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## A Plea for Reality

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Roy A. Schotland<sup>1</sup>

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Thank you for the privilege and the pleasure of joining you, in the best possible state for any discussion of judicial selection and blessedly at a distinguished law school. For me, after twenty-five years of involvement in the judicial election scene and four weeks after retiring from teaching – but not, I hope, from continued involvement – this is a unique opportunity to share views, air questions, consider the ever-evolving changes and challenges, and speak bluntly on a few points. I treasure the friendships I have built with others similarly involved, and I hope that my comments, some of which may seem unrestrained, are taken in the spirit that underlies them. My plea for reality stems from the view that this subject suffers from much myth and much spin. *Myth* matters when it differs from reality about where we are and

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1. Professor Emeritus, Georgetown Univ. Law Center. This will be my last article, after twenty-four years writing on this subject, which may explain the shameless citations to previous articles. Preferring “reality” over myth and spin has been a constant. See, e.g., Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659 (2002); Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1250, 1254 (2008) (Afterword, Part C., *Public Campaign Funding: A Dialog*, under Demythologizing “Full” Public Funding, which argues against “over-selling spin” by proponents of public funding). The best-ever statement about contact with reality was by Thomas Huxley, the nineteenth-century English intellectual who defended Darwin in famous Oxford debates with Bishop Samuel Wilberforce.

Wilberforce, . . . scornfully asked Huxley whether he was descended from an ape through his grandfather or his grandmother. Huxley had the last word years later, when the Bishop died after being thrown headfirst from a horse. . . . Huxley wrote in a letter: “For once, reality and his brains came into contact and the result was fatal.”

John Tierney, *Darwin the Comedian. Now That’s Entertainment*, N.Y. TIMES, Feb. 10, 2009, at D2.

how we got here. *Spin* matters because it interferes with honest dialog about where we are and what, if any, change is needed.

What should get our attention? That is always a question of priorities and relative relevance. Here, what is “relevant” is what may help reduce the problems in judicial selection.

## I. THE ENDLESS DEBATE<sup>2</sup>

Legend has it that a long-ago Chief Justice of Texas said, “No judicial selection system is worth a damn.” This view has been all but proven by American experience; nothing else in American law matches this subject in terms of the volume of written debate and endless sweat spent working for change. The selection system for federal judges is unchanged but far from untroubled, and

the States have never used a common method . . . [O]ne can identify almost as many different methods . . . as there are States in the Union . . . Moreover, most States have changed the way they choose judges at some point in their history, often more than once.<sup>3</sup>

My focus is on judicial elections. Since I began work on them, I have adhered to agnosticism about methods of selection.<sup>4</sup> One reason is this: My writing and work aim at making a difference, but to say anything new on this subject seems almost impossible, and for the last generation the battles to change selection methods have been futile.<sup>5</sup> Of course past performance is no

2. See Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259 (2008).

3. Brief for the Conference of Chief Justices as Amici Curiae Supporting Neither Party at 5, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22). The lead author was Thomas R. Phillips, ex-Chief Justice of Texas; I was one of his two co-authors, but these words were not mine. *Id.* at 1.

4. Professors often say how much they learn from their students. My most notable teacher was an Election Law seminar student, Robert Friedman, who proposed a paper on elective judges’ campaign finance. When my response was silence, he asked why, and I said, “Simply because it’s a terrific idea and I never thought of it.” Now a notable Los Angeles lawyer, he is the one to credit or blame for getting me started in this domain, which, until a 1998 ABA Report and the dramatic 2000 elections, was almost completely ignored except by a few candidates in a very few states and by handfuls of advocates trying to end contestable elections. My first venture was *Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?*, 2 J.L. & POL. 57 (1985).

5. “Don’t let them take away your vote!” has been the landslide-winning slogan in Ohio (1987), Florida (2000), and South Dakota (2004), even though their appellate judges are selected by a “merit” system and face the voters only for “retention.” See Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1081-82, 1090 (2007). For further information on efforts for change, see sources

predictor of the future, but, as the chief justices formally resolved two years ago, “elections will stay in many and perhaps all of the states that have that system.”<sup>6</sup> People who advocate ending contestable elections always point to

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cited *infra* note 7. Perhaps the experience of recent decades will not continue, given the dramatic changes in judicial elections since 2000. See Brandenburg & Schotland, *supra* note 1, at 1231. Not to be overlooked: “Intellectuals are reliable lagging indicators, near-infallible guides to what used to be true.” CHARLES R. MORRIS, *THE TRILLION DOLLAR MELTDOWN 17* (2008).

6. Conference of Chief Justices, Resolution of February 7, 2007, <http://ccj.ncsc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html>. That resolution stemmed in part from lower courts’ extensions of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). See, e.g., *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004). The Resolution may have also stemmed in part from reactions to Justice O’Connor’s concurring opinion, in which she treated “the State” as if it were a single individual rather than the reality of an entity in which voters will not give up judicial elections. She wrote, “If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.” *White*, 536 U.S. 765, 788, 792 (O’Connor, J., concurring). The problem, of course, is that the voters in many states with judicial elections will not give up voting for judges. Changes in judicial selection systems may have to be more modest than systemic change. Since her retirement, Justice O’Connor has become an icon for judicial independence. This praise is unquestionably deserved due to her extraordinarily active initiative and leadership in efforts to support and advance the nation’s judiciary. See, e.g., Linda Greenhouse, *Independence: Why & from What?*, *DAEDALUS*, Fall 2008, at 5, 7 (“The Sandra Day O’Connor Project on the State of the Judiciary at Georgetown University Law Center held conferences in 2006, 2007, and 2008 that drew the attendance of six sitting Supreme Court Justices and hundreds of scholars, business and political leaders, and representatives of the non-profit sector.”). It is no surprise that the Justice believes that “states should do away with judicial elections.” (For a description of her comments in Phoenix a few weeks ago, see Sandra Day O’Connor, *Where Judges Can Be Bought and Sold*, Jan. 28, 2009, available at <http://knowledge.wpcarey.asu.edu/article.cfm?articleid=1739>). But given her work with state judges and the weight of her statements, there is reason to believe she is open to the view that moving to “merit” is outside the realm of the possible in most states. With total respect for all she did as a Justice and all she continues to do for justice, I hope she can be persuaded to adjust her advocacy to reflect two realities: 1) Her talk in Phoenix treats states as her opinion did: “If I could do one thing to protect judicial independence in this country,” O’Connor said, “it would be to convince those states that still elect their judges to adopt a merit selection system . . . .” 2) She added, “. . . [S]hort of that – at least do something to remove the vast sums of money being collected by judicial candidates . . . .” *Id.* As Justice O’Connor wrote (with Justice Stevens) for the Court in the landmark *McConnell v. FEC*, 540 U.S. 93, 224 (2003), “Money, like water, will always find an outlet.” That is exactly what is happening in judicial campaign spending: The more we limit contributions to candidates, the more funds flow to independent spending. See, e.g., *Petition for a Writ of Certiorari, Avery v. State Farm Mut. Auto. Ins. Co.*, 547 U.S. 1003 (2006) (No. 05-842); *Brief for Petitioners, Caperton v. A.T. Massey Coal Co.*,

some pending bill in some state (lately, Nevada), but for over one hundred years, the hurdles in turning proposals into constitutional amendments have been all but insuperable.<sup>7</sup>

The endless debate does have new elements. Some “merit” systems have recently suffered unusual confrontations between governors and nominating committees.<sup>8</sup> Also, we have new analyses drawing upon the actual

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129 S. Ct. 2252 (2009) (No. 08-22). No voice matters as much as hers does. Her advocacy for moving to “merit” stirs attention for change. My hope is only that she will draw attention to feasible steps to reduce the problems in judicial elections where, as is so likely, the “elective” system continues.

