

New Challenges to States' Judicial Selection

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ABSTRACT

Sam Houston, on the Texas Democratic state chairman who began the practice of having the Party endorse judicial candidates:

"[O]ne drop of his blood would freeze a frog."¹

"I've never seen the judiciary, national and state, so vulnerable," a leader of the judiciary in one of our largest states wrote to me recently. Vulnerability is obvious for judges facing elections, but problems are increasing in states with all types of selection systems. Dissatisfaction with courts is leading