law was an enterprise reserved for the upper class

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22. For a fuller statement of the history with more references, see Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 *LAW & CONTEMP. PROBS.*, Summer 1998, at 79, 81–99.

23. ARNDT M. STICKLES, *THE CRITICAL COURT STRUGGLE IN KENTUCKY, 1819–1829*, at 49–62 (1929).

24. See FREDERICK GRIMKE, *THE NATURE AND TENDENCY OF FREE INSTITUTIONS* 444–75 (John William Ward ed., 1968).

25. JOHN P. FRANK, *LINCOLN AS A LAWYER* 10–11 (1991).

26. See PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* 21 (1999).

and the more ancient Roman idea that law is a science known only to the intellectual elite were simply unacceptable to nineteenth century American voters. But the absence of firm control of admission to the bar left governors and legislators with very little basis for the selection of judges. So why not appoint a friend or political ally? Thus, a farmer with no legal training who expressed contempt for professional lawyers served as chief justice of New Hampshire from 1785 to 1797.<sup>27</sup>

Dissatisfaction with the judicial appointments made by governors was reinforced by a shared sense that judges should be made to know that they serve the whole society and ought therefore be accountable to voters. This was especially true as it became clear to many citizens that all American appellate judges were following the model of John Marshall and declaring many kinds of new law in their published judicial opinions. By the middle of the nineteenth century, in recognition of their political role, judges were elected in many states.<sup>28</sup> The practice led the French tourist Alexis de Tocqueville to observe that American politicians, including American judges, were greater sycophants than European courtiers, so quick were they to profess their belief in the superior wisdom of the electorate.<sup>29</sup> But this faith in the voters was comparative; it may have reflected not so much admiration for voters and the judges whom they elected as disdain for the limited wisdom and integrity of the legislators and governors who

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27. Chief Justice Dudley urged jurors to disregard the talk of lawyers; “[b]e just and fear not” was his instruction. WILLIAM PLUMER, JR., *LIFE OF WILLIAM PLUMER* 154 (A. P. Peabody ed., 1969). As far as the law was concerned, he said, “[i]t is our business to do justice between the parties, not by any quirks of the law out of Coke or Blackstone, books that I never read, and never will, but by common sense and common honesty as between man and man.” *Id.* In a famous charge to a jury, Dudley said:

You have heard, gentlemen of the jury, what has been said in this case by the lawyers, the rascals! . . . They talk of law. Why gentlemen, it is not the law we want, but justice. They would govern us by the common law of England. Trust me, gentlemen, common sense is a much safer guide . . . A clear head and an honest heart are worth more than all the law of the lawyers.

MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876*, at 57 (1976). Justice Dudley’s jurisprudence had an English ancestry in the utterances of the Levellers. See CHRISTOPHER HILL, *INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION REVISITED* 230–32 (1997).

28. EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 99–100 (1944). On the causes of this development, see generally Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 *AM. J. LEGAL HIST.* 190 (1993).

29. See I ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 289–90 (Henry Reeve trans., Nabu Press 2010) (1835).



were widely deemed unsuited for the task of selecting and governing politicized judges.

Judicial elections were also a product of a time when most lawyers and judges were well known to the agrarian communities of voters who would elect them. It was also a time in which political campaigns were the best available form of public entertainment and received the full attention of many of the all-male voters, most of whom could be expected to show up at the polls on election day with some personal information about those for whom they voted. No one got their information from costly television advertising. Thus, fashioned in the nineteenth century was the practice of electing judges by vote of the people, a practice that remains almost unique to America.<sup>30</sup>

Electing judges was just one of several important departures from common law traditions that marked nineteenth century reforms advanced by citizens of populist sentiment to empower citizens' right to self-government. Thus, populist sentiments were also advanced by: the assault on apprenticeship requirements for admission to the bar, which they rejected as undemocratic sanctuaries of privilege;<sup>31</sup> by the simplification of civil procedure by abolishing the ancient common law forms of action in order to reduce the amount of arcane knowledge needed to present a case in court;<sup>32</sup> by legitimizing the contingent fee;<sup>33</sup> and by the advent of the American Rule forbidding routine fee-shifting against losing parties<sup>34</sup> to protect the access of impecunious plaintiffs to judicial forums. Populists also disfavored the

30. For a comparison of American and European democracy, see generally EUROPEAN AND U.S. CONSTITUTIONALISM (G. Nolte ed., 2005). Well, there is an exception: Western Samoa, but theirs is a constitution that cannot be difficult to amend. For a compilation of constitutions, see generally CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flantz eds., 2011).

31. For brief accounts of their efforts in this field, see BLOOMFIELD, *supra* note 27, at 32–58; SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750–1900, at 91–116 (1991).

32. See CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 43 (1897); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 171 (1952); Steven N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 332–33 (1988).

33. See F. B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES 14–15 (1964); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 527 (1986).

34. See generally John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9 (discussing the history of the American Rule).

mysteries of judge-made law and promoted codification to make the law's texts equally accessible to all.<sup>35</sup>

While these reforms were being made, state constitutions grew in length, and many came to provide much more elaborate constraints on their judiciaries than could be found in the very succinct federal Constitution that left so much space to judicial interpretation. Of all the initiatives to revise state constitutions, the campaign to elect judges was perhaps the strongest and most keenly favored by the people.<sup>36</sup> Supreme Court of Ohio Justice Frederick Grimke provided the most lucid explanation of the time. Grimke explained that elected judges have greater independence from the unworthy influence of other officials and their mischievous partisan managers, and might thus be expected to secure greater trust of the people. He acknowledged the difficulty faced by voters in discerning the professional competence of judicial candidates, but endorsed as imperative the need to subordinate the judicial power to the collective will of self-governing citizens. He explained that it was not the primary aim of a judicial election to identify the professionally best-qualified person available to fill the office, or even the person whose political views or jurisprudence are preferred by voters. The primary aim was to assure that any person holding high judicial office will remember that he is merely a humble citizen of a republic representing his fellow citizens in the interpretation and enforcement of legal texts, a perspective less frequently detected in those appointed to judicial office for the period of "good behavior," as federal judges are. Voters in many states adhered to that vision of their constitution.

The considerations identified by Grimke were not without weight. Tocqueville was impressed by the relative measure of trust vested by Americans in their courts.<sup>37</sup> Francis Lieber, the Prussian immigrant and mid-century comparativist, shared that impression, although he was skeptical that electing judges could be made to work over the longer term.<sup>38</sup> But the high purpose of electing judges was expressed more recently by the late eminent federal judge, Richard

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35. See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 185-200* (1981). For a recent review of a very successful codification movement in nineteenth century Montana, and reconsideration of this initiative, see generally Andrew P. Morriss et al., *Debating the Field Code 105 Years Later*, 61 MONT. L. REV. 371 (2000).

36. See HAYNES, *supra* note 28, at 97-100; Nelson, *supra* note 28, at 190.

37. See 2 TOCQUEVILLE, *supra* note 29, at 325.

38. See FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 217-24 (Theodore D. Wolsey ed., 3d ed. 1880).

Arnold, who observed that “the courts, like the rest of the government, depend on the consent of the governed,” and they need often to be reminded of that dependence.<sup>39</sup> That was, and is, indeed the point of judicial elections.

## II. ESTABLISHING JUDICIAL ELECTIONS IN NORTH CAROLINA

North Carolina courts in the eighteenth century were primitive. Until 1799, there was no right to appeal an adverse judgment, and therefore no appellate court.<sup>40</sup> That year, the trial judges appointed by the governor were authorized to form a “court of conference” to meet twice a year to review one another’s decisions.<sup>41</sup> In 1805, that body was renamed as the supreme court, and in 1810, it was directed to reduce its decisions to written opinions, for which they were paid a modest additional fee.<sup>42</sup> And the judges were authorized to designate one of their colleagues as chief justice. In 1818, a separate appellate institution was established. The justices were then appointed by the Governor but with the assent of two-thirds of both houses of the General Assembly.<sup>43</sup> Although there were surely ample expressions of Jacksonian political views favoring the election of North Carolina judges in the antebellum years, it was not until the 1868 constitution was adopted that North Carolina judges were elected for eight-year terms.<sup>44</sup> One might view that new state constitution as a Lincolnesque assurance that “government of the people, by the people, for the people, shall not perish”<sup>45</sup> in North Carolina.

In 1894 and 1896, North Carolina judicial elections were bitterly contested by partisan rivals.<sup>46</sup> In 1900, the state’s supreme court

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39. Address of Judge Richard Arnold, in SYMP. ON JUDICIARY 12, 12 (Ark. Bar Found. 1989). Judge Arnold’s view of his role was almost surely influenced by his earlier experience as an elected office holder. He affirmed that “running for office [was] one of the biggest parts of [his] education,” and that he found it “very helpful as [he sat] on the bench to have had some experience in politics.” *Id.*

40. See Hon. Kemp P. Battle, *Address on the History of the Supreme Court*, 103 N.C. 339, 357–58 (Feb. 4, 1889).

41. *Id.*

42. *Id.* at 358.

43. Walter Clark, *History of the Supreme Court of North Carolina*, 177 N.C. 617, 620 (1919).

44. *Id.*

45. Abraham Lincoln, President of the United States of America, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in LAURENCE BERNES ET AL., *ABRAHAM LINCOLN THE GETTYSBURG ADDRESS AND AMERICAN CONSTITUTIONALISM* 14 (Leo Paul S. de Alvarez ed., 1976).

46. See HELEN G. EDMONDS, *THE NEGRO AND FUSION POLITICS IN NORTH CAROLINA 1894–1901*, at 34–35, 48–51 (1951).

declared unconstitutional legislation enacted in 1899 by the General Assembly.<sup>47</sup> The General Assembly responded by impeaching the two Republican members of the court deemed responsible for this indignity, but the impeachment did not receive the two-thirds vote in the Senate necessary to remove the justices from office.<sup>48</sup>

Lord James Bryce at the end of the nineteenth century, notwithstanding such troubled moments as these in North Carolina, assessed American state courts for an audience of English barristers and counselors as roughly equal in professional respect with the federal judges who were appointed by the President even though they lacked the royal affect associated with life tenure, a trait often attributed to Article III judges serving “during good [b]ehaviour.”<sup>49</sup>

### III. PROGRESSIVE REFORMS

The Progressive Movement of the early twentieth century transformed judicial elections in many states. Progressives of that time rested great hope in the ability of trained professionals to do the right thing in all fields of endeavor, but they also generally confided in the judgment and integrity of citizen-voters. Reformers of the Progressive era favored public elections, and so they devised referenda, partisan primaries,<sup>50</sup> and recall elections. A notable event of the era was President Taft’s veto of the admission of Arizona to statehood because its constitution, approved by the territory’s voters, included a provision for popular recall of a judge deemed responsible for an unpopular judgment.<sup>51</sup> The Arizona Constitution was amended

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47. See Edward B. Clark, *The Discipline and Removal of Judges in North Carolina*, 4 CAMPBELL L. REV. 1, 12–13 (1981).

48. *Id.* at 14.

49. U.S. Const. art. III, § 1; see 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 486–88 (2d ed. 1891).

50. See CHARLES EDWARD MERRIAM & LOUISE OVERACKER, *PRIMARY ELECTIONS 1–4* (1928).

51. See William H. Taft, President of the United States of America, Remarks at the White House on the Veto of the Arizona Enabling Act 1–2 (Aug. 22, 1911), available at <http://www.bobsuniverse.com/BWAH/27-Taft/19110822a.pdf> (“This provision of the Arizona constitution, in its application to county and state judges, seems to me so pernicious in its effect, so destructive of independence in the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular –majority, and, therefore, to be so injurious to the cause of free government, that I must disapprove a constitution containing it.”); J. Patrick White, *Progressivism and the Judiciary: A Study of the Movement for Judicial Reform, 1901–1917*, at 150 (1971) (unpublished Ph.D. dissertation, University of Michigan) (on file with author). Recall was first adopted in Oregon in 1908, and little consideration was given to the possible exclusion of judges from that provision. See generally ALLEN H. EATON, *THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON* (1912) (discussing the adoption of recall elections in Oregon).

to delete the offending clause so that President Taft might sign the statehood resolution. But the Progressive people of the new state then promptly amended their constitution to provide for popular recall of judges.<sup>52</sup> This provision is the most extreme application of the principle favoring judicial accountability as a constraint on misuse of judicial independence.<sup>53</sup>

Another Progressive reform was the partisan primary. It was intended to weaken political party leadership and empower individual citizen-voters. But it had the unintended effect of increasing the likelihood that an unknown and seriously under-qualified individual with a familiar or attractive name might capture a judicial office. With rare exception, the smoke-filled room of partisan politics, whatever its failings, seldom results in the nomination of candidates who are a sordid embarrassment to their party, as can happen with open primaries. And the likelihood that a corrupt or incompetent judge would be elected was increased as the number of elected offices grew, along with the number of voters, thus spreading voter attention ever thinner and making it less likely that voters shared their personal acquaintances with candidates.<sup>54</sup>

Leaders of the organized legal profession that emerged in the late nineteenth century reacted against contestable judicial elections.<sup>55</sup> Still, many Progressives of the early twentieth century acknowledged the wisdom and virtue of the electorate. The American Judicature Society was organized to marshal the support of the bar organizations to advance a compromise with the Progressive sentiment favoring democratic elections.<sup>56</sup> The compromise was

52. See ARIZ. CONST. art. VIII; White, *supra* note 51, at 217–21.

53. For a useful summary of the diverse methods of removing judges to be observed among the fifty states, see *Methods of Judicial Selection: Removal of State Judges*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/methods/removal\\_of\\_judges.cfm?state](http://www.judicialselection.us/judicial_selection/methods/removal_of_judges.cfm?state) (last visited Aug. 25, 2011). Examples are provided below.