7. Nevada’s pending bill is typical: Even if enacted, it would have to be followed by re-enactment, then passage by a majority of voters in order to become a constitutional amendment; Nevada voters rejected the change in 1972 and 1988. AM. JUDICATURE SOC’Y, CHRONOLOGY OF SUCCESSFUL AND UNSUCCESSFUL MERIT SELECTION BALLOT INITIATIVES, available at [http://www.judicialselection.us/uploads/documents/Merit\\_selection\\_chronology\\_1C233B5DD2692.pdf](http://www.judicialselection.us/uploads/documents/Merit_selection_chronology_1C233B5DD2692.pdf). From 1940-67, ballot propositions to move to “merit” won in seven states; in 1969-77, there were seven more victories and four defeats; since 1978, there have been six victories and eight defeats, with a two-four score for 1987 to date. *Id.* “Since 1990, legislatures in North Carolina, Texas, and elsewhere have considered merit selection, only to reject it.” G. Alan Tarr, *Politicizing the Process: The New Politics of State Judicial Elections*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 52, 53 (Keith Bybee ed., 2007). On the past 103 years’ glacial progress (which if continued will need another 160 years to end contestable elections for appellate judges and 770 years for trial judges), see Schotland, *Introduction: Personal Views*, 34 LOY. L.A. L. REV. 1361, 1366-67 (2001) (introducing “Call To Action” and papers from the National Summit on Improving Judicial Selection). In fact, we might be moving in the wrong direction: “Back in 1906, Roscoe Pound, a scholar at Harvard Law School, started a campaign to have judges appointed . . . . When he spoke, eight in ten American judges stood for election. Today, the figure is 87%.” *The Election of Judges: Guilty, Your Honour?*, THE ECONOMIST, July 24, 2004, at 28-29; see also *My Judge is a Party Animal*, THE ECONOMIST, Jan. 1, 2005, at 20. As of 2004, 89% of state appellate and trial (general jurisdiction) judges face some form of election. Twenty-six percent (26%) of appellate judges and 9% of trial judges face only a retention election. See David Rottman, *Judicial Elections in 2008*, 41 BOOK OF THE STATES (2009). “[The recent] loss of reform momentum has led groups like the [ABA] to seek ways of improving existing modes of selection rather than transforming them, at least in the short run.” G. Alan Tarr, *The Judicial Branch*, in 3 STATE CONSTITUTIONS FOR THE 21ST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 85, 99-100 (G. Alan Tarr & Robert F. Williams eds., 2006) (footnotes omitted). How telling it is that in 1988 Professor Tarr wrote of the movement toward “merit” systems. G. ALAN TARR & MARY CORDELIA PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 61 (1990). Many lawyers and good-government advocates have a strong preference for “merit” systems, but “the evidence supporting [the claims for its superiority] is largely anecdotal.” *The Judicial Branch*, *supra*.

8. On confrontations in Missouri in 2007, see Kit Wagar, *Conservatives Denounce Governor’s Pick for the Missouri Supreme Court*, KANSAS CITY STAR, Sept. 8, 2007, at A1. On Tennessee in 2007, see Erik Schelzig, *[Gov.] Bredesen Hopes*

operation of “merit” systems to argue that some are dominated (or even controlled) by the organized bar and that at least some actions have been partisan.<sup>9</sup> Further, unless the Tennessee legislature does this spring what it refused to do in 2008, its “merit” system for appellate judges will terminate in June 2009. This would be the first time for any jurisdiction to return to contestable elections after ending them.<sup>10</sup>

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*Next Judicial Pick Less Political*, MEMPHIS COMMERCIAL APPEAL, Sept. 29, 2007, at 3. In New York in December 2008, to fill the vacancy created by the mandatory retirement of their revered Chief Judge Judith Kaye, the governor objected strongly to being given seven nominations, all male. See Jeremy W. Peters, *Paterson Criticizes Panel For Its Judicial Selections*, N.Y. TIMES, Dec. 4, 2008, at A39. Many of us found it inconceivable, especially for New York, that only men would be nominated. Fortunately, the new Chief is the outstanding Judge Jonathan Lippman, but, when the Senate confirmed him without dissent, senators called for “examin[ing] the flawed process of judicial nomination.” Jeremy W. Peters, *Senate Confirms Top Judge on State Court of Appeals*, N.Y. TIMES, Feb. 11, 2009, at A32. The newest organized grass-roots dissatisfaction with judicial selection is Virginia’s “Pitchfork Rebellion,” seeking change in its system of selection by the legislature, Tom Jackman, *Va. Judge Selection Process Criticized: Group Challenges Lack of Public Input*, WASH. POST, Mar. 2, 2009, at B1.

9. See Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL’Y 386 (2008) (arguing that Kansas uniquely empowers the Bar); Robert C. Casad, *A Comment on “Selection to the Kansas Supreme Court”*, 17 KAN. J.L. & PUB. POL’Y 424 (responding to Ware); Linda Parks, *Judicial Selection Counterpoint*, 77 J. KAN. B. ASS’N 7 (2008); Stephen Ware, *Judicial Selection Point*, 77 J. KAN. B. ASS’N 6 (2008). On Kansas’s latest judicial appointment (the law partner of the State’s Democratic Party chairman), see Stephen J. Ware, *Ware: Open Up Process of Picking Justices*, WICHITA EAGLE, Jan. 23, 2009, at A3. For a response to the latest attack on Kansas’s nominating commission members with “selective distortion of data,” see James M. Concannon & Robert C. Casad, *James M. Concannon and Robert C. Casad: Data Does Not Support Claim of Radical Lawyers*, WICHITA EAGLE, Mar. 11, 2009, at A3.

10. Tennessee, in 1971, ended partisan elections for appellate judges. TENN. CODE ANN. § 17-4-102 (2009). This is the nation’s only move to “merit” by mere statute. Pursuant to a general statute that “sunsets” unless a reenactment is passed, the “merit” system would end June 30, 2009. TENN. CODE ANN. § 4-29-112, -229 (2009) (terminating twenty-eight governmental entities on June 30, 2008, and allowing them to “wind up” until June 30, 2009). See also Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473 (2008); Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501 (2008); Brian T. Fitzpatrick, *Errors, Omissions, and the Tennessee Play*, 39 U. MEM. L. REV. 85 (2008). In June 2009, Tennessee’s “merit” system was extended for two years, but now all members of the nominating commission will be appointed by, separately, the governor and the legislative leaders; bar associations will no longer have power to fill any seats. See Richard Locker, *“Year of the Gun” Ends with a Bang*, MEMPHIS COMMERCIAL APPEAL, June 21, 2009; Monica Mercer, *Locals Apply to Panel to Nominate State Judges*, CHATTANOOGA TIMES FREE PRESS, Aug. 3, 2009. In 2008, Missouri’s Greene County moved to merit selection

## II. A REPLY TO ADVOCACY AT THE SYMPOSIUM

At the Symposium, some advocates urged judicial elections as the only way – or at least the best way – to assure accountability; that advocacy requires response. Without diminishing my decades-long adherence to agnosticism about judicial selection methods, I submit six points in response to such advocacy.