54. For example, in 1900, there were nineteen judges sitting in North Carolina courts. See 127 N.C. REPS. iii–vii. The number in 2001 was 138. See generally N.C. JUDGES DIRECTORY (2001) (listing current judges in North Carolina).

55. See generally Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 JUDICATURE 178 (1937) (describing the public dissatisfaction with the justice system and noting that the politicization of judges has been a chief cause); William H. Taft, *The Selection and Tenure of Judges*, 38 A.B.A. REP. 418 (1913) (arguing that election, rather than appointment, leads to less expertise on the bench). An antecedent to the Progressive efforts to reform judicial elections was led by the Association of the Bar of the City of New York, which sought in 1873 to replace the judicial election provisions of the state constitution of 1867. For an account, see Renée Lettow Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York*, 15 GEO. MASON L. REV. 109, 156–59 (2007).

56. See MICHAL R. BELKNAP, TO IMPROVE THE ADMINISTRATION OF JUSTICE: A

labeled “merit selection.”<sup>57</sup> The “Missouri Plan” became a model of that scheme.<sup>58</sup> It conferred the appointment power on the governor but limited that officer’s choice to a list of nominees selected by a panel, preferably comprised of professional elites.<sup>59</sup> The scheme limited judges to terms, but required them to stand for retention by the voters without an opposing candidate, a scheme that made them accountable but not subject to the hazards of political competition.

That Progressive “Missouri Plan” or numerous variations of it have been, over time, adopted by over thirty states, most commonly only for the judges sitting on highest state courts or intermediate courts of appeal.<sup>60</sup> The state nominating commissions vary in their memberships and the process by which their members are selected. A simple example is Wyoming. Its group has seven members: the Chief Justice, three lawyers elected by the bar, and three non-lawyers appointed by the Governor.<sup>61</sup> The Tennessee commission, however, has seventeen members, including six appointed by each speaker of a

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HISTORY OF THE AMERICAN JUDICATURE SOCIETY 1–28 (1992).

57. See AM. JUDICATURE SOC’Y, JUDICIAL MERIT SELECTION: CURRENT STATUS *passim* (2011), available at [http://www.judicialselection.us/uploads/documents/Judicial\\_Merit\\_Charts\\_0FC20225EC6C2.pdf](http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf); AM. JUDICATURE SOC’Y, MERIT SELECTION: THE BEST WAY TO CHOOSE THE BEST JUDGES *passim*, available at [http://www.judicialselection.us/uploads/documents/ms\\_descrip\\_1185462202120.pdf](http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf). See generally Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839 (1994) (arguing that judicial reliance on political and financial support has compromised judicial independence).

58. See Schoshinski, *supra* note 57, at 847–48. For an account of the variations, see Polly J. Price, *Selection of State Court Judges*, in STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 9, 16–19 (Roger Clegg & James D. Miller eds., 1996).

59. This last feature continues to evoke opposition from the less elite, not least including business interests. See, e.g., *Without Judicial Merit*, WALL ST. J., Aug. 23, 2008, at A10.

Though the Missouri Plan is supposed to keep politics out of the process, it has instead transferred power from voters to state bar associations and legal groups that control the judicial commission. The result is a system that’s contentious and opaque—and has tipped the state courts steadily to the left.

*Id.* A significant difference in Missouri Plans lies in the mode of selecting the panel. For a consideration of the options, see Tillman J. Finley, Note, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49, 55–64 (2002). For a skeptical assessment of merit selection, see generally Michael R. Domino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803 (2004).

60. California, for example, created a panel to select judges from a list supplied by the Governor. CAL. GOV’T CODE § 12011.5 (West 2005).

61. WYO. CONST. art. V, § 4.

house of the legislature and five representatives of diverse bar groups.<sup>62</sup>

Two New England states continue to authorize gubernatorial appointments, while Virginia and South Carolina vest the initial selection in the legislature.<sup>63</sup> These longstanding methods do avoid arousing resistance to elitism without incurring the disadvantages of judicial campaigns.<sup>64</sup> But it remains true that over eighty percent of the trials conducted in all American courts are conducted by judges who were elected or who are subject to the risk of non-retention by vote of the people.<sup>65</sup>

As noted, North Carolina remains among the states whose constitutions require competitive election of all judges. And all four of the listed problems with that means of selection have been magnified in the last half century by two developments: the advent of television that vastly elevates the cost of political campaigns, and the simultaneous elevation of the political role of highest courts that increases the importance of ideological considerations. At least partly in response to these developments, Arizona, Colorado, Connecticut, Florida, Indiana, Maryland, New York, Oklahoma, South Dakota, and Tennessee were inspired in the decade from 1967 to 1977 to adopt variations on the Missouri Plan for their highest courts.<sup>66</sup> But North Carolina stuck to general elections with primaries, although not without reconsideration of the Missouri Plan.<sup>67</sup>

#### IV. THE FOUR ENDURING PROBLEMS WITH JUDICIAL ELECTIONS

Identified in the introduction to this Article are four problems inhering to judicial elections. It may be helpful to examine each briefly.

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62. TENN. CODE ANN. §§ 17-4-102 to -112 (2009).

63. *Judicial Selection in the States*, AM. JUDICATURE SOC'Y, <http://www.judicialselection.us> (last visited Aug. 25, 2011).

64. An advocate of this scheme is Stephen J. Ware. See generally Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751 (2009) (characterizing the Missouri Plan as elitist and advocating, instead, executive nomination and senate confirmation as a way to avoid the disadvantages of both merit selection and popular election).

65. Roy A. Schotland, Comment, *Judicial Independence and Democratic Accountability*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 149, 154.

66. *Judicial Selection in the States: Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=) (last visited Aug. 25, 2011).

67. LEGISLATIVE RESEARCH COMM'N, FUTURE OF THE COURTS: REPORT TO THE 1998 SESSION OF THE 1997 GENERAL ASSEMBLY OF NORTH CAROLINA 3-5, 8 (1998).

### A. Campaign Promises

The first, and most obvious, problem is the need to constrain campaign promises limiting the independence of the judge if elected. A judge rendering a decision in conformity with a campaign promise is visibly denying a fair hearing to the losing party, and thus offending the most elementary feature of due process of law. To constrain such a practice, the American Bar Association promulgated its Canons of Judicial Ethics in 1924,<sup>68</sup> and in 1972 it published its Model Code of Judicial Conduct,<sup>69</sup> which it intended to be enforced by a disciplinary system. But, in 2002, the Supreme Court affirmed the constitutional right of judicial candidates to make campaign promises bearing on the resolution of future cases,<sup>70</sup> invalidating a Minnesota law enacted pursuant to the Model Code to shield the state's elected judges from the practice of making promises that is generally associated with campaign politics. The Minnesota law had provided that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues."<sup>71</sup>

A possible implication of the Court's decision is that a state choosing to elect judges must simply forfeit the integrity and independence of its judiciary. But as J.J. Gass has forcefully affirmed, "due process rights of individual litigants are not the state's to forfeit."<sup>72</sup> Justice O'Connor was moved by this consideration to publish a concurring opinion expressing doubt that it is possible to have an election of a disinterested judiciary deserving the public's respect. She explained that:

We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to

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68. AM. BAR ASS'N, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 29 (1936).

69. JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 1.03 (4th ed. 2007). The Code was rewritten in 1990 in ways not important to the present discussion, and amended in 2007 to respond to the problem presented by the Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

70. See *Republican Party of Minn.*, 536 U.S. at 788. For an analysis of this case and the implications on state judicial campaign regulation, see generally Richard L. Hasen, *First Amendment Limits on Regulating Judicial Campaigns*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS* 15 (Matthew J. Streb ed., 2007).

71. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2006).

72. J.J. GASS, AFTER *WHITE*: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS 10 (2004), available at [http://brennan.3cdn.net/0b74af850b81d92928\\_bvm6y5sdf.pdf](http://brennan.3cdn.net/0b74af850b81d92928_bvm6y5sdf.pdf). For a discussion of the relationship between canons of judicial ethics and due process, see Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1083-92 (1996).



which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.<sup>73</sup>

Justice O'Connor had a point. And, as a person who was herself once elected to such an office by the voters of Arizona,<sup>74</sup> her view may be entitled to added weight. On the other hand, as one who was appointed to office "for life," her implication that such appointments are the only way to select independent judges has a self-congratulatory ring. That system liberating judges from any accountability for their politically motivated decisions has its problems, too.<sup>75</sup>

The Court did not join in Justice O'Connor's opinion,<sup>76</sup> but its ruling was further elaborated by the United States Court of Appeals for the Eighth Circuit on remand when it invalidated other Minnesota rules advanced by the American Bar Association that foreclosed partisanship of judicial candidates and forbid them from making direct requests to contributors for campaign funds.<sup>77</sup>

73. See *Republican Party of Minn.*, 536 U.S. at 788–89 (O'Connor, J., concurring) (citations omitted). Justice O'Connor cited Julian Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994) (quoting former California Supreme Court Justice Otto Kaus's statement that ignoring the political consequences of visible decisions is "like ignoring a crocodile in your bathtub"). 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, 793–94 (1995) (citing statistics indicating that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty than are judges who do not run for election).

74. See JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 35 (2005).

75. See *generally* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006) (providing a comprehensive discussion of term limits and lifetime tenure of United States Supreme Court Justices).

76. However, all the Justices are seen to share her distaste for judicial elections. See Joan C. Rogers, *Caperton Ruling is Expected to Spur States to Enhance Their Process for Judicial Recusal*, 77 U.S.L. WK. 1780, 1780 (2009).

77. *Republican Party of Minn. v. White*, 416 F.3d 738, 763–66 (8th Cir. 2005) (en banc).

### B. *The Appearance of Corruption*

The second and closely related problem with judicial elections, greatly increased in the age of television, is the funding of vastly more expensive campaigns. Citizens often perceive large contributions as bribes.<sup>78</sup> Laws limiting the size of individual campaign contributions present a different issue under the First Amendment,<sup>79</sup> and such limits may not work.<sup>80</sup> Even under the best of circumstances, raising money for judicial candidates is problematic because of the unsuitability of judicial campaign promises made in exchange for financial support.<sup>81</sup> And there is a related problem of a candidate's temptation to raise excessive campaign funds or even to continue raising money after the election has been held.<sup>82</sup> When campaign funds are left over, it may

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78. See JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS* 206, at 20–24 (2007) (highlighting a recent dip in the effectiveness of large monetary contributions to judges' election campaigns); Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 *IND. L. REV.* 669, 672–74 (2001) (describing television advertisements as a medium to criticize opponents, "portraying them as corrupted by campaign contributions [or] tools of special interests"); Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in *RUNNING FOR JUDGE, THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS* 73, 77 (Matthew Streb ed., 2007) (noting a rise in "[t]he perception that our courts are tilted toward wealthy interests"). For comparisons to the problem in other democracies, see generally Justin Fisher, *Party Finance and Corruption: Britain*, in *PARTY FINANCE AND POLITICAL CORRUPTION* 15 (Robert Williams ed., 2000); James Newell, *Party Finance and Corruption: Italy*, in *PARTY FINANCE AND POLITICAL CORRUPTION* 61 (Robert Williams ed., 2000).

79. See *Buckley v. Valeo*, 424 U.S. 1, 14–23 (1976) (finding political contribution ceiling law too restrictive); *Randall v. Sorell*, 548 U.S. 230, 243–44 (2006) (upholding *Buckley*). For contrasting critiques of *Buckley*, compare Burt Neuborne, *Toward A Democracy-Centered Reading of the First Amendment*, 93 *NW. U. L. REV.* 1055, 1055–58 (1999) (arguing that *Buckley* was "unduly hasty" in removing the advancement of political equality as a justification for limiting campaign spending), and Bradley A. Smith, *Money Talks: Speech, Corruption, Equality and Campaign Finance*, 86 *GEO. L.J.* 45, 47–48 (1997) (advocating for a "political equality" view of campaign financing regulations), with Vincent Blasi, *Free Speech and the Widening Gyre of Fund Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 *COLUM. L. REV.* 1281, 1283–84 (1994) (focusing on protection of candidates' time as a justification for campaign finance reform). See also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 94–100 (1993) (suggesting alternatives for regulating campaign financing following *Buckley*).

80. For reasoned skepticism about the effectiveness of these limitations, see Roy A. Schotland, *Campaign Finance: Just an Illusion of Reform*, *NAT'L L.J.*, Sept. 1, 2003, at 30.

81. See generally David Barnhizer, *On the Make: Campaign Funding and the Corrupting of the American Judiciary*, 50 *CATH. U. L. REV.* 361 (2001) (discussing the effect of campaign financing on judicial candidate's behavior); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 *U. CHI. L. REV.* 689 (1995) (discussing the justifications and downfalls of elective judiciaries).

82. See Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 *J.L. & POL.* 57, 90–96 (1985).

be possible to spend unused campaign contributions on items such as country club dues or a new car to be used while campaigning.

The elevation of campaign expenditures was assisted by section 527 of the Internal Revenue Code as enacted in 2001.<sup>83</sup> By that law, Congress encouraged organizations to engage in public education that may be aimed at issues presented in judicial campaigns, and indirectly at candidates. It allows deductions from taxable income for contributions to educational organizations. As long as such groups refrain from “express advocacy” of specific candidacies, their supporters can claim deductions for “soft money” campaigns addressed to issues.<sup>84</sup>

The resemblance of big campaign contributions to bribes is most visible when a judge is asked to disqualify himself or herself from deciding a case in which a major contributor is a party. The Chamber of Commerce is almost never a party and, therefore, has the advantage of having no direct stake in cases of the sort that might disqualify judges deciding them. But the issue of contributions as bribes was forcefully presented in 2005 by the conduct of Justice Lloyd Karmeier of the Illinois Supreme Court.<sup>85</sup> After accepting over \$350,000 from diverse employees of State Farm Insurance Company for his 2004 campaign, he refused a request to disqualify himself from casting the deciding vote in favor of State Farm on its appeal from an adverse judgment requiring it to pay punitive damages.<sup>86</sup> His court held, in effect, that a judge might not be disqualified merely because of a large campaign contribution.<sup>87</sup> Certiorari was denied.<sup>88</sup>

But the event resonated with the rising cry of “Payola Justice,”<sup>89</sup> and seemed contrary to earlier decisions of the Supreme Court

83. Economic Growth and Tax Reconciliation Act, Pub. L. No. 107-16, 115 Stat. 38 (2001) (codified as amended in scattered sections of 26 U.S.C.).

84. See Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 10–11 (A. Corrado et al. eds., 2005) (tracing the history of campaign finance reform). See generally M. Mellman & R. Wirthin, *Public Views of Party Soft Money*, in INSIDE THE CAMPAIGN FINANCE BATTLE 266 (Anthony Corrado, Thomas E. Mann & Trevor Potter eds., 2003) (discussing the American public’s perspective on large political contributions).

85. Leonard Post, *Contributions to Justice Lead to Protest: Ethics Case Highlights Judicial Election Issue*, NAT’L L.J., Feb. 13, 2006, at 4.

86. *Id.*

87. Brief Amici Curiae of 12 Organizations Concerned about the Influence of Money on Judicial Integrity, Impartiality, and Independence in Support of Petitioners at 1–2, *Avery v. State Farm Mut. Auto Ins. Co.*, 547 U.S. 1003 (2006) (No. 05-842).

88. *Avery*, 547 U.S. at 1003.

89. The term, describing contributions as bribes, was circulated in Bill Medaille & Andrew Wheat, *Texans for Public Justice, Payola Justice: How Texas Supreme Court*

holding that it is a denial of due process of law to submit a case to the decision of a judge having a stake in the outcome.<sup>90</sup> The Illinois case deciding not to disqualify Justice Karmeier was followed in 2008 by a similar West Virginia case.<sup>91</sup> In an extraordinary gesture, the Conference of Chief Justices was among the many groups seeking as amici to convince the Supreme Court that excessive campaign support disqualifies the judge receiving it from sitting on cases in which his benefactor is a party. The Supreme Court, by a 5 to 4 vote, decided in 2009 that it was indeed a denial of due process to a litigant for a judge to cast a deciding vote in favor of a former client who had invested three million dollars in his election campaign.<sup>92</sup> But maybe one million would be alright? The dissenters expressed concern that the decision would invite many more motions to disqualify a sitting judge.<sup>93</sup> The Wall Street Journal vigorously protested the decision as a threat to the freedom of institutions to invest money in securing an amiable judiciary.<sup>94</sup>

While few surely doubt that much of the money contributed to judicial candidates is given for benign public motives, there can also be no doubt that such big contributions have an appearance gravely prejudicial to public confidence in the disinterest and integrity of the judiciary. Some recall the defensive utterance attributed to Chancellor Francis Bacon,<sup>95</sup> that he only accepted gifts from litigants whose cases he favored on the merits. And there are visible correlations between contributions and judicial decisions that do

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*Justices Raise Money from Court Litigants* 29 (1998) (analogizing the election campaign contributions of today to the early rock and roll executive's practice of paying disk jockeys to play their records in hopes of making it a hit). The subject in Texas was examined by CBS's *60 Minutes* in 1987 and 1998. *60 Minutes: Justice for Sale* (CBS television broadcast Dec. 6, 1987); *60 Minutes: Justice for Sale* (CBS television broadcast Nov. 1, 1998). For comment, see *Texas Justice: The Needs for Reform and Reality Are Both Great*, HOUS. CHRON., July 12, 1998, at 2C.

90. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973); *Tumey v. Ohio*, 273 U.S. 531, 531, 534–35 (1927).

91. *Caperton v. A.T. Massey Coal Co. Inc.*, 679 S.E.2d 223 (W. Va. 2008), *rev'd* 129 S. Ct. 2252 (2009).

92. *Caperton*, 129 S. Ct. at 2252–57.

93. *Id.* at 2267–74 (Roberts, C.J., dissenting) (“This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be.”); *id.* at 2274–75 (Scalia, J., dissenting) (noting that lawyers would “contest[] nonrecusal decisions through every available means”).

94. Editorial, *Judges and ‘Bias’: The Supremes Trample on State Courts*, WALL ST. J., June 10, 2009, <http://online.wsj.com/article/SB124451495768196807.html>.

95. DANIEL R. COQUILLETTE, FRANCIS BACON 222 (1992) (“As Bacon himself said, ‘Of my offense, I will say [which] I have good warrant for, they were not the greatest sinners in Israel upon whom the wall of Shilo fell . . . I was the justest judge that was in England these fifty years . . .’”).

suggest that the judicial office, if not the judge, may be purchased with campaign contributions.<sup>96</sup>

The American Bar Association has undertaken to prepare guidelines for courts facing the issue of disqualification and has convened a Standing Committee on Judicial Independence.<sup>97</sup> Despite the Supreme Court's leanings, it is surely time for all states to strengthen rules of judicial conduct requiring disqualification in cases in which a party, or his counsel, or an organization committed to the party's interests, has made a substantial monetary investment in the judge's election.

### C. *The Shortage of Voter Information*

The third problem with elections is that, despite the Progressive belief in the wisdom of informed voters, we who vote are seldom sufficiently interested to know much about the judicial candidates for whom we vote. Primaries increase the number of candidates whom we are expected to recognize, but also the number of candidates of whom we are likely to be ignorant.<sup>98</sup> Judicial elections are especially at risk of being governed by the axiom of eighty percent attributed to Charles Geyh<sup>99</sup>: it dictates that eighty percent of voters support the continued election of judges, eighty percent will not vote in judicial

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96. See Vernon V. Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291, 1291 (2008); see also Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. TIMES, Jan. 29, 2008, at A14 (describing the study by Palmer and Levendis and other studies of campaign contributions by litigants and judicial decisions in contributors' favor). For a direct challenge to this study, see generally Kevin R. Tully & E. Phelps Gray, *The Louisiana Supreme Court Defended: A Rebuttal of the Louisiana Supreme Court in Question: An Empirical Study of the Effects of Campaign Money on the Judicial Trail*, 69 LA. L. REV. 281 (2009). Another scholar suggests that the best way to preserve "judicial integrity without violating First Amendment protections" is to use "independent, non-governmental monitoring 'commissions.'" See Ferris K. Nesheiwat, *Judicial Restraint: Resolving the Constitutional Tension Between First Amendment Protection of Political Speech and the Compelling Interest in Preserving Judicial Integrity During Judicial Elections*, 24 QUINNIPIAC L. REV. 757, 760 (2006).

97. Its report is on the agenda of the ABA House of Delegates. Maria da Silva, *Reinvigorate Recusal Reform*, BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW (Feb. 10, 2011), [http://www.brennancenter.org/blog/archives/reinvigorate\\_recusal\\_reform/](http://www.brennancenter.org/blog/archives/reinvigorate_recusal_reform/).

98. See Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 140, 150-56 (Matthew J. Streib ed., 2007) (describing the demography of those who vote on judicial elections).

99. Robert Rackleff, *Judicial Elections: Still Fair and Balanced?*, CARNEGIE REP., Spring 2006, at 12, 16, available at [http://carnegie.org/fileadmin/Media/Publications/Reporter/PDF/carnegiereporter\\_v3n4.pdf](http://carnegie.org/fileadmin/Media/Publications/Reporter/PDF/carnegiereporter_v3n4.pdf).

elections, eighty percent of those who do are unable to identify the judicial candidates for whom they vote, and eighty percent suppose that judges are influenced by the campaign contributions they receive.

The inattention of voters to judicial elections has produced some extraordinarily unwelcome results in some other states that North Carolina has so far escaped. One recurring result has been the occasional success of grievously unqualified candidates who happened to share a name with a popular figure.<sup>100</sup> The worst case of misrecognition was that of Donald Burt Yarborough, who was elected in 1976 at the age of thirty-five to the Supreme Court of Texas because voters thought that he was the same Don Yarborough for whom they had voted in races for other state offices (who was, in turn, mistaken for Ralph Yarborough, a United States Senator).<sup>101</sup> But he was not. His unsuitability was not revealed until he had won the primary election and was in a commanding position in the general election. Shortly after his election, he was indicted for diverse frauds and fled to Granada. In 1986, he was convicted of bribery in a federal court and served a six-year prison term.<sup>102</sup> As it happened, Justice Yarborough did not decide many cases, but that was just a lucky break for the people of Texas.

#### *D. Competitive Defamation*

Finally, the advent of television dramatically elevated the availability and effectiveness of campaign methods demeaning to the public office, perhaps especially judicial office, and the candidates seeking it.<sup>103</sup> An important aim of the American Bar Association Code was to maintain public trust in the law by forbidding those campaign practices most likely to call the integrity of judicial candidates into public question or otherwise demean the office being contested.<sup>104</sup> Judges have been subjected to discipline for gross

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100. In 1964, as an Ohioan, I rang door bells in a futile effort to help re-elect an able but doomed Justice of the Ohio Supreme Court who was opposed by a candidate who shared the name of the legendary coach of the Cleveland Browns.

101. KYLE CHEEK & ANTHONY CHAMPAGNE, *JUDICIAL POLITICS IN TEXAS: PARTISANSHIP, MONEY, AND POLITICS IN STATE COURTS* 39 (2005).

102. *See id.*; Donald Burt Yarborough, TARLTON LAW LIBRARY JAMAIL CTR. FOR LEGAL RESEARCH, UNIV. OF TEX. AT AUSTIN (last updated Oct. 16, 2009), <http://tarlton.law.utexas.edu/justices/spct/yarborough.html>.

103. *See generally* SAMPLE ET AL., *supra* note 78 (describing how the increased usage of television ads funded by special interest groups threatens the fairness of state court judicial elections).