*First:* The advocates of judicial elections base their argument on the notion that the norm in America is to *elect* any high official who has a role in policy; that injecting “merit”-system screening at the selection stage is “elitism;” and that the “merit” system’s retention elections are not elections but “referenda.”

Though we give elections an enormous role, we do not have “majoritarian democracy uber alles.” We have a republican form of government with mediating tools and structures like the U.S. Senate (not “elitist” but federalist), the executive veto, and, of course, judicial review by appointed judges, including life-tenured ones. The “merit” system, good or bad, is one more mediating structure in our ever-evolving system of checks and balances. We choose mediating devices to advance deliberativeness.

Why do advocates urging elections aim all their effort at judges and ignore administrative officials – from zoning to police searches and the regulation of health and the environment – who govern vastly more of our lives? One possibility is that administrators are subject to removal. But, so are state judges; retention elections guarantee periodic opportunities for removal by voters, and contestable elections offer opportunities to hold incumbents accountable. The reality of modern governance is remarkably far from the beliefs of myth-laden voters, which were described perfectly by a Mississippi editor in 2002. After voters defeated a ballot proposition to lengthen judicial terms from four to six years, the editor commented, “They’d vote on the mailman if they could.”<sup>11</sup>

Whether one applauds the “merit” system (perhaps as excellent, perhaps as only the best available alternative) or attacks it (from its self-applauding label to some states’ excessive role for lawyers), our dialog about judicial

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by popular vote, the first such move anywhere since 1985. See Am. Judicature Soc’y, Voters in Four Jurisdictions Opt for Merit Selection on November 4 (2008), [http://www.ajs.org/selection/sel\\_voters.asp](http://www.ajs.org/selection/sel_voters.asp). Missouri allows a local option for trial courts, and Greene County, the largest jurisdiction still having contestable elections, was Missouri’s first move since 1985. *Id.* Also in 2008, Kansas voters in Johnson County (Kansas City) rejected returning to contestable elections. And in Alabama, which also allows local option for trial courts, voters in two counties chose the “merit” system for appointments to fill vacancies. *Id.*

11. Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1422 n.80 (2003).

selection needs to be freer of spin. We need more discussion like that provided by Justice Sandra Day O'Connor.<sup>12</sup>

*Second:* Accountability for judges is secured not only by facing election but also by pervasive procedural requirements like appeals and written opinions, by massive bodies of law that cabin decision and even discretion, and by disciplinary oversight that is incomparably closer and more active than for other elective officials. Some all-out advocates of elections for judges argue that accountability solely means accountability to voters. But, even if one accepts that shrunken definition, it misses the point that voters often choose to replace direct elections with other modes of selection and accountability. It misses the point even where contestable elections are retained because having contestable elections gives almost no opportunity, in fact, for the voters to choose: contests are nearly non-existent. While high-court elections do draw competition, the norm for our trial judges is like the California experience: Of its roughly 450 Superior Court judges up for re-election in 2004, only nine were even challenged. From 1972-2002, challenges peaked at 5.1% in 1978, two years after Rose Bird overcame opposition and won retention, with the only other “high” being 3.2% in 1988, two years after she was defeated. From 1996-2004, of the sixty-seven judges who were challenged, only nine lost, although obviously challengers would take on only vulnerable judges. From 2000-2004, of the thirty-nine who were challenged, only four lost – one of them literally a wife-beater; twenty-one of that thirty-nine were landslide winners, getting over 65%, while another twelve got over 55% of the vote.<sup>13</sup>

*Third:* The most frequent attack on the “merit” system is that it does not abolish “politics.” This point has two fatal flaws: (a) With all due respect, it is preposterous to think that one could or would want to remove all politics from *any* official action in a democracy; and (b) The attack is based on lump-thinking, treating all “politics” as the same. But everywhere, even among nursery school kiddies, we find “politics” of some type. The inescapability of “politics” was never stated better than it was by New York’s Schuyler Chapin, general manager of the Metropolitan Opera, Dean of Columbia’s School of the Arts, and New York City’s Commissioner of Cultural Affairs: “Politics are at their worst in the arts world and the academic world.”<sup>14</sup> In fact, “merit”

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12. Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479 (2009).

13. For high-court data, see Melinda Gann Hall, *On the Cataclysm of Judicial Elections and Other Popular Anti-Democratic Myths* (Mar. 27, 2009) (unpublished manuscript). The California trial-court data are from Roy A. Schotland, *The Crocodile in the Bathtub: Achieving the Right Balance Between Judicial Accountability and Judicial Independence in Terms for Trial Court Judges*, CAL. CTS. REV., Fall 2005, at 10, 12.

14. Daniel J. Wakin, *Schuyler G. Chapin, Stalwart Champion of the Arts in New York, Dies at 86*, N.Y. TIMES, Mar. 9, 2009, at A21. “Politics” in judicial elections are skewed by the entry, even dominance, of factors like name familiarity, which of course matters in all kinds of elections but is uniquely important in judicial elections.



selection greatly reduces the relevant kinds of politics: partisanship and the inside track for people active in the realm of electoral politics for *non*-judicial offices. For example, in 2008 in Johnson County, Kansas (Kansas City), where voters defeated a proposal to end the local “merit” system, one of the arguments used to defend that system pointed to the elective system in Wichita (Sedgwick County), where “three judges are former state legislators and a current state senator [was] running for a judgeship . . . .”<sup>15</sup>

*Fourth:* Elections are crude forums, at best, for airing and making decisions about judicial performance. *Roe v. Wade*, flag salutes, lightning-rod capital cases, cases about a child, and cases about other dramatically personal plights (e.g., Terri Schiavo) are infinitely far from the docket of virtually any judge who faces some election – but many judicial campaigns have involved, often centered on, such matters. Even in state high courts, the tiny portion of the docket that involves constitutional issues is either dictated (or nearly so) by federal court precedent or does not involve high-visibility matters. The hot-button issues or cases likely to get attention in campaigns are a complete (or near-complete) distortion of what the judge or candidate has done or can do. Would anyone say that the public discourse about hot-button cases is any better than distorting, hyper-simplification, and slanting? Such episodes are outbursts of passion seeking to displace our processes and dispassionate, deliberative efforts to act justly – the opposite of all we revere as the rule of law. As an ABA task force found,

[n]ever is there more potential for judicial accountability being distorted and judicial independence being jeopardized than when a judge is campaigned against because of a stand on a single issue or even in a single case. In such a situation, it is particularly important for lawyers to support the judicial process and the rule of law.<sup>16</sup>

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A dramatic example: In 2006, California judge Dzintra Janavs, a twenty-year veteran outstanding in complex litigation and endorsed by a large, varied spectrum of officials, lost to bagel shop owner Lynn Diane Olson, see Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1093 (2007). In Texas in 2008, a striking new pattern has emerged: “color-based voting,” not racial but with “a last name that appears on a palette,” e.g., Mary Kay Green and Susan Brown won despite paltry funding. Rick Casey, *How Judge Candidates Waste Money*, HOUSTON CHRONICLE, Oct. 24, 2008. For many states’ experience over many decades, see Roy A. Schotland, *Elective Judges’ Campaign Financing*, *supra* note 4 at 88-89.