104. Other problems with television advertising campaigns are recounted by Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95, 98 (2003).

violations of such rules.<sup>105</sup> But the constraints abide only in the shadow of the Supreme Court's extensions of the First Amendment that may be held to bar their enforcement.<sup>106</sup>

Defamatory advertising in contested judicial elections has flourished in Alabama in 1996,<sup>107</sup> Nebraska in 1996,<sup>108</sup> Ohio in 2000,<sup>109</sup> West Virginia in 2004,<sup>110</sup> Georgia in 2006,<sup>111</sup> Wisconsin in 2008,<sup>112</sup> and perhaps elsewhere. For example, in Wisconsin in 2008, a justice won election to the state supreme court by accusing his incumbent adversary of responsibility for a rape committed by a former client. The incumbent had long before, as a public defender, unsuccessfully defended a client against a charge of rape. His client had then served a prison term and, on his release, committed another rape. The false attribution of responsibility to the incumbent for the second rape by his former client was expressed with an investment of many, many campaign dollars spent on television advertising uniting the incumbent and his former client, who are both African Americans, on voters' television screens, where their images were placed side-by-side while the voice-over explained the incumbent's vicarious guilt for his client's crime.<sup>113</sup> The newly elected Justice Gableman invoked the First Amendment as a defense to the accusation of professional

105. William Glaberson, *States Rein In Truth-Bending in Court Races: Judges Face Penalties for Deceiving Voters*, N.Y. TIMES, Aug. 23, 2000, at A1.

106. See Lawrence M. Friedman, *Benchmarks: Judges on Trial, Judicial Selection and Election*, 58 DEPAUL L. REV. 451, 462–66 (2009); cf. *Weaver v. Bonner*, 309 F.3d 1312, 1320–21 (11th Cir. 2002) (holding that speech by judicial candidates is not entitled to less protection than speech by legislative and executive candidates).

107. Stan Bailey, *Ingram's Ads Likely Caused Voter Disgust, Analyst Says*, BIRMINGHAM NEWS, Nov. 7, 1996, at 1A.

108. See Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70–71 (1999).

109. See generally Kara Baker, *Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Ohio Supreme Court*, 35 AKRON L. REV. 159 (2001) (discussing issues in judicial campaigning and potential solutions).

110. See Brian P. Anderson, *Judicial Elections in West Virginia: "By the People, For the People" or "By the Powerful for the Powerful?" A Choice Must Be Made*, 107 W. VA. L. REV. 235, 255–59 (2004).

111. See Jill Young Miller, *Hunstein Wins Supreme Court Race*, ATLANTA J.-CONST., Nov. 8, 2006, [http://www.ajc.com/metro/content/shared-blogs/ajc/elections/entries/2006/11/08/georgia\\_supreme.html](http://www.ajc.com/metro/content/shared-blogs/ajc/elections/entries/2006/11/08/georgia_supreme.html).

112. See Ryan J. Foley, *Gableman Criminal Probe Urged—Justice Accused of Breaking Law in Campaign*, WIS. ST. J., Oct. 21, 2008, at A3; Dee J. Hall, *Was Ad Misleading, or a Lie?—Gableman Seeks to Avoid Discipline for Commercial*, WIS. ST. J., Sept. 17, 2009, at A3.

113. Scott Bayer, *Supreme Court Justice Denies TV Ad Was Misleading*, CHANNEL 3000, Nov. 19, 2008, <http://www.channel3000.com/news/18019438/detail.html>.

misconduct.<sup>114</sup> The Wisconsin Judicial Commission conducted a proceeding to discipline Justice Gableman,<sup>115</sup> but he remains on the court.

## V. MAGNIFYING EFFECTS OF NATIONAL POLITICS ON STATE COURTS

All four of these problems with judicial election campaigns were magnified in the last half of the twentieth century, not only by the advent of commercial television, but also by national political developments blurring the distinctions between judges and the executive branches, and between judges and legislators.<sup>116</sup> The notion of constitutional separation of powers lost much of its slender claim on the minds of citizens.<sup>117</sup> In the 1960s, the Warren Court led the way in constitutionalizing issues for resolution by Justices that many populist citizens had long assumed were subject to their democratic control. Some of those issues continued to percolate in state politics attentive to issues of judicial administration.

### A. *The Capital Punishment Issue*

Capital punishment had long been an issue evoking strong responses. The Supreme Court of the United States was, for a time in the 1970s, clearly headed toward the abolition of capital punishment by judicial decree.<sup>118</sup> The Justices prudently detected that voters and state legislatures were not ready to accept such a reform.<sup>119</sup> But the

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114. *Cf.* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964) (relating to the Court's previous disposition on the First Amendment and libel).

115. A proceeding was commenced by the Wisconsin Judicial Commission on October 7, 2008, in the Supreme Court of Wisconsin. *See* Patrick Marley & Steven Walters, *Judicial Commission Says Gableman Ad was Deceiving*, MILWAUKEE J. SENTINEL, Oct. 8, 2008, <http://www.jsonline.com/news/statepolitics/32440994.html>.

116. Edward L. Rubin, *Independence as a Governance Mechanism*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 56, 86–87 (Stephen B. Burbank & Barry Friedman eds., 2002).

117. Although it was not as confused as it would become when Congress undertook to determine the medical condition and decided the case of Theresa Schiavo. *See, e.g.*, *Relief of the Parents of Theresa Marie Schiavo*, Pub. L. No. 109-3, § 1, 119 Stat. 15, 15 (giving the United States District Court for the Middle District of Florida jurisdiction to rule on an immediate injunction to prevent withdrawal of life support); *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1272–75 (11th Cir. 2005).

118. *E.g.*, *Furman v. Georgia*, 408 U.S. 238, 240 (1972). *See generally* MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973) (describing the efforts of a group of civil rights lawyers to abolish capital punishment during the 1960s and early 1970s).

119. For a critical assessment of the Court's treatment of capital punishment from the 1970s to the 1990s, see generally Carol S. Steiker & Jordan M. Steiker, *Sober Second*



Supreme Court of California and some other state courts were inspired by the Supreme Court of the United States' "activist" role model to tackle the issue.

There was already strong political resistance to the California court for other decisions,<sup>120</sup> but Chief Justice Rose Bird nevertheless took up the cause against capital punishment and persuaded her colleagues to invoke an implied meaning of the text of the state constitution to forbid it. Her court was, however, soon reversed by the voters with an amendment to that constitutional text achieved by popular referendum, a device available in California and a few western states.<sup>121</sup> The conflict over that referendum led to a sustained and ultimately successful popular struggle to rid the California courts of Chief Justice Bird. She and two sympathetic colleagues were not retained in a heated election in 1986.<sup>122</sup> That event was rightly

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*Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

120. Especially in the years from 1970 to 1978, under the leadership of Chief Justice Donald Wright, the court had made a number of decisions of extraordinarily high salience, causing then-Governor Ronald Reagan, who had appointed Wright, to despise the court and his appointee. BETTY MEDSGER, *FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE BIRD AND THE COURTS* 20, 28–29 (1983). For an account of the further reactions that Wright's successor evoked, see generally PREBLE STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* (1981). Among the court's more consequential decisions was the invalidation of a state law governing public school finance in *Serrano v. Priest*, 487 P.2d. 1241, 1243 (1971). See generally William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & POL. 607 (1996) (discussing the unforeseen and unintended secondary and tertiary consequences of the *Serrano* decision); Stanley Mosk, *The Emerging Agenda in State Constitutional Rights Law*, ANNALS, March 1988, at 54 (describing the *Serrano* ordeal from the perspective of a member of that court).

121. CAL. CONST. art. II, § 9. This experience was repeated in 2008 on the issue of gay marriage. The court held that such marriages were protected by the state constitution. *In re Marriage Cases*, 183 P.3d 384, 429 (2008). And it was promptly reversed by a referendum, Proposition 8, California Marriage Protection Act, by adding § 7.5 to Article I of the state constitution, which borrowed the text of the statute invalidated by the court. California Marriage Protection Act, Proposition 8 (2008) (codified at CAL. CONST. art. I, § 7.5). Litigation challenging the validity of the amendment continues. See also John Schwartz & Jesse McKinley, *Court Weighs Voters' Will Against Gay Rights*, N.Y. TIMES, Mar. 6, 2009, at A12 (discussing the dilemma presented to the California Supreme Court by successful passage of Proposition 8, which banned same-sex marriage in the state).

122. For accounts of the 1986 election, see John H. Culver & John T. Wold, *Judicial Reform in California*, in JUDICIAL REFORM IN THE STATES 139, 156 (Anthony Champagne & Judith Haydel eds., 1993); Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988). See generally Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 S. CAL. L. REV. 809 (1986) (using the retention election campaign of Chief Justice Bird as an illustration of the many issues surrounding judicial elections in general).

alarming to the state's organized bar and others rightly concerned for the professional independence of the judiciary. The money spent on the political campaigns for and against the three justices may well exceed the sums spent in contemporaneous gubernatorial elections. The campaign against Bird also elevated our awareness of the ease with which voters can sometimes be influenced by the suggestion that a judge or candidate might be "soft on crime."

### *B. One Man, One Vote*

Also elevating the problems with judicial elections were the decisions of the Supreme Court of the United States establishing the new constitutional principle of "one man, one vote."<sup>123</sup> Those decisions empowered highest state courts to play a major role in establishing the boundaries for the political constituencies of Congressmen and state legislators. Whether a neighborhood was in one election precinct or another was a question assigned ultimately to highest state courts, which were empowered to review the constitutionality of each wrinkle in precinct boundaries to assure equality of populations and compliance with other constitutional standards.

A secondary consequence of that constitutional "reform" was the 1996 defeat of Justice Penny White in Tennessee. She was highly recommended for retention by the state's Judicial Evaluation Commission and was well regarded by the bar.<sup>124</sup> A group that had been organized and funded solely to cause her defeat nevertheless attacked her. Its aim was to assure Republican control over the state's redistricting decisions that were soon to be made by the court of which she was the swing member. The organization's attack was mounted on spot commercials calling attention to her vote with a majority of her colleagues requiring a rehearing on the sentencing phase of a celebrated capital case. The court had modified the state's procedure in order to meet requirements imposed by the Supreme Court of the United States.<sup>125</sup> To do so required a postponement of an execution. On the basis of her vote for that result, she was portrayed in television ads as the defender of a vicious murderer.<sup>126</sup>

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123. *Reynolds v. Sims*, 377 U.S. 533, 554–56 (1964); *Baker v. Carr*, 369 U.S. 186, 207–08 (1962).

124. Bronson D. Bills, *A Penny for the Court's Thoughts: The High Price of Judicial Elections*, 3 NW. J.L. & SOC. POL'Y 29, 44–45 (2008); Colman McCarthy, *Injustice Claims A Tennessee Judge*, WASH. POST, Nov. 26, 1996, at C11.

125. *State v. Odom*, 928 S.W.2d 18, 25 (Tenn. 1996).

126. See McCarthy, *supra* note 124.

### C. *The Right to Defame*

The events in Wisconsin and Tennessee demonstrated the power of advertising to falsify a sitting judge's record as one "soft on crime" to be presented when it suits the desires of an interest group to unseat a judge.<sup>127</sup> That demonstration has been observed in other retention elections. In a 2004 Missouri retention election, such defamation resulted in a very close call.<sup>128</sup> But such false advertising is also an exercise of a constitutional right established in 1964 by the Supreme Court assuring citizens of the right to express defamatory statements about public figures.<sup>129</sup> Thus, state law cannot constrain such utterances. Those standing for election to judicial office must, pursuant to the First Amendment, expose themselves to such abuse.

The temptation to defame and demean may be especially threatening to the judiciary in retention elections because the defamers are less subject to the deterrent effect of competition in which a competitor may reply in kind and "give as good as he gets." Perhaps when the advertising is blatantly false, and the defamer can be identified (which is not always easy), this form of outrage could be deterred by the disciplinary process,<sup>130</sup> but, again, the Supreme Court's First Amendment jurisprudence casts doubt.<sup>131</sup> It seems clear that the Constitution now protects the right of a hostile organization to dredge up a single vote that some voters can be led to misunderstand and disapprove and call public attention to it over, and over, and over. And the claim is made that such organizations, having no connection to a candidate, are outside the reach of any state election laws and are merely exercising their First Amendment

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127. See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 313 (1997).

128. See Donna Walter, *Supporters Rally to Defense of MO Supreme Court Judge Richard B. Teitelman*, DAILY REC. (Kansas City, Mo.), Nov. 1, 2004, available at [http://findarticles.com/p/articles/mi\\_qn4181/is\\_20041101/ai\\_n10066272/](http://findarticles.com/p/articles/mi_qn4181/is_20041101/ai_n10066272/) (describing the efforts of Judge Teitelman's supporters required to combat the negative publicity campaign of his detractors).

129. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283–84 (1964) (upholding the right unless actual malice is shown).

130. Disciplinary efforts have been elevated in Ohio and perhaps elsewhere. See Robert Derocher, *Bar Associations and Judicial Campaigns*, JUDGES' J., Winter 2005, at 41, 41–42. For a recent proposal, see Cathy R. Silak & Aaron C. Charrier, *The Future of Judicial Elections: A Campaign Conduct Commission Proposal*, 39 IDAHO L. REV. 357, 372–75 (2003).