15. Grace Hobson, *Johnson County Defeats Election System for Judges*, KANSAS CITY STAR, Nov. 5, 2008, at B1.

16. A.B.A., REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS’ POLITICAL CONTRIBUTIONS PART 2, at 6 (1998) [hereinafter A.B.A. TASK FORCE]. For an unusually compelling, even moving, statement of the poor fit between judicial elections and a judge’s caliber, see Chief Justice Wallace Jefferson, Op-Ed, *Why Not Elect Judges on Merit, Not Whim?*, DALLAS MORNING NEWS, Mar. 12, 2009, *availa-*

*Fifth:* The mere potential of lightning-rod distortions jeopardizes judicial independence and open-mindedness. A sitting judge who will soon face an election may understandably, perhaps inescapably, be concerned about being on the wrong side of a hot-button matter. California Justice Otto Kaus referred to this as being “like finding a crocodile in your bathtub when you go in to shave in the morning. You know it’s there, and you try not to think about it, but it’s hard to think about much else while you’re shaving.”<sup>17</sup> A leading local observer wrote this:

[W]hen the rumblings about an electoral challenge to the justices had turned to thunder, Otto Kaus announced his resignation from the supreme court. He took advantage of his new freedom to speak candidly on the impact of electoral challenges upon the independence of the court. On one such occasion, I was among a large audience at a forum sponsored by the Los Angeles County Bar Association. I remember how stunned I was when I heard Otto recount to the audience how a “friend” had suggested in a speech in San Francisco that his vote on the decision to uphold Proposition 8 had been affected by the threats made to his reelection and how in retrospect he himself wasn’t sure it hadn’t.<sup>18</sup>

*Sixth:* The “judicial personality” that is likely to seek and get a judgeship is different, usually deeply so, from the “political personality” that will willingly, perhaps eagerly, engage in election campaigns. To the extent that judicial elections continue as they were traditionally held – “low-key affairs, conducted with civility and dignity” or “about as exciting as a game of checkers played by mail” – the electoral route is not an obstacle to getting and keeping the people who are likely to be fine judges.<sup>19</sup> However, the more judicial campaigns become like campaigns generally, the more the elective route will change who are our judges and will probably lower the caliber of the bench.<sup>20</sup>

But of course, the above six points are not dispositive distinctions between modes of judicial selection, for we would not have an “endless debate”

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ble at [http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-jefferson\\_13edi.State.Edition1.2212195.html](http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-jefferson_13edi.State.Edition1.2212195.html).

17. See Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1996).

18. Gerald F. Uelman, *Otto Kaus and the Crocodile*, 30 LOY. L.A. L. REV. 971, 973-71 (1997). California justices face retention-only elections.

19. William C. Bayne, *Lynchard’s Candidacy, Ads Putting Spice Into Justice Race: Hernando Attorney Challenging Cobb*, MEMPHIS COMMERCIAL APPEAL, Oct. 29, 2000, at 1; Hon. Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995).

20. See *infra* text accompanying note 28.

if the differences were clearly compelling rather than, in large measure, matters of degree. Surely this is one of the countless matters on which no single answer is best everywhere, at least with our differences among jurisdictions (both current differences and political traditions). For example, Missouri, which is so notable that “merit” systems everywhere are often referred to as “the Missouri plan,” does allow local option among counties.<sup>21</sup> Thus, two-thirds of Missouri’s trial judges – all in places with the kinds of personal contact and word-of-mouth connections that are impossible in the major metropolitan areas – have continued with contestable elections. In fact, in 2008, Missouri’s *largest* county with contestable elections – Greene County – voted to switch to “merit.”<sup>22</sup> Further, apart from differences among jurisdictions, each selection mode has strengths and weaknesses that inescapably lead different people to different overall evaluations. For example, we have evidence that initially elected judges in California, Florida, and New York are more likely to be disciplined for misconduct than judges appointed to fill vacancies; also, several studies have found that sentencing by elective judges may be affected by electoral considerations.<sup>23</sup> On the other hand, undeniably “there are times when an exceptional candidate for the bench, who later does become a well-regarded judge, is unable to get an appointment and would never have reached the bench but for the electoral route.”<sup>24</sup> Also, as a Pennsylvania justice said recently, “[C]ampaigning is a humbling experience. . . . You’re meeting with citizens . . . [in] poor neighborhoods, wealthy neighborhoods, ethnic neighborhoods. I think it makes you a better judge.”<sup>25</sup>

One other reaction to the Symposium discussion is a plea to academics who deal with judicial selection: Instead of continuing “the endless debate” as in the recent proliferation of articles defending and opposing this or that method of selection, we need research and writing on realities, like the actual operation of selection systems and of courts. For example, we need to know more about how many vacancies are filled initially by appointment (whatever the system), with the new appointees later facing election as incumbents, and especially about career patterns. This would help us see, among other things, what proportion of the bench is former prosecutors (in each system) and where judges go when they leave the bench.<sup>26</sup>

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21. MO. CONST. art. V, § 25b.

22. See Am. Judicature Soc’y, *supra* note 10.

23. See Schotland, *supra* note 5, at 1087 & n.36.

24. *Id.* at 1091 (giving striking recent examples from Minnesota and California).

25. Bobby Kerlik, *Judges Face Problems When Their Cases Involve Donors*, PITTSBURGH TRIB.-REV., Mar. 22, 2009 (quoting Supreme Court of Pennsylvania Justice Max Baer).

26. For exemplary studies of reality, see Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711 (2009); Rachel Paine Caulfield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORD.

Let us put aside the endless debate and focus on *feasible* changes to reduce the problematic aspects of judicial elections. The debate distracts severely and concretely: In any state where events (or reform energies) stir dissatisfaction with judicial elections, the first response is to work toward ending contestable elections. Understandable as that response is, its supporters ignore (or, more likely, do not realize) that for the past generation that route has gone nowhere, and, consequently, they have failed to even try for feasible improvements – which get little to no attention, leaving the problems to continue or even worsen.

### III. ARE JUDICIAL ELECTIONS LIKE OTHER ELECTIONS, SHOULD THEY BE?

In fact, elections for the bench are bound to be different in many ways – and should be – because the judge’s job is so different from other elected officials:

[O]ther elected officials are open to meeting – at any time and openly or privately – their constituents or anyone who may be affected by their action in pending or future matters, but judges are not similarly open; nonjudicial candidates [are free to] seek support by making promises about how they will perform; [o]ther elected officials are advocates, free to cultivate and reward support by working with their supporters to advance shared goals; other elected officials pledge to change law, and if elected they often work unreservedly toward change; other elected officials participate in diverse and usually large multi-member bodies; other elected incumbents build up support through “constituent case-work,” patronage, securing benefits for communities, etc.; almost all other elected officials face challenges in every election; [and last, fundraising by judicial candidates is uniquely constrained].<sup>27</sup>

Consider how judges make decisions compared to how legislators and executives make their decisions. To make any decision in a case, a judge must hear the parties, find facts (if any are relevant) cabined by rules of evidence, determine the relevant law, and apply it. A judge must be open-minded, and her decision must be based on a record, subject to appeal.<sup>28</sup> In

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URB. L.J. 163 (2007); Fred N. Six, testimonies comparing details of “merit” systems in different States, before Kansas Senate and House Judiciary Committees, Special Committee on Judiciary, and House State & Federal Affairs Committee, 2/21/05, 10/21/05, 2/08/06, 2/13/07, 2/21/08 and 2/12/09.