131. See Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167, 1188, 1197–1203 (2001) (elaborating on the Court's jurisprudence regarding the First Amendment and commercial advertising).

rights.<sup>132</sup> They may even be categorizing their spending as “public education” and deducting the cost of such advertising from their taxable income.

In some cases, degradation of the specific candidate for retention may be unnecessary. For example, Justice Russell Nigro, a member of the Supreme Court of Pennsylvania elected in 1995 was not retained in 2005 in an outcry of indignation over a pay raise for judges and other elected officials of the state. Never mind that the judge not retained had nothing to do with the pay raise other than an apparent willingness to receive it.<sup>133</sup> Only eighteen percent of the voters cast a vote on the issue of his retention, and a slight majority of those who did were opposed to the pay raise.<sup>134</sup> Whether the outcome had anything to do with any of his judicial decisions is not certain.

#### D. *Abortion Rights; Gay Rights*

Similar to capital punishment in its consequences for high court judges has been the emergence of claims to constitutional family law rights to an abortion or to a single sex marriage.<sup>135</sup> In 2009, the Iowa Supreme Court unanimously held that there is, under the equal protection clause of the Iowa constitution, a right of a same-sex couple to marry.<sup>136</sup> In 2010, three members of the court were on the ballot for retention, and none was retained.<sup>137</sup> A fourth justice who participated in the decision faces a retention election in 2012. Meanwhile, a group of five conservative legislators filed articles of impeachment against the other four members of the Iowa Supreme Court; it does not seem likely that the State Senate will pursue the impeachment process, but their action is nevertheless illustrative of the public sentiment toward the court’s pro gay-marriage decision.<sup>138</sup>

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132. See Douglas Johnson & Mike Beard, *Campaign Reform: Let’s Not Give Politicians the Power to Decide What We Can Say About Them*, 31 CATO Institute Briefing Papers 7, (1997), available at [http://www.cato.org/pub\\_display.php?pub\\_id=1470](http://www.cato.org/pub_display.php?pub_id=1470) (defending the First Amendment rights of third parties to publicly criticize candidates for judgeships).

133. Shira J. Goodman & Lynn A. Marks, *Lessons from an Unusual Retention Election*, CT. REV., Fall/Winter 2006, at 6, 8–11. Justice Sandra Shultz Newman, a Republican, was narrowly granted retention in the same election that Nigro, a Democrat, lost. *Id.* at 11 n.52.

134. *Id.* at 6, 11.

135. This was inspired, of course, by *Roe v. Wade*. 410 U.S. 113, 152 (1973) (explaining that “zones of privacy” do exist under the Constitution).

136. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

137. Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REG., Nov. 3, 2010, <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/-1/NEWS04/Iowans-dismiss-three-justices>.

138. Lynda Waddington, *GOP House Members Seek Impeachment of Iowa Justices for*

Objections to such constitutional decisions as those of the California and Iowa courts are often stated as protests against “activism.”<sup>139</sup> In defense of state courts rendering such decisions, it might be said that the role model of the Supreme Court of the United States in recent times makes such state court decisions merely adherent to the federal standard for social change by judicial decree.

### E. Tort Reform

The money spent on state judicial campaigns such as those resulting in the non-retention of Chief Justice Bird or Justice Russell Nigro was not necessarily, or even likely, spent as an expression of the donors’ interest in the issues of capital punishment or a pay raise. Some and perhaps much of the funding of judicial campaigns almost surely comes from groups having a stake in the law of torts that is made and enforced in state courts. The Rose Bird court, like its predecessors, could be seen as sympathetic to the needs of injured citizens for compensation. As a result of such perceptions, elected state judiciaries became “a political football”<sup>140</sup> in numerous states.<sup>141</sup>

Beginning in the 1980s, contests in funding judicial elections between tort lawyers and defense interests became highly visible in several states. Most notable at first were Texas<sup>142</sup> and Alabama.<sup>143</sup> Much of the money for contested judicial campaigns came from lawyers and litigants who expected to appear in court. A notable

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*Same-Sex Marriage Decision*, IOWA INDEP. (Apr. 22, 2011, 8:22 AM), [http://iowaindependent.com/55122/gop-house-members-seek-impeachment-of-iowa-justices-for-same-sex-marriage-decision?utm\\_campaign=twitter&utm\\_medium=twitter&utm\\_source=twitter](http://iowaindependent.com/55122/gop-house-members-seek-impeachment-of-iowa-justices-for-same-sex-marriage-decision?utm_campaign=twitter&utm_medium=twitter&utm_source=twitter).

139. See Mallory Simon, *Iowa Voters Oust Justices Who Made Same-Sex Marriage Legal*, CNN.COM (Nov. 3, 2010, 1:13 PM), <http://www.cnn.com/2010/POLITICS/11/03/iowa.judges/index.html?iref=storysearch>.

140. Stephen B. Burbank, *Judicial Accountability to the Past, Present and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 28–29 (2005).

141. For empirical support, see generally Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Voter Knowledge, Behavior, and Attitudes in Primary and General Judicial Elections*, 82 JUDICATURE 216 (1999) (analyzing voter knowledge, behavior, and attitudes in Washington state judicial elections); Elenore Cotter Klingler, *Poll Finds Voters Uninformed About Judicial Selection*, LITIG. NEWS, ABA (Dec. 15, 2008), [http://apps.americanbar.org/litigation/litigationnews/top\\_stories/voters-judicial-elections.html](http://apps.americanbar.org/litigation/litigationnews/top_stories/voters-judicial-elections.html). For more general information, see generally CHARLES G. GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* (2008) (discussing the dynamic equilibrium between Congress and the independent judiciary).

142. Timothy Howell, *So Long “Sweetheart”—State Farm Fire & Casualty Co. v. Gandy Swings the Pendulum Further to the Right as the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY’S L.J. 47, 52–56 (1997).

143. Gregory Jaynes, *Where the Torts Blossom*, TIME, Mar. 20, 1995, at 38.

example was provided in the case of *Pennzoil v. Texaco, Inc.*,<sup>144</sup> in which plaintiff's counsel made a \$10,000 contribution to the judge's campaign fund at the very moment of filing the case with the court's clerk.<sup>145</sup>

In 1988, the United States Chamber of Commerce established its Institute for Legal Reform and began to invest many millions of dollars each biennium to secure the election of state court judges who favor and are likely to advance the cause of "tort reform."<sup>146</sup> The Chamber was not alone. In Texas, for example, the state medical association invested significant resources and efforts to secure election of judges sympathetic to their concerns about malpractice liability.<sup>147</sup> Funding by such organizations is not technically objectionable as corrupt because those organizations providing the funds almost never litigate and cannot be accused of seeking favor for themselves.<sup>148</sup> But the funding groups are often associations of future litigants who are obviously buying future favor for their members, partly by electing judges' who share political aims favoring tort reform or the social values of their fund-providers, or perhaps also seeking to intimidate high court judges deciding cases that might present new issues of interest to their members who might in the future seek retention or re-election. And many who seek to influence judicial elections may have no interest in the professional qualifications of the candidates they support.<sup>149</sup>

In addition to its heavy spending, the Chamber's Institute has been responsible for some of the ugliest judicial campaigns. In the 2000 Ohio campaign, its local group established and funded Citizens for a Strong Ohio<sup>150</sup> that ran attack ads against Justice Alice Resnick,

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144. 481 U.S. 1 (1987).

145. THOMAS PETZINGER JR., *OIL & HONOR: THE TEXACO-PENNZOIL WARS* 282, 288-90 (1987).

146. David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws and the First Amendment*, 72 U. CIN. L. REV. 1, 5-10 (2003); Emily Gottlieb, *Chamber of Horrors: The U.S. Chamber of Commerce Leads the Campaign to Eviscerate Victims' Right to Sue*, MULTINAT'L MONITOR, March-April 2005, at 10, 10.

147. CHEEK & CHAMPAGNE, *supra* note 101, at 42-50; Ken Ortolon, *The Big 4-0: TEXPAC Celebrates a Milestone Anniversary*, TEX. MED., May 2002, at 45, 47-48.

148. Such is an accusation that cannot be denied in *Caperton v. A.T. Massey Coal Co., Inc.*, 679 S.E.2d 223 (W. Va. 2008), *rev'd* 129 S. Ct. 2252 (2009). See *supra* text accompanying notes 90-93.

149. See RICHARD DAVID, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 103 (2005); Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1402 (2001).

150. The group's website was Citizens for a Strong Ohio, <http://www.ohiochamber.com>

who was seeking re-election.<sup>151</sup> Among its commercials was one showing a female judge switching her vote after someone dropped a bag of money on her desk, with a voice calling attention to the trial lawyers' contributions to her campaign.<sup>152</sup> The Institute also arranged for the Michigan Chamber of Commerce to run ads in Ohio inviting businesses to relocate in Michigan in order to secure the services of its courts said to be more congenial to business interests than those in Ohio.<sup>153</sup>

Justice Resnick was nevertheless re-elected, and the Ohio Elections Commission imposed a modest penalty on the Institute for its misdeed.<sup>154</sup> The Institute's approach was replicated elsewhere in 2004, but with somewhat greater restraint. It ranked states whose "legal environments" were less forgiving of business practices, and then ran campaign commercials publicizing its negative assessments of Illinois, West Virginia, and Mississippi.<sup>155</sup> This sort of communication might be identified as "voter education" within the meaning of the 2001 Internal Revenue Code so that firms contributing to its preparation and distribution are entitled to deduct the cost from taxable income.<sup>156</sup> In Mississippi, the 2004 distribution of this voter education was followed by a million dollar campaign (a sum previously unheard of in Mississippi) that succeeded in unseating Justice Charles McRae.<sup>157</sup> In Illinois, the members of the Chamber contributed more than \$2 million to the campaign of Lloyd Karmeier (who refused to recuse himself from the *Avery* appeal, despite receiving contributions from the defendants' employees) for a seat on the state supreme court;<sup>158</sup> the contributions were made through a

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/Citizens/about.asp. Unsurprisingly, it seems to have disappeared.

151. Gottlieb, *supra* note 146, at 10.

152. John Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217, 299 (2001).

153. *Id.*

154. Steve Hoffman, *Sleaze-Free Ohio Races Next Year? Good Luck. The Anonymous Now Can Attack at Will*, AKRON BEACON J., Nov. 29, 2007, at A14.

155. See generally U.S. CHAMBER INST. FOR LEGAL REFORM, RANKING THE STATES LAWSUIT CLIMATE 2010: STATE LIABILITY SYSTEMS SURVEY (2010) available at <http://www.uschamber.com/sites/default/files/reports/2010LawsuitClimateReport.pdf> (reviewing the rankings, perceptions, and concerns of court liability systems in 2010).

156. See *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 11–12 (D.C. Cir. 2009); 26 U.S.C. §§ 501(c)(3), 501(c)(6), 527 (2011). See generally BRUCE P. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* (2011) (discussing current regulations regarding tax-exempt organizations).

157. Robert Lenzner & Matthew Miller, *Buying Justice*, FORBES, July 21, 2003, at 64, 64. This event appears to have inspired a novel of JOHN GRISHAM, *THE APPEAL* (2008).

158. See Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 510–11 (2006).

group called the American Taxpayers Alliance, an organization known only to its funding sources.<sup>159</sup>

The Chamber's Institute claimed to have won every race that it tried to influence in 2004, but this cannot be confirmed because the Institute was not required in most states to make the necessary disclosures, and the money must generally pass through multiple hands. A similar level of expenditure on judicial campaigns was achieved by the Institute in subsequent elections, but with less visible results.<sup>160</sup>

#### F. *The Price of Judicial Candidacies*

As a result of these developments, it came to be that, even in a state of average size such as Alabama, a campaign for a six-year term on the supreme court could cost a candidate and his or her supporters millions of dollars.<sup>161</sup> And the price is similar or higher in Texas, California, Ohio, and Pennsylvania.<sup>162</sup> Indeed, by 2000, candidates for seats on highest state courts sometimes appear to have spent more on their campaigns than did candidates for the United States Senate running for office on the same ballot.<sup>163</sup> And the price has not visibly declined.

#### G. *The Impediment to Court Reform*

The furors over capital punishment, the design of election districts, abortion, gun control, tort reform, and gay marriage have had the additional secondary effect of elevating the resistance of many voters to any reform that makes judges less accountable to the electorate for decisions having such moral and political content and consequences.<sup>164</sup>

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159. See Pub. Citizen, *Overview: American Taxpayers Alliance*, PUBLIC CITIZEN: THE NEW STEALTH PACS, [http://www.stealthpacs.org/profile.cfm?org\\_id=106](http://www.stealthpacs.org/profile.cfm?org_id=106) (last visited Aug. 25, 2011).

160. Pub. Citizen, *Overview: US Chamber of Commerce*, PUBLIC CITIZEN: THE NEW STEALTH PACS, [http://www.stealthpacs.org/profile.cfm?org\\_id=43](http://www.stealthpacs.org/profile.cfm?org_id=43) (last visited Aug. 25, 2011).

161. Mark Hansen, *A Run for the Bench*, A.B.A. J., Oct. 1998, at 68, 70.

162. See *id.* at 68–70, 72.

163. See Matthew J. Streb, *Judicial Elections and Public Perception of the Courts*, in THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS AND THE PUBLIC 147, 151 (Bruce Peabody ed., 2011).

164. See THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS: HOW THE CONSERVATIVES WON THE HEART OF AMERICA 198–200 (2005) (describing how Conservatives influenced the abortion debate); KEVIN PHILLIPS, AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY 237–50 (2006) (discussing the controversial topics that



In 1987, in light of the then current developments, a major effort was made to amend the Ohio Constitution to provide for merit selection.<sup>165</sup> The reform was widely supported by political parties and organizations as well as the organized bar, but was soundly rejected by the electorate.<sup>166</sup> Opponents of such revivals of the twentieth century Progressive reform movement explained that the merit selection proposal “assume[s] that the voting public is incapable of selecting qualified judges . . . . This is a dangerous and undemocratic premise that would place the selection of judges in the hands of a privileged few.”<sup>167</sup> An extreme example of this widely shared attitude was the proposed amendment to the South Dakota Constitution limiting judicial immunity to expose judges to civil and criminal liability for certain unpopular decisions.<sup>168</sup> The state’s voters rejected that extreme proposal in November 2006,<sup>169</sup> but its proponents hold similar ambitions in other states.<sup>170</sup>

In 1997, the American Bar Association conducted a national conference to address these issues.<sup>171</sup> No clear solutions emerged from that discussion, but other academic discussions would ensue.<sup>172</sup> In

have influenced politics).

165. For an account of this effort, see John Felice, John Kilwein & Eliot Slotnick, *Judicial Reform in Ohio*, in JUDICIAL REFORM IN THE STATES 51, 51 (Anthony Champagne & Judith Haydel eds., 1993).

166. *Id.* at 51–52.

167. Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL’Y 273, 307 (2002) (quoting Lawrence Landskroner, *An Unmeritorious Way to Select Judges*, PLAIN DEALER (Cleveland, Ohio), Jan. 29, 1994, at 7B); see also Seth Anderson, *Judicial Election Against Merit Selection: Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 794–95 (2004) (discussing reasons for the declining support of merit selection proposals).

168. See Richard Acello, *South Dakota to Vote on Putting Judges on Trial*, 5 A.B.A. J. EREPORT 2 (Jan. 18, 2006, 2:48PM), <http://www.cobar.org/docs/ABA%20Journal.pdf?ID=20813>.

169. Matt Apuzzo, *Fight Against ‘Judicial Activism’ to Continue Despite Election Setbacks*, USA TODAY, Nov. 11, 2006, [http://www.usatoday.com/news/washington/2006-11-11-judicial-critics\\_x.htm](http://www.usatoday.com/news/washington/2006-11-11-judicial-critics_x.htm).

170. On similar initiatives in Florida, see David Nitkin, *Christian Right Seeks Triple Crown: With the Legislature Won and the Governorship Within Reach, the Coalition Sets Sights on Judiciary*, SUN SENTINEL, Apr. 19, 1998, at A1; David Nitkin, *Religious Right: Rein in Judges*, ORLANDO SENTINEL, Apr. 20, 1998, at C1. For initiatives in California, see Gail Diane Cox, *Ouster of Two Calif. Justices Sought*, NAT’L L.J., June 29, 1998, at A8.

171. The papers were published as Symposium, *Judicial Independence and Democratic Accountability*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 1.

172. See generally, e.g., William V. Dorsaneo, III, Opening Comment to the March 1999 Roy R. Ray Lecture, *Judicial Independence and Democratic Accountability in Highest State Courts*, 53 SMU L. REV. 255 (2000) (introducing the issues of partisan election process for Texas Supreme Court candidates and current campaign finance

2000, the Century Foundation's Constitution Project published a report addressing the issues; it favored the Missouri Plan, but also emphasized the need for longer terms that would at least diminish the stress and cost of frequent elections, and it acknowledged the growing perils of retention elections.<sup>173</sup> Also in 2000, the National Center for State Courts conducted a National Summit conference on the subject of judicial selection.<sup>174</sup> And the Conference of Chief Justices then joined the call for reform.<sup>175</sup> In 2002, the American Bar Association partially conceded a point when it acknowledged the possibility of public financing of elections as an alternative less attractive than "merit selection," but as a viable alternative.<sup>176</sup> In 2005, the American Bar Association amended its guidelines for the evaluation of judges in the hope that voters mindful of its guidelines would resist the urge to vote ideologically on the basis of the outcome in a celebrated case.<sup>177</sup> Several states now employ systems of evaluation, and the North Carolina Bar has a project underway to provide judicial evaluations that will become a part of an official voters' guide.<sup>178</sup>

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practices); Bradley A. Smith, *Symposium on Judicial Elections: Selecting Judges in the 21st Century*, 30 CAP. U. L. REV. 437 (2002) (discussing the challenges of judicial election processes); Symposium, *Judicial Independence and Accountability*, 72 S. CAL. L. REV. 311 (1999) (examining the threats to judicial independence and the available means of ensuring judicial accountability); Symposium, *Selecting Judges in Pennsylvania*, 106 DICK. L. REV. 679 (2002) (presenting a variety of perspectives on judicial election processes); Others are noted in Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City, 1977-2002*, 37 U. MICH. J.L. REFORM 791, 792-94 (2004).

173. See CHOOSING JUSTICE: REFORMING THE SELECTION OF STATE JUDGES: THE REPORT OF THE CITIZENS FOR INDEPENDENT COURTS TASK FORCE ON SELECTING STATE COURT JUDGES, in UNCERTAIN JUSTICE: POLITICS AND AMERICAN COURTS 77, 90-91 (The Century Foundation Press ed., 2000).

174. Its conclusions were stated in *Call to Action, Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353, 1355-59 (2001).

175. Tony Mauro, *Justices Urge Overhaul of Judicial Races*, RECORDER, Jan. 26, 2001, at 1.

176. COMM'N ON PUB. FINANCING OF JUDICIAL CAMPAIGNS, AM. BAR ASS'N STANDING COMM. ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 40-43 (2002), available at [http://www.americanbar.org/content/dam/aba/migrated/judind/pdf/commissionreport4\\_03.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judind/pdf/commissionreport4_03.authcheckdam.pdf).

177. See, e.g., AM. BAR ASS'N, BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE 3-4 (2005), available at [http://www.abanet.org/jd/lawyersconf/pdf/jpec\\_final.pdf](http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf) (asking voters, in Guidelines 5-2-5 to 5-2-7, to be influenced by the ability of a judge to consider both sides, to decide without regard for the identity of the parties, and to make difficult or unpopular decisions). On the origins of the reform, see Kevin M. Esterling, *Judicial Accountability the Right Way: Official Performance Evaluations Help the Electorate as Well as the Bench*, 82 JUDICATURE 206, 206-07 (1999); Leonard Post, *ABA Offers New Way to Judge the Judges*, NAT'L L.J., May 2, 2005, at 4.

178. Russell Rawlings, *Judicial Performance Evaluation Report Issued*, N.C. BAR ASS'N (Nov. 7, 2008), <http://www.ncbar.org/about/communications/news/2008-news->

The effect of these efforts remains uncertain. But the judicial elections of 2008 provided a cheerful moment for those attentive to the concern that money was being used to buy the judiciaries of many states. Underfunded judicial candidates in Michigan and West Virginia gained seats on their highest state courts despite large investments in their rivals' campaigns by business interests. And there was some evidence that this result was a reaction of voters against the efforts of Chambers of Commerce to buy favorable election results.<sup>179</sup> The Chamber may have lightened up in 2010. There seem to have been no momentous contests that year.

These events in other states were in due course noticed in North Carolina. In 1989, a Judicial Selection Study Commission appointed by the North Carolina Governor recommended replacing the system of electing judges with a gubernatorial appointment system with retention elections.<sup>180</sup> The proposal, coming not long after the resounding defeat of the idea in Ohio, was approved by the State Senate but was never acted on by the House.<sup>181</sup> By that time, it was evident that the financing of judicial campaigns was a growing threat to the respect of North Carolinians for their state's judiciary, even though big money campaigns had not yet been experienced in their state.<sup>182</sup> In 1986, an average of \$73,600 was spent on each seat of the Supreme Court of North Carolina that was up for election. By 1994, the average was \$300,000,<sup>183</sup> and the price continued to rise, although not to levels experienced in many other states. At that time, the Supreme Court of the United States had not yet extended the First Amendment to invalidate laws applicable to judicial election campaigning, but that prospect was clearly seen on the horizon in the light of other decisions bearing on the right to spend money to influence elections. But no action was then taken to avoid pending doom.

In 1994, Chief Justice James Exum appointed an array of eminent citizens to a Commission for the Future of Justice and the

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articles/judicial-performance-evaluation-report-issued.aspx.

179. Amanda Bronstad, *Business Connections Hurt Judicial Incumbents*, NAT'L L.J., Nov. 10, 2008, at 6.

180. JUDICIAL SELECTION STUDY COMM'N, REPORT TO THE GOVERNOR, CHIEF JUSTICE, ATTORNEY GENERAL AND THE 1989 GENERAL ASSEMBLY OF NORTH CAROLINA 12 (1989).

181. S.B. 218, 1989-1990 Gen. Assemb., Reg. Sess. (N.C. 1989); S.B. 219, 1989-1990 Gen. Assemb., Reg. Sess. (N.C. 1989).

182. Robert Morgan, *Let's Reform the Judicial Election Process Now*, N.C. LAW., Jan.-Feb. 2001, at 14.

183. Behrens & Silverman, *supra* note 167, at 278.

Courts in North Carolina. Its report, published in 1996, proposed a “merit selection” scheme resembling the Missouri plan.<sup>184</sup> The stated aim was to insulate the judiciary from partisan politics. That proposal, like others advanced by the Commission for enhancement of the state court system, gained little support in the state legislature and was not seriously considered,<sup>185</sup> perhaps partly in recognition of the considerations causing the similar proposal to fail in Ohio.

In 2001, a North Carolina Committee on Judicial Elections appointed itself to develop a more marketable proposal.<sup>186</sup> The Committee sought a method of facilitating low-budget campaigns for judicial office and a means of deterring the high-cost methods employed with increasing frequency in other states. Although fully sensitive to the considerations that had led the North Carolina Bar Association to support the Missouri Plan, it recommended the establishment of a publicly-funded voter’s guide of the sort in use in some other states<sup>187</sup> that would contain information about every candidate for judicial office who agreed to accept constraints on high-cost campaigns.<sup>188</sup> It was proposed that the guide be distributed by mail to every registered voter in the state and would be posted on a publicized website. The committee’s recommendations were, like those of the previous commission’s, not seriously considered by the state’s legislature.

While this self-appointed committee proposal also failed to gain traction, its proposal did resonate with another under consideration

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184. COMM’N FOR THE FUTURE OF JUSTICE AND THE COURTS IN N.C., FINAL REPORT (1996). For comment, see generally Samuel Latham Grimes, *Without Favor, Denial or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges*, 76 N.C. L. REV. 2266 (1998).

185. See Kathleen Hall Jamieson & Bruce W. Hardy, *Will Ignorance & Partisan Election of Judges Undermine Public Trust in the Judiciary?*, DAEDALUS, Fall 2008, at 11, 12–13; Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1445–47 (2003).

186. Its members included eight former members of the state’s appellate courts (one of whom has since been appointed to the United States Court of Appeals), a former Governor, a former United States Senator, a former president of the American Bar Association, two former university presidents, and three former law school deans. See N.C. COMM. ON JUDICIAL ELECTION CAMPAIGNS, A PROPOSAL TO ESTABLISH A VOTER’S GUIDE FOR USE FOR CANDIDATES FOR STATEWIDE JUDICIAL OFFICES IN NORTH CAROLINA (2001) (on file with author).

187. *Id.* Such guides have been used in other states beginning in Washington in 1996. See *2006 Judicial Voter Pamphlet*, WASHINGTON COURTS, available at <http://www.courts.wa.gov/voters/index.cfm> (last visited Aug. 25, 2011).