27. Robert M. O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 34 IND. L. REV. 701, 716-17 (2002).

28. Of course in some matters judges “make law,” *but*, in the first place, judges’ law-making is almost entirely merely interstitial, technical, and subject to

contrast, legislators and executive officials can act with no hearings, with no record, and based on whatever mix of facts they like (i.e., unsubstantiated “facts,” etc.). Further, if they do have hearings, they are shaped freely by the law-makers. And their actions are not reviewed except by public opinion (apart from the very few matters that raise either constitutional questions or, for executive officials, questions of compliance with statutory requirements); legislation and executive action needs only public support or tolerance. Last, but perhaps most important of all, judges’ actions directly impact one or a few individuals, a power and responsibility that is unique except for executives’ power to pardon. To deny the differences between selecting judges and selecting other officials is to deny the differences between the judges’ job and the jobs of other elective officials; to deny the differences between the branches is to deny a bedrock of our republican form of government: checks and balances.

One more crucial factor calls for keeping judicial elections from being like other elections. As noted above, no-holds-barred elective campaigns will affect the pool of people willing to run for the bench and for re-election.<sup>29</sup> That would work against the whole goal of efforts surrounding judicial selection: to bring to the bench people as suitable as we can find for the unique responsibilities and powers of judges.

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override by the other branches. Holmes put it unforgettably: “I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.” *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 220-21 (1917) (Holmes, J., dissenting). Even full common-law “making” is always subject to, and often overridden by, legislation. Second, law-making by judges is almost entirely limited to high courts and, even there, is a minor fraction of the docket, even in the U.S. Supreme Court. The high visibility of the cases in which judges’ law-making is significant not only (understandably) misleads the public but also distorts the view of lawyers and others who know better. While judges make very little law, trial judges do rule on motions and other matters that are not subject to appeal. However, even there (a) they are cabined by process, practice, and a great deal of relevant law; and (b) the matter is appealable and/or, if significant, will be reviewed despite doctrine about limited review. I doubt that even those who want judicial elections to be like other elections and who rely on elections to hold judges accountable can imagine a judicial candidate running on a platform stating her approach to motions about discovery or *forum non conveniens*.

29. Roy A. Schotland, *Six Fatal Flaws: A Comment on Bopp and Neeley*, 86 *DENV. L. REV.* 235, 242-45 (2008). Only after writing that, I discovered the unusually rich article in this law review, Marie A. Failing, *Can a Good Judge be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 *MO. L. REV.* 433 (2005).

#### IV. THE LIVELY, THORNY PROBLEM OF RECUSAL BECAUSE OF CAMPAIGN CONDUCT AND/OR CAMPAIGN FUNDING

“The topic du jour is recusal,” said Judge M. Margaret McKeown of the Ninth Circuit.<sup>30</sup> “The time has come for elected courts, which are at the eye of the storm, to replace anxiety about declining public trust with active measures to restore it. . . . [C]urrent disqualification doctrines and procedures are inadequate. . . . [D]ue process interests [are] in severe jeopardy across the states . . . .”<sup>31</sup>

Several years before the Supreme Court brought judicial recusal into the spotlight with its review of *Caperton v. A.T. Massey Coal Co.*, the need to modernize recusal (used here to include disqualification) became acute for two reasons.<sup>32</sup> First, since the Court’s decision in *Republican Party of Minnesota v. White*,<sup>33</sup> it is more likely that judges will make “campaign statements that may seem to prejudice . . . or compromise their impartiality.”<sup>34</sup> Second, “perhaps the greatest cause of consternation is large campaign contributions from attorneys and parties with business before state courts.”<sup>35</sup>

30. M. Margaret McKeown, *Don’t Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS 45, 45 (2005).

31. Deborah Goldberg, James Sample, & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 504, 509 (2007).

32. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

33. 536 U.S. 765 (2002).

34. Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 DRAKE L. REV. 691 (2007). In fact, as important as *White* has been, so far it has had little impact on campaigns, but that will change as traditional norms are eroded by envelope-stretching candidates. See Roy Schotland, *Impacts of White*, 55 DRAKE L. REV. 625, 635-36 (2007).

35. Goldberg, Sample, & Pozen, *supra* note 31, at 508. Note that the proportions of contributions from lawyers (let alone lawyers who come before judges to whom they contributed) are far less than the point-with-alarm myth: (a) They accounted for 22% of contributions in 2000, 37% in 2002, and 22% in 2004, or 26% on average. Data compiled by National Institute on Money in State Politics (on file with author). See [www.followthemoney.org](http://www.followthemoney.org). (b) As the 1998 ABA Task Force stressed, “Often attorneys account for large proportions [of donors], often even over 75 percent . . . but it is also true that often attorneys’ contributions total only a minor fraction [of total funds collected].” A.B.A. TASK FORCE, *supra* note 16, at 89. The myth has notable believers. See, e.g., Derek Bok, *Too Many Beholden Judges*, NAT’L L.J., Nov. 25, 2002, at A8 (“Judges raise roughly half of their campaign funds from lawyers and law firms.”).

An obviously important point is too often overlooked:

We have no doubt that most contributions from lawyers are motivated not by any hope of currying favor, but by the conviction that if law-

Given the two 2007 articles just cited and the *Caperton* briefs, treatment here can be limited to one point about procedure and one point about standards. The ABA's Standing Committee on Judicial Independence has been at work on recusal since 2007. The Conference of Chief Justices has similarly been working on the issue. The Conference submitted an amicus brief in *Caperton*, has held sessions on the matter, and is well at work on this subject.<sup>36</sup> Additionally, several state courts have produced significant work in the area of recusal and, starting before the *Caperton* decision, have proposed advances. With *Caperton* now decided, all this is bound to go forward.

First, I will look at the issue of procedure. Many states have fine, even exemplary, procedures for trial-court judges' recusal, from peremptory-strike challenges by litigants to automatically sending recusal motions to an administrative judge (or, as in Ohio, to the chief justice).<sup>37</sup> However, at many appellate courts and at even more high courts, recusal cries for procedures that can assure fairness, protect public confidence, and – to put it simply – work effectively and smoothly (no small challenge). In a very few high courts (e.g., Alabama and Texas), a member's decision to participate, despite a motion seeking recusal, is reviewed by the full court; some multi-member courts have other processes. But many multi-member courts (especially high courts) have no procedure other than leaving recusal decisions entirely to the judge targeted by a motion.

A suggested procedure: For high courts (perhaps also for intermediate appellate courts, although for them a greater variety of procedures may work), we should adopt a version of the NFL's Rooney Rule. That rule re-

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yers do not support able judges, who will? Many lawyers say it is a professional obligation, in a jurisdiction where judges stand for election, to give appropriate support to good judges and good candidates. Indeed, the Model Code of Professional Responsibility supports this [citing Canon 2 and Ethical Consideration 8-6].

A.B.A. TASK FORCE, *supra* note 16, at 26-27. In 1955, Oregon's Chief Justice Harold J. Warner listed as one of the four essentials to maintaining judicial independence "the vigilant and able support of the bar." Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 379 (2002) (quoting *Warner Speaks on Judicial Freedom*, OR. ST. B. BULL., June 1955, at 1, 4).

36. The Chief Justices' brief was quoted by the *Caperton* majority, see 129 S. Ct. at 2266, and noted in Chief Justice Roberts's dissent, *id.* at 2273.

37. See OHIO CONST. art. IV, § 5(C):

The chief justice of the Supreme Court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

See also R.C. 2701.03, at <http://codes.ohio.gov/orc/2701.03>; and for municipal and county court judges R.C. 2701.031, at <http://codes.ohio.gov/orc/2701.031>.

quires teams, when interviewing candidates for coaching positions, to include at least one minority prospect. While that rule may have been adopted largely because of the special status of the Rooney family in the NFL, the rule has been a significant success. All the rule requires is a conversation – a chance to talk and to listen.