188. See generally N.C. COMM. ON JUDICIAL ELECTION CAMPAIGNS, *supra* note 186 (proposing that North Carolina publish a voter guide to avoid undue influence, or the appearance of such, from campaigns).

by the legislature. The other proposal was for public financing of legislative campaigns that was modeled on laws then recently enacted in Arizona, Maine, and Vermont. The legislature was willing to consider the proposal because it was sponsored by a group of organizations having significant political clout, such as the American Association of Retired Persons and the North Carolina Academy of Trial Lawyers. Two other groups assembled that group of influential organizations: Democracy North Carolina and the North Carolina Center for Voter Education. Their cry was for “voter-owned” elections.<sup>189</sup>

The timing of these two proposals facilitated a compromise of sorts in the North Carolina legislature when it enacted a law providing for public funding of judicial campaigns. That reform was less than the advocates for voter-owned elections sought, and was not what either the Commissions, the Committee, or the voluntary North Carolina Bar Association had advocated to shield the state’s judiciary from the worst features of privately financed campaigns. However, it was better for both initiatives than outright rejection would have been. The Governor signed the Judicial Campaign Reform Act on October 10, 2002.<sup>190</sup>

The Act first directed the State Board of Elections to publish a voters’ guide providing information about the candidates.<sup>191</sup> The legislation failed to appropriate sufficient funds for that purpose. A guide was nevertheless published for the 2004 election,<sup>192</sup> with help from several non-profit organizations, private foundations, and federal funds for voter education. It was distributed to every

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189. See generally Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994) (arguing that public financing of campaigns for public office is inconsistent with American democracy). For earlier considerations of this idea, see generally Joel L. Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens*, 52 N.C. L. REV. 349 (1973) (examining and comparing the litigative and legislative models of legal change in the context of public financing of election campaigns); Marlene Arnold Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 (1974) (applying equal protection analysis in the context of the electoral process to the inequalities created by the campaign funding practice).

190. N.C. GEN. STAT. § 163-278.61 (2009).

191. § 163-278.69(a).

192. STATE BD. OF ELECTIONS, 2004 JUDICIAL VOTER GUIDE: A GUIDE TO VOTING AND JUDICIAL ELECTIONS IN NORTH CAROLINA (2004), available at [http://www.ncjudges.org/downloads/voter\\_guide\\_04.pdf](http://www.ncjudges.org/downloads/voter_guide_04.pdf); see also *Study: N.C. Judicial Voter Guide a Success*, NCJUDGES.ORG (FEB. 16, 2005), [http://www.ncjudges.org/media/news\\_releases/2\\_16\\_05.html](http://www.ncjudges.org/media/news_releases/2_16_05.html) (describing voters’ approval of the new voter guides).

household at a cost of approximately \$500,000. A subsequent poll revealed that the voters favorably received it.<sup>193</sup>

That Act also created a form of semi-non-partisan runoff election to be held following partisan primaries.<sup>194</sup> This reform led the Republican Party to circulate a voters' guide identifying its candidates. The wisdom of the non-partisan judicial election has been questioned by the recent work of Chris W. Bonneau and Melinda Gann Hall, whose data indicate that voters are better informed about candidates in partisan judicial elections than in non-partisan ones.<sup>195</sup> But no substantial protest was raised against this mixing of partisan and non-partisan politics.

Of greatest interest to those in other states, the Act created a Public Fund for use in the 2004 and subsequent elections for the purpose of deterring large campaign contributions.<sup>196</sup> Candidates who raised a threshold amount of money and who agreed to strict spending and fundraising limits are entitled to receive a lump sum of public funding to run their campaign.<sup>197</sup> The law also provides for rescue money in the event that a publicly financed candidate is outspent by a privately financed opponent.<sup>198</sup> To gain this public subvention, judicial candidates had to first raise \$35,000 from at least 350 voters, with no contribution greater than \$500.<sup>199</sup>

The Public Fund was barely sufficient to meet the needs for the 2004 election. In response, legislation in 2005 added an important new source of money for the Public Fund, a surcharge of fifty dollars on annual state bar dues.<sup>200</sup> The private North Carolina Bar Association protested this funding technique, but the money lawyers or lawyer organizations paid in the form of voluntary campaign contributions to

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193. *Study: N.C. Judicial Voter Guide a Success*, *supra* note 192 (discussing the poll that was conducted for the Center for Voter Education by American Viewpoint of Alexandria, Virginia).

194. Act of Oct. 10, 2002, ch. 158, § 7(a), 2002 N.C. Sess. Laws 615, 626 (amending N.C. GEN. STAT. § 163-329). On the issue of partisan selection of judicial candidates, see Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 17-18 (2003); Ryan L. Souders, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 548-55 (2006).

195. CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 109 (2009).

196. N.C. GEN. STAT. § 163-278.63(a) (2009).

197. § 163-278.64(d) (describing the restrictions on contributions and expenditures for certified candidates).

198. Act of Oct. 10, 2002, ch. 158, § 1, 2002 N.C. Sess. Laws 615, 620 (amending N.C. GEN. STAT. § 163-278.67(a)).

199. § 1, 2002 N.C. Sess. Laws at 618 (amending N.C. GEN. STAT. § 163-278.64).

200. Act of Aug. 13, 2005, ch. 276, § 23A.1(a), 2005 N.C. Sess. Laws 668, 959 (amending N.C. GEN. STAT. § 84-34).

appellate-level judicial candidates dropped from \$744,000 in 2002 to \$302,000 in 2004.<sup>201</sup> The \$442,000 saved did not equal the proceeds from the \$50 tax imposed after that election, but it did make a dent.

The other wrinkle in the scheme was a provision allowing state income taxpayers a choice in the amount of three dollars.<sup>202</sup> If they check the right box on the state tax form, three dollars goes to the Public Fund, but if they do not check the box, the three dollars goes into the General Fund with their other tax dollars. This choice posed a public relations challenge for those favoring the program. Many taxpayers do not see the box at all, or assume that if they check it, their taxes will increase by three dollars. As such, this forced supporters of public funding to remind their acquaintances to check the box, and that it would cost them nothing to do so.

Despite its flaws and limitations, the scheme was pronounced “the nation’s number-one model for reform” by the executive director of the Justice at Stake Campaign, a Washington-based group that monitors judicial elections across America.<sup>203</sup> It was replicated in New Mexico,<sup>204</sup> Wisconsin,<sup>205</sup> and West Virginia.<sup>206</sup>

Alas, the Supreme Court of the United States in 2011 held that the matching funds feature of the scheme was a violation of the First

201. DEMOCRACY N.C., A PROFILE OF THE JUDICIAL PUBLIC FINANCING PROGRAM, 2004–2006, at 3 (2006), available at <http://www.nc-democracy.org/downloads/JudicialVOEImpact06-06.pdf>.

202. § 4, 2002 N.C. Sess. Laws at 625 (amending N.C. GEN. STAT. § 105-159.2).

203. *N.C. Bucks Trend of Nasty Judicial Elections*, NCJUDGES.ORG (Nov. 11, 2004), [http://www.ncjudges.org/media/news\\_releases/11\\_11\\_04.html](http://www.ncjudges.org/media/news_releases/11_11_04.html) (internal quotations omitted); see also Press Release, Justice at Stake, 2004 State Supreme Court Elections Driven by Record TV Ad Spending (Jun. 27, 2005), available at [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/2004\\_state\\_supreme\\_court\\_elections\\_driven\\_by\\_record\\_tv\\_ad\\_spending?show=news&newsID=6126](http://www.justiceatstake.org/newsroom/press_releases.cfm/2004_state_supreme_court_elections_driven_by_record_tv_ad_spending?show=news&newsID=6126) (describing the growing use of advertising in judicial elections).

204. BONNEAU & HALL, *supra* note 195, at 122–24.

205. Act of Dec. 1, 2009, ch. 89, 2009 Wis. Sess. Laws, 1020, 1020–27; see Press Release, Justice at Stake, ‘Big Victory’ in Wisconsin (Nov. 5, 2009), available at [http://www.justiceatstake.org/newsroom/featured\\_stories.cfm/justice\\_at\\_stake\\_hails\\_public\\_financing\\_breakthrough\\_in\\_wisconsin?show=news&newsID=6241](http://www.justiceatstake.org/newsroom/featured_stories.cfm/justice_at_stake_hails_public_financing_breakthrough_in_wisconsin?show=news&newsID=6241). It was promptly challenged by Wisconsin Right to Life for its “chilling effect” on its right to influence elections with campaign contributions. Warren Richey, *Wisconsin Lawsuit Tests a Pioneering Campaign Finance Law*, CHRISTIAN SCI. MONITOR, Dec. 19, 2009, <http://www.csmonitor.com/USA/Justice/2009/1219/Wisconsin-lawsuit-tests-a-pioneering-campaign-finance-law>.

206. Act of Mar. 13, 2010, ch. 72, 2010 W. Va. Acts 863, 863–96; see Press Release, Justice at Stake, Justice at Stake Hails Public-Financing Vote in West Virginia (Mar. 12, 2010), available at [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/justice\\_at\\_stake\\_hails\\_public\\_financing\\_vote\\_in\\_west\\_virginia?show=news&newsID=7006](http://www.justiceatstake.org/newsroom/press_releases.cfm/justice_at_stake_hails_public_financing_vote_in_west_virginia?show=news&newsID=7006); see also Editorial, *From Scandal to Example*, N.Y. TIMES, Mar. 19, 2010, at A24 (describing the pilot program for voluntary public financing in Supreme Court elections).

Amendment rights of citizens or corporations to express thoughts about a judicial election by spending on a scale that overwhelms the standard fund normally provided to the candidate who accepts the support of the public fund.<sup>207</sup>

#### VI. EXPERIENCE WITH THE 2002 NORTH CAROLINA ACT: ITS PROBLEMS AND PROPOSALS FOR REFORM

While three other states have now followed its lead in the public funding reform, North Carolina has continued to struggle with the issues. Its experience may be informative not only to those states that have replicated the public funding law, but also to those numerous other states in need of reforms to resolve the crises imposed on them by the decisions of the Supreme Court.

In 2003, the Supreme Court of North Carolina, invoking *Republican Party of Minnesota v. White*,<sup>208</sup> without prior notice or hearings, announced an amendment to its canons governing judicial campaigning to affirm that “[a] judge may engage in political activity consistent with the judge’s status as a public official.”<sup>209</sup> Thus, public finance did not fully resolve the problem of campaign promises, nor address the problem of defamatory campaigning.

In 2004, there were two contested seats on the state’s supreme court, and three on the intermediate court of appeals. There were sixteen candidates for the five offices. Twelve qualified for public funding. Four of the five who won offices qualified for, and received, public funding. Court of appeals candidates received \$137,500 and were permitted to raise an additional \$66,000. Supreme court candidates received as much as \$201,775 and were permitted to raise an additional \$69,180.<sup>210</sup> Apparently, no rescue funds were needed or sought in 2004.

It thus remained that no candidate seeking a judicial office in North Carolina engaged in big spending of the sort experienced in many other states. Chris Heagerty, the Executive Director of the Center for Voter Education explained that “[b]ecause the new law gave our candidates the ability to respond to special interest attacks,

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207. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011).

208. 536 U.S. 765, 787–88 (2002).

209. See Supreme Court of N.C., Order Adopting Amendments to the N.C. Code of Judicial Content, at Canon 7 (Jan. 31, 2006), available at <http://www.aoc.state.nc.us/www/public/aoc/Amendments-NCJudicialCode.pdf>.

210. See Gary L. Wright, *Soliciting Taken Out of Judicial Races*, CHARLOTTE OBSERVER, Oct. 3, 2004, at 1P.



from the political left or right, I think many groups stayed out of North Carolina because they knew that our candidates now had the resources to fight back and set the record straight.”<sup>211</sup>

Barbara Jackson won a seat on the court of appeals in 2004. She had failed to qualify for public funding, and, in 2006, brought an action in the federal court seeking a declaration that the scheme is unconstitutional.<sup>212</sup> Jackson argued that it was a violation of the First Amendment for the state to provide public funds to a rival candidate. The North Carolina Bar Association (a voluntary organization) also appeared to challenge the fifty-dollar tariff on lawyers as an unjust discrimination. The Brennan Institute at the New York University Law School undertook to represent the state in defending the program and acquired the services of former Chief Justice Exum for that purpose. The district court dismissed, the court of appeals affirmed,<sup>213</sup> and the Supreme Court denied certiorari.<sup>214</sup> But, in 2011, it would reverse its position on the matching funds issue.

In addition to now-Justice Jackson, some lawyers aggrieved to pay fifty dollars were not happy with the 2002 legislation. As soon as the 2004 election was held, the North Carolina Bar Association resolved to deal with the problem with a new initiative. A committee was appointed to study the matter and make a different proposal. Its specific proposal to the 2005 legislature was a constitutional amendment providing for gubernatorial appointments, an early confirmation election in which no rival candidacy would be presented, and thereafter longer terms than the present eight years.<sup>215</sup> At least some of its lobbying effort was invested in an unsuccessful protest against the fifty-dollar contribution. Its proposal was at least for the moment resisted by the North Carolina Academy of Trial Lawyers (now the North Carolina Advocates for Justice), whose members were prone to mistrust the proposal as elitist in its aims. No action was taken by the legislature on the Bar’s proposal.

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211. *N.C. Bucks Trend of Nasty Judicial Elections*, *supra* note 203.

212. Press Release, Democracy N.C., Lawsuit Challenges Judicial Public Financing Program, *available at* <http://www.democracy-nc.org/reports/researchreports/LawsuitChallenges.pdf>.

213. *N.C. Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 432 (4th Cir. 2008). This was not the first conflict between that group and North Carolina election laws. In 1999, the court of appeals had partially affirmed a district court decision invalidating an earlier state law regulating campaign funding. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 708 (4th Cir. 1999).

214. *Leake*, 524 F.3d 427, *cert. denied*, 129 S. Ct. 490 (2008).

215. S.B. 523, 2005 Gen. Assemb., Reg. Sess. (N.C. 2005).

In June 2006, because Justice Sarah Parker's rival in the campaign for the office of chief justice spent more than allowed by the scheme, Parker was permitted to draw from the Public Fund an additional rescue grant enabling her more nearly to match his expenditures. Even though she was still outspent, she won the election.<sup>216</sup> Also, in 2006, for the first time a substantial sum was spent by an independent group advocating the election of some of the candidates.<sup>217</sup> Members of the trial lawyers' organization expended this money in the last weeks of the campaign. The Board of Elections was asked to provide rescue funds for those candidates who were disfavored by the 527 interjection, but concluded that it was not authorized to do so.<sup>218</sup> Others feared that this unexpected special funding by a group of trial lawyers would evoke a massive response by the Chamber of Commerce in later elections, but this did not happen in 2008 or 2010.<sup>219</sup>

Despite its moderate success, there are continuing frailties in the scheme enacted in 2002. One is the delicate sufficiency of the Public Fund. In 2006, the legislature did approve a one-time only contribution from the current excess revenue of \$750,000 to shore up the Fund against possible needs to make rescue payments.<sup>220</sup> It also modified the taxpayer check off to make it less dependent on the taxpayer's momentary understanding of the consequences of the contribution. The funds provided were apparently adequate for the needs of 2008 and 2010.<sup>221</sup>

A second enduring frailty is the Official Voters' Guide ("Guide"). Although well-received by voters, it is not as informative as it could be. The Guide could provide the voters with the important excerpts from the American Bar Association guidelines promulgated in 2005<sup>222</sup> to counsel against simplistic ideological voting. And in

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216. Gary D. Robertson, *Campaign Funds Stir up Debate*, NEWS & OBSERVER (Raleigh, N.C.), June 21, 2006, at 5B.

217. Andrea Weigl, *TV Ads Highlight 4 Candidates: Some Question Legality of Contributions to FairJudges.net*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 31, 2006, at 5B.

218. See Editorial, *Judicial Ad Trips Alarm*, NEWS & REC. (Greensboro, N.C.), Nov. 2, 2006, at A10 ("Both [candidates] quickly petitioned the State Board of Elections for 'rescue funds,' released to candidates whose opponents exceed spending limits. They were denied because the ads weren't run by their opponents but by a group known as a '527' for the Internal Revenue Service rule governing it.")

219. See *N.C. Public Funding Programs: 2010 Candidates*, N.C. STATE BD. OF ELECTIONS, <http://www.sboe.state.nc.us/content.aspx?id=21> (last visited Aug. 25, 2011).

220. Lynn Bonner, *House Backs Election Funding: Some Campaigns Could Get State Aid*, NEWS & OBSERVER (Raleigh, N.C.), July 29, 2007, at 1B.

221. No requests for matching funds are recorded.

222. See generally BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL

accord with recommendations of a subcommittee of the North Carolina Bar Association, it could also be more useful and more effective if it was enlarged to incorporate endorsements by pre-existing organizations (including the political parties) that agreed to refrain from spending on judicial campaigns. A website could then be supplied to which every contribution would be reported instantaneously. That would provide an additional disincentive to spend large sums calling for matching funds.

Also, the public funding program could be strengthened further if only candidates agreeing to the campaign finance rules were permitted to make brief campaign statements in the Guide. If organizations endorsing candidates could be permitted to make brief statements explaining their endorsement provided that they limit other forms of communicating with voters and make an appropriate contribution to the Public Fund. This last suggestion is not without risk; some organizations could give reasons so inappropriate as to diminish the utility of the Guide to produce an informed electorate.<sup>223</sup>

In response to these weaknesses, the North Carolina Bar Association is now conducting a program to formally evaluate its judges. The American Bar Association recommended such a program in 2005.<sup>224</sup> Some states use the American Bar Association standards to guide a formal evaluation process that produces a report, which can be made available in a voters' guide when a sitting judge stands for retention. The institution performing the evaluation is generally the same as that responsible for the discipline of miscreant judges. As the case of Penny White in Tennessee exemplified, a favorable report does not assure retention even when there is no rival.<sup>225</sup> But a program of this sort will add weight to the Guide. Experience in the State of Washington tends to confirm that many voters take such reports seriously and that they tend to strengthen judicial

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PERFORMANCE, *supra* note 177 (recommending guidelines for judicial evaluation programs).

223. For example, Oklahomans for Judicial Excellence was a business organization in disguise. Chuck Ervin, *Oklahoma Judges Rated by Coalition*, TULSA WORLD, Apr. 5, 1998, at B1.

224. See generally BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE, *supra* note 177 (recommending guidelines for judicial evaluation programs).

225. For the current report, see TENN. JUDICIAL PERFORMANCE EVALUATION COMM'N, TENNESSEE APPELLATE JUDGES EVALUATION REPORT (2010), available at [http://www.tncourts.gov/sites/default/files/docs/jpec\\_evaluations\\_2010.pdf](http://www.tncourts.gov/sites/default/files/docs/jpec_evaluations_2010.pdf). See generally Susan Keilitz & Judith W. McBride, *Judicial Performance Evaluation Comes of Age*, 16 STATE CT. J. 4 (1992) (comparing various evaluation methods and noting the benefits of each).

independence.<sup>226</sup> Those who participate in judicial evaluations in the State of Washington are not only the lawyers, but also the witnesses and jurors who have appeared in the incumbent's court. For appellate judges, only appellate advocates are enlisted as evaluators. The usual problems associated with efforts to quantify the ineffable persist; no one engaged in the process can be confident in their own judgment, based as it is on narrowly limited experience. To some extent, receiving written comments can diminish that problem, but if circulated to voters, these may be likely to weigh too heavily. With respect to appellate courts,<sup>227</sup> the crudely quantified appraisals of lawyers over time and across cases, when compared to responses of lawyers to other judges, would seem to have some value. Shared with voters, they could provide a more rational basis for choice than much of the other information shared in a voters' guide of the sort distributed in 2004–2010, and would have the effect of reducing the ability of partisan voter guides to compete with the disinterested Guide.

That feature in the existing scheme evokes comparison with a scheme proposed by Bruce Ackerman and Ian Ayres that would give each voter a fund of fifty “patriot dollars” to distribute to any candidate they might choose.<sup>228</sup> They proposed that this could be done with a private visit to an ATM machine, where all contributions would be made, so that the candidate would not know the source of the contributions.<sup>229</sup> The hope would be that secret contributions like secret votes would immunize both candidates and voters against any sense of obligation or entitlement derived from their contributions. Their stated aim was to disrupt the market for political influence.<sup>230</sup> While their scheme has theoretical attraction, its practical implications and consequences are complex and difficult to foretell.<sup>231</sup> Its authors rest their advocacy in part on the futility they perceive in

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226. David C. Brody, *The Relationship between Judicial Performance Evaluations and Judicial Elections*, 87 JUDICATURE 168, 170, 177 (2004).

227. On the difficulties with publicizing results for trial judges, see Marilyn Cavicchia, *Judicial Evaluations: Hennepin County, Minnesota*, JUDGES' J., Winter 2005, at 41, 43.

228. BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 4, 66–67 (2002).

229. *Id.* at 66–68.

230. *Id.* at 69.

231. See Lillian R. BeVier, *What Ails Us*, 112 YALE L.J. 1135, 1137 (2003) (reviewing ACKERMAN & AYRES, *supra* note 228). For an array of other comments on their book, see Kathryn Abrams, *Commentaries: Hybridizing Citizenship*, 37 U. RICH. L. REV. 935, 935–1184 (2003) (reviewing ACKERMAN & AYRES, *supra* note 228).

efforts to reconstruct the present regime in light of what the Supreme Court of the United States has done with the First Amendment.<sup>232</sup>

Another useful, but modest, reform in the present system of judicial selection in North Carolina is the “instant runoff.”<sup>233</sup> A law enacted in 2005 authorized its use in elections to fill vacancies.<sup>234</sup> In 2008, its use was extended to apply to all local elections.<sup>235</sup> It allows voters to express a second choice in the general election should their first choice fail to win, thus eliminating the need for a runoff and sparing the candidates some additional expense.

Despite the persistence in efforts to reform a system of selecting judges that is faithful to the Lincolnesque aim embodied in the 1868 North Carolina constitution, the North Carolina Bar Association proposal may be the nearest thing to an acceptable constitutional compromise with the Supreme Court’s activist political vision.

The Bar’s present proposal was crafted by a committee led by former Chief Justice Exum and former Bar president John Wester, and has been introduced as Senate Bill 47.<sup>236</sup> The sponsors are Senator Fletcher Hartsell and Assemblyman Dan Clodfelter. It is a variation on the traditional Missouri Plan resembling plans in place in other states that have reluctantly surrendered their citizens’ right to elect judges. The critical feature is that it maintains the retention of election and so assures a measure of accountability to deter excesses of judicial activism. The bill would create a statewide Judicial Nominating Commission whose twelve members would be selected in diverse ways to assure a measure of non-partisan but popular representation; half would be lawyers. When a vacancy occurs, the Commission would be responsible for nominating two candidates for the office. The Governor would be eligible to run for the office. The Governor would be authorized to choose one of the candidates. If the other chose not to contest an election, the Governor’s choice would

232. Bruce Ackerman & Ian Ayres, *Response: Why A New Paradigm?*, 37 U. RICH. L. REV. 1147, 1162–64 (2003).

233. For a succinct statement of the case, see Blair Bober, *Voting, as Easy as 1, 2, 3*, L.A. TIMES, Dec. 10, 2008, <http://articles.latimes.com/2008/dec/10/opinion/oe-bobier10>. *But see Instant Runoff Voting: Fact vs. Fiction*, INSTANTRUNOFFVOTING.US, <http://www.instantrunoffvoting.us/> (last visited Aug. 22, 2011) (arguing that instant runoff voting is not “as easy as 1-2-3”).

234. See Rob Richie, *Campaign 2006 and Bringing Instant Runoff Voting to the Tipping Point*, COMMONDREAMS.ORG (Nov. 3, 2006), <http://www.commondreams.org/views06/1103-23.htm>.

235. Act of Aug. 2, 2008, ch. 150, § 3(a), 2007 N.C. Sess. Laws 605 (codified at N.C. GEN. STAT. § 163-182.13 (2009)).

236. N.C. BAR ASS’N, PROPOSAL FOR IMPROVING HOW NORTH CAROLINA SELECTS JUDGES (2011), available at [www.ncbar.org/media/12554545/S47PartisanJudElections.pdf](http://www.ncbar.org/media/12554545/S47PartisanJudElections.pdf).

still be required to face a prompt retention election. Once elected, the judge would serve for eight years and then stand for another retention election.

The scheme would certainly protect the state from the election of an unqualified judge of the Donald Yarborough sort.<sup>237</sup> It would discourage but not prohibit heavy spending on a perhaps bitterly contested campaign or on a campaign to cause the non-retention of the sitting judge. One cannot be sure that our activist Supreme Court will not find a constitutional objection to this design, too, but it is presently difficult to see what that might be. This author served as a member of the drafting committee and offers it an unqualified endorsement. It is, in his view, “worth a damn” and much to be preferred over the method by which our Supreme Court Justices are selected. I beg the legislature to enact it.

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237. See CHEEK & CHAMPAGNE, *supra* note 101, at 39.