When a litigant seeks the recusal of a justice, *if* the court leaves such decisions to the justice individually, before the justice makes a decision, she or he shall have a conversation (if necessary, by conference call) with a panel of three court-appointed “wise souls” (probably retired judges, lawyers, and legal academics with rotating terms of, say, two years). The consultation shall be confidential. A potential rule might provide that consultation is unnecessary if the justice decides to grant the recusal motion, or a rule might call for consultation even then to promote dialog, to promote uniformity, and to protect the “duty to sit.”<sup>38</sup> One might add a requirement for the justice to write an opinion, or one might add other steps.<sup>39</sup>

Second, about the standards used in recusal situations, Justice Kennedy wrote, concurring in *White*, “[Minnesota] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”<sup>40</sup> “Due process [is] assessed by reference to ‘those *fundamental principles of liberty and justice* which lie at the base of all our civil and political institutions.’”<sup>41</sup> (Here, as in *Caperton*, only issues arising in the context of campaign finance are discussed.)

For a new judge to sit in a case argued by a lawyer with whom a few months earlier she was in partnership, or who was her leading campaign fundraiser, would raise such probability of bias that – in my view – recusal

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38. On many state courts’ traditional “duty to sit,” see RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 610-12 (2d ed. 2007).

39. The suggested procedure might stand alone, but further steps should be considered: (1) If the judge decides to deny the motion, should there be a written decision, or should that be left entirely up to the decider? Or, even if a motion is granted, might an opinion be useful for future reference? (In courts which receive many recusal motions from pro se litigants, those may warrant separate treatment on all counts.) Some commentators who favor the procedure suggest that, if it is adopted, written opinions should be called for lest the new procedure be deemed, however unfairly, insufficient. And even if the judge decides to grant the motion, a written opinion, however brief, would be valuable for future reference. (2) Wholly apart from whether the suggested procedure is adopted, consideration should be given to how, when a judge does withdraw from a case, the replacement is selected (e.g., some courts select from retired judges or presiding judges of lower courts). Such selection is no problem if it is entirely up to the presiding judge, but the person in that position is not always one who enjoys full support from her or his colleagues. (3) What of occasions when several members of the court withdraw from a case?

40. *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002).

41. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 32 (1991) (Scalia, J., concurring) (quoting *Hurtado v. California*, 100 U.S. 516, 535 (1884)).



would be required as a matter of “fundamental fairness,” i.e., due process. In comparison, for a judge to hear a case argued by a lawyer who was a partner or fundraiser, say, fifteen years earlier, would be unproblematic. For that type of “conflicting” interest, a flat line can, and surely should, be drawn by court rules, taking into account the minimum requirements of due process and the value of fuller protection.

Again, noting the recent articles and *Caperton*, the treatment here can be skeletal and limited to one key point: If the facts (e.g., campaign support that was extraordinary compared to the campaign as a whole and to the jurisdiction’s practices) create a “probability of actual bias [that] is too high to be constitutionally tolerable,” fundamental fairness – let alone public confidence – requires recusal.<sup>42</sup> If recusal were triggered *only* by a judge’s financial stake, close relationship, or “actual bias,” protection of fundamental fairness would be hollow. On the other hand, if the probability of bias is not substantial, then mere “appearances” cannot control.<sup>43</sup>

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42. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). In *Caperton*, the CCI’s amicus brief set forth eight “criteria [that] must be evaluated . . .” See Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 26-31, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22). An important note about campaign “support”: Contributions to candidates are only part, a shrinking part, of spending in campaigns. Independent spending may overwhelm candidates’ own spending, as in *Caperton*. There, the independent spending that led to the recusal motion now being reviewed by the Supreme Court totaled over \$3 million; that spender had contributed only \$1,000 directly to the candidate. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009). Recusal standards cannot be tied to contributions and ignore independent spending: A tie to contributions will obviously only increase independent spending. The unavoidable and worsening move to independent spending renders counterproductive any recommendation that ignores independent spending, like recent recommendations (incomprehensibly) by the Brennan Center. James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, BRENNAN CENTER FOR JUST., Apr. 1, 2008, available at [http://www.brennancenter.org/content/resource/fair\\_courts\\_setting\\_recusal\\_standards](http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards).

43. The *Caperton* amicus briefs are a laboratory example of good lawyering and its absence. Like the Brief for Petitioners, some of the amicus briefs (supporting Petitioners or arguing that the standard applied below did not satisfy due process) stressed “probability,” with almost a score of explicit references. Brief for Petitioners at \*3, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22). In contrast are other briefs that stress “appearances,” making much of polls and newspaper editorials; some of those briefs seem written more for editorial boards than to persuade Justices. Imagining what Justice Scalia may write about the “appearances” test is the surest way to think about how loose and perilous it is. Wholly apart from that, one should not miss the most imaginative argument in the amicus briefs, the closing paragraph of the brief for law professors Ronald D. Rotunda and Michael R. Dimino, supporting Justice Benjamin’s denial of the motion that he withdraw: “The appointment of federal judges is really an election, where the nominator is the President and the universe of voters is limited to the United States Senate. Any rule fash-

## V. REALISTIC EXPECTATIONS

Given the *Caperton* result, new recusal rules are needed and will not be delayed.<sup>44</sup> The ABA and the state high courts have become dramatically more organized for responsiveness than in the past. We are indebted to the ABA for the Canons of Judicial Conduct started under former Chief Justice Taft, and now, when the Model Code is revised, the ABA works to support action on them. The contrast between the recent and still-pending widespread actions on the most recent Code amendments and the 1999 amendment about recusal and campaign contributions, which was not even considered by more than three or four high courts, is stunning. True, some courts in fact did impressively thorough work on that provision (although not publicly), but in most of the thirty-nine states where judges face elections, nothing at all was done, even though election campaign spending was creating more and more problems.<sup>45</sup> It is not that the Canons were a low priority; rather, it is that courts tend to be responders, deciders of cases, not initiators of rule-making.

There would not have been a *White* case if the Minnesota court – despite its excellent leadership and members – had not ignored the Model Code’s 1990 elimination of the “Announce” clause, which was done precisely because of strong doubts about its constitutionality. For that matter, when *White* came down in June 2002, it took the Minnesota court seventeen months simply to appoint an advisory committee to recommend how to respond, and it took an additional five months before the committee had finally reported. During almost all of that time, the Eighth Circuit, having before it the remand in *White*, was patient – the ultimate dissent even set forth the timetable. Perhaps a timely revision of Minnesota’s Canon would have affected the decision on remand, a serious loss for Minnesota and therefore for all states’ roles in choosing judicial selection systems and regulating judicial campaigns.<sup>46</sup>

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ioned in this case will eventually work its way into the federal system, with unknown results.” Brief of Law Professors Ronald D. Rotunda and Michael R. Dimino as Amici Curiae in Support of Respondents at 21, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22). That is, we elect our Ambassadors?

44. Legislation does not work well on this subject. For example, see Alabama’s futile §12-24-1, enacted in 1995 and unavoidably buried the next year. See REPORT TO THE SUPREME COURT BY THE ALABAMA STANDING COMMITTEE ON RULES OF CONDUCT AND CANONS OF JUDICIAL ETHICS (on file with author). See also Roger M. Baron, *A Proposal for the Use of a Judicial Peremptory Challenge System in Texas*, 40 BAYLOR L. REV. 49, 54 (1988).

45. However, one knowledgeable high-court administrator said rightly that the 1999 amendment “is 10 years old, yet it remains an orphan. We are long past the time for the ABA to take a hard look at this . . . .” E-mail to Roy A. Schotland (on file with author).

46. *Republican Party of Minn. v. White*, 416 F.3d 738, 766-67 (8th Cir. 2005) (en banc) (Gibson, J., dissenting). The Eighth Circuit struck down Minnesota’s “partisan-activities” clause, which provided that judicial candidates could not “identify

New rules are needed on recusal processes and standards; with the result in *Caperton*, we will get them soon.

## VI. STEPS TO REDUCE THE PROBLEMATIC ASPECTS OF JUDICIAL ELECTIONS

In addition to modernizing recusal –

a) **Lengthen terms:** Ohio’s Chief Justice Moyer has actively pressed for steps to meet the challenges created by changes in judicial elections. Starting in 2003, he made it his top priority to lengthen Ohio’s six-year terms to eight.<sup>47</sup> Such a step helps on all (and I stress, *all*) the problematic aspects of judicial elections. Although I have long urged term-lengthening as a feasible step, the record makes me view this as only “ought-to-be feasible.”<sup>48</sup>

b) **Public funding:** This is many people’s favorite step and unquestionably brings advances but is oversold:

(i) It cannot end the impact of (indeed, it will encourage) independent spending, and so it is at best an incomplete step to meet the challenge.<sup>49</sup>

(ii) Even all-out supporters of public funding generally wonder about its desirability for judicial elections because it may encourage competition,

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themselves as members of a political organization, except as necessary to vote in an election” and could not “attend political gatherings; or seek, accept or use endorsements from a political organization.” That decision directly jeopardizes the choice by nineteen states other than Minnesota to have nonpartisan judicial elections. (The states are listed in Schotland, *New Challenges*, *supra* note 5, at 1104.)

47. See Jon Craig, *Longer Terms for Judges Proposed*, COLUMBUS DISPATCH, Nov. 7, 2003, at 1B.

48. Consider the term-length picture: For appellate judges who face elections, 38.5% have terms of ten to fifteen years, and another 60.6% have six- to eight-year terms. For trial judges who face elections, 13% have terms of ten to fifteen years, and another 67.6% have six- to eight-year terms. Roy A. Schotland, Comment, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 154-55 tbls. 3 & 5 (1998). In Mississippi in 2002, Chief Justice Pittman placed on the ballot a proposition to lengthen judges’ terms from four to six years, but that was voted down 63%-37%. *Voters Reject Longer Terms for Trial Judges*, SUN HERALD (Biloxi, Miss.), Nov. 6, 2002, at A5. As one editor commented to the author, “They’d vote on the mailman if they could.” Schotland, *supra* note 11, at 1422 n.80. Since 1968, only three states have lengthened terms: Hawaii in 1968 to ten years from six or seven, Montana in 1972 to eight or six years from six or four years, and Nevada in 1976 to six years from four. Louisiana, in 1972, shortened terms to ten years from fourteen or twelve. See AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES – HISTORY OF REFORM EFFORTS, available at [http://www.judicialselection.us/judicial\\_selection/reform\\_efforts/formal\\_changes\\_since\\_inception.cfm?state=](http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=).

49. Independent spending continues to soar generally. Steve Weissman & Suraj Sazawal, *Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election*, CAMPAIGN FINANCE INSTITUTE, Feb. 25, 2009, <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=221>.

but “a well-qualified judge should be freed as much as possible from political pressure.”<sup>50</sup>

(iii) Sheer cost makes feasibility very slight, except for small-population states. When this step was being debated in Ohio, a supreme court justice likely to be sympathetic said he would “be surprised if we can get much traction for it . . . . You could probably get more interest in the General Assembly for legislation to keep cats on a leash.”<sup>51</sup> Even if adopted, funding fades toward the vanishing point; in Wisconsin – the first state (1979) with public funding for any judicial campaigns (there, supreme court only) – the program worked well initially, but by 2007 the available funds totaled 2% of the two candidates’ spending.<sup>52</sup>

c) Campaign conduct committees and candidate education: Justice Kennedy, concurring in *White*, addressed what can be done to meet inappropriate conduct in judicial campaigns: “The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so.”<sup>53</sup> Justice Stevens made the same point in dissent, adding that even official bodies like the defendant board in *White* “may surely advise the electorate that such announcements demonstrate the speaker’s unfitness for judicial office. If the solution to harmful speech must be more speech, so be it.”<sup>54</sup>

Today, thanks to the bar and the National Center for State Courts, at least seventeen states have campaign-conduct committees that protect the “culture” of judicial campaigns, including steps to “educate” candidates. As recently stated in an Ohio decision sanctioning a candidate for violating Canons about campaigning, “[It is] the responsibility of all judicial candidates to conduct their campaigns with the same degree of honesty, dignity and respect that, if elected, they would expect to receive from lawyers, litigants, and other members of the public.”<sup>55</sup>

50. Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95, 108-09 (2003).

51. Nate Ellis, *ABA Recommends Public Funding of Judicial Races, Local Doubts Persist*, DAILY REP. (Ohio), July 24, 2001 (quoting Justice Paul Pfeifer).

52. Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 7, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22). Florida’s twenty-year-old program, according to sympathetic observers, “needs to be reformed.” CENTER FOR GOVERNMENTAL STUDIES, PUBLIC CAMPAIGN FINANCING IN FLORIDA: A PROGRAM SOURS 23 (2008).

53. *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring).

54. *Id.* at 797 (Stevens, J., dissenting).

55. *In re Beery*, No. 2008-2235 (Ohio, Jan. 15, 2009), available at <http://www.sconet.state.oh.us/rod/docs/pdf/0/2009/2009-ohio-113.pdf>. Ohio, since 1995, requires (by court rule) candidates to attend sessions about campaign conduct early in the election cycle. See Richard A. Dove, *Judicial Campaign Conduct: Rules, Education,*

d) Disclosure of contributions to independent spending efforts: Contributors to candidates, parties, and PACs are all disclosed, but in nearly all states disclosure of contributors to independent spending efforts is not required or the requirement applies only to “express advocacy.”<sup>56</sup> This allows contributors to bypass the disclosure requirement by giving to organizations that use “issue ads,” despite their high likelihood (as usually intended) of impacting a pending campaign. Whether it be to evade triggering recusal or to conceal from the voters the source of the funds, anyone seeking to avoid disclosure will contribute nothing or little to candidates, instead funding “issue ad” efforts. Supreme courts should promulgate a rule requiring parties and counsel in a lawsuit to certify that all their campaign contributions and expenditures with respect to the sitting judge’s campaign(s) within the past *X* years are set forth in an affidavit filed in that case.<sup>57</sup>

e) Voter guides: Improving voter awareness is at least as important as any other step. The Chief Justices’ Summit, in 2000, issued a “Call To Action” with twenty recommendations, including this: “State and local governments should prepare and disseminate judicial candidate voter guides.”<sup>58</sup>

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and Enforcement, 34 LOY. L.A. L. REV. 1447, 1456 (2001). The “bible” about campaign conduct committees is David Rottman, *Conduct and Its Oversight in Judicial Elections: Can Friendly Persuasion Outperform the Power to Regulate?*, 21 GEO. J. LEGAL ETHICS 1295 (2008); recent efforts are described in William Fortune & Penny J. White, *Judicial Campaign Oversight Committees’ Complaint Handling in 2006 Elections: Survey and Recommendations*, 91 JUDICATURE 232 (2008). A virtually sinful departure from all prior committees’ practice occurred in 2007 in Wisconsin, where the bar-established committee had a partisan majority and became embattled against one side of a supreme court campaign. See David Callender, *Accusations Fly in High Court Race*, CAP. TIMES (Madison, Wisc.), Feb. 21, 2008, at A1. For campaign conduct committees, credibility is crucial, and it depends on the committee’s balance.

56. See Clyde Wilcox, *Designing Campaign Finance Disclosure in the States: Tracing the Tributaries of Campaign Finance*, 4 ELECTION L.J. 371, 371-72 (2005).

57. For a draft rule or statute, see Roy Schotland, *Proposed Legislation on Judicial Election Campaign Finance*, 64 OHIO ST. L.J. 127, 133-36 (2003).

58. Nat’l Summit on Improving Judicial Selection, *Call To Action*, 34 LOY. L.A. L. REV. 1353, 1357 (2001). Voter guides, with information on candidates from the top of the ballot to the bottom, have been mailed to every registered voter for generations in California, Alaska, Oregon, and Washington and widely distributed in Utah. See Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voters’ Guides*, 64 OHIO ST. L.J. 81, 84-85 (2003); Roy A. Schotland, *Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperors’ Clothes of American Democracy?*, 2 J.L. & POL. 57, 127 (1985). The pamphlets are especially valuable for bottom-of-ballot candidates. Several states now have fine online guides. Canary, *supra*, at 84-85.

## VII. HONORING FIFTEEN CHIEF JUSTICES

Let me close by honoring fifteen special chief justices. A leading Italian political philosopher and public servant wrote of “the little nucleus of sound minds and choice spirits that keep mankind from going to the dogs every other generation . . . .”<sup>59</sup> These chiefs belong in that “little nucleus.”

Back in the 1970s, when I was a leading academic in the pension world and the only one interested in state and local pension funds, for almost a decade I addressed the state investment officers every year. My third annual talk was about their funds’ accountability, which in practice meant the funds’ disclosure of their investment performance. Many of the funds’ reports were classic fogs, utterly avoiding accountability, but a few were good to excellent. The most useful step was to commend best practices, so I started annual awards for good disclosure. There is only one possible name for an award for good disclosure, and my Godiva Awards (of course in the form of some wonderful chocolate) became a little legend among these massive investment funds and a few media.

Although my awards to the following chief justices are for performance, not mere disclosure, may I continue calling them Godiva awards?<sup>60</sup>

The chiefs’ accomplishments are matters of public record, so my few words here aim more personally. One of America’s main maladies is the lack of regard, even disdain, with which we view public servants. On one hand we have the destructive approach of the anti-government yahoos;<sup>61</sup> on the

59. GAETANO MOSCA, *THE RULING CLASS* 429 (Arthur Livingston ed., Hannah D. Kahn trans. 1939).

60. “Performance” is too narrow for what I am trying to say. These people represent the best in public service and more; they are wonderful individuals. One of the best ways to advance American public service would be for these people, and others like them, to spend time in high school classrooms; meeting such people may be life changing for some kids. Among my own most important experiences were brief encounters with two state party chairmen (one Republican, one Democrat) and, during my first campaign (Oregon 1954, Democrat Richard L. Neuberger’s election to the U.S. Senate), coffee times with an old GOP leader. How valuable judges can be in schools is pricelessly exemplified by Ohio’s Judge John Bender, who holds actual DUI hearings in high school auditoriums every spring just before the time for high school proms. Shouldn’t that practice be copied everywhere?

61. Different from the yahoos but also radical are those who want judicial elections to be like other elections because

Judges’ decisions make policy . . . . [they] – particularly appellate judges – exercise discretion in making those decisions . . . . [A] judge’s formulation of the common law – and thus the content of the state’s public policy – [involves] essentially the same types of questions that a legislator confronts, and the public has exactly the same interest in ensuring that the policy choices made are acceptable to the voters.

*Hearing on HCR 5005 & HR 2123 Before the H. Judiciary Comm.*, 2009 Leg. Sess. (Kan. 2009) (statement of Michael R. Dimino). To ignore the differences between

other we have “reformers” who seek to improve government but too often try to make their case by attacking office holders’ integrity.<sup>62</sup>

First, to an “ex-chief,” Judith Kaye of New York. Her remarkable quality was captured for me by the response of other New York judges at one of their annual meetings, when I said how amazed I was by the warmth among them. Over several days, *each* judge to whom I said that strikingly made the same response: “Oh, that’s because of Judith.”

Next, Gerry Alexander of Washington state, who successfully protected public confidence in his court despite problematic conduct by some of his colleagues, and who in his last re-election beat one of the strongest, nastiest opposition campaigns we have suffered.

Paul de Muniz of Oregon, who has turned court-legislature relations into an art and, as one part of that, recently produced the best-ever report on judges’ pay.

Ron George of California, whose unfailing grace hides successes like his reorganization of the world’s largest judiciary.

Dave Gilbertson of South Dakota, whose imagination, ability to build support, and sheer courage beat – by a landslide – a ballot proposition that was one of the most extreme attacks ever on American courts.

Marilyn Kelly of Michigan, new as chief but experienced as a justice, who has what it takes to bring sorely needed unity to her court.

Joe Lambert of Kentucky (an “ex-”), whose deft creativity saved his state from trouble in 2006 when its transition to implement a constitutional amendment required all but two of Kentucky’s 266 judges to stand for election in that one year.

Ruth McGregor of Arizona, who initiated, and still leads, a uniquely well-organized and effective program to strengthen public understanding of the role of the courts.

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“policy-making” by judges and by legislators is to jeopardize the rule of law in any country and to undermine the distinctive role of the judicial branch, a bedrock of America’s checks and balances.

62. An unusual example that created problems for Louisiana’s Supreme Court, consuming much time and energy but finally overcome, was a *Tulane Law Review* article attacking the justices’ campaign funding. See Vernon 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 (2008). Errors in that article were such that Tulane’s dean sent a formal letter of apology to the justices. See Susan Finch, *Tulane Law School Issues Apology to Louisiana Supreme Court*, N. ORLEANS TIMES-PICAYUNE, Sept. 16, 2008, at 1. But before the article was published or even available to the justices, *The New York Times* reported on it, and advocates urged the legislature to act. See Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. TIMES, Jan. 29, 2008, at A14. The *Times* never reported the apology except on NYTimes.com as an “Editor’s Note Appended,” Sept. 20, 2008.

Tom Moyer of Ohio, the nation's senior CJ, who has constantly, indefatigably advanced excellence in so many ways, while keeping up a daunting drive for needed changes.

Ray Price and Michael Wolff of Missouri, whose silken political savvy and personal skills have preserved and advanced the caliber and independence of the judiciary.

Randy Shepard of Indiana, a model gentleman, model chief, and model ever-probing thinker.

Jean Toal of South Carolina, an unprecedented combination of high energy, brilliance, leadership, and values.

Jerry VandeWalle of North Dakota, the nation's only CJ chosen by all judges in his state and who deservedly enjoys uniquely high regard and affection among the CJs.

Last, another "ex-chief," Tom Phillips of Texas, whom I have had the luck to work with and learn from for many years. Appointed to a vacancy as CJ in 1988, when only thirty-eight, he was re-elected repeatedly and currently holds Texas's record for judicial campaign fund-raising. Yet, running his last campaign without contributions, he accomplished major changes (including the nation's most sophisticated campaign finance regulation for judicial campaigns), tried for still more, and continues to bring the Conference of CJs unfailing wisdom, wit, and leadership.

I close with deepest appreciation to all who work to keep our state courts strong enough to assure justice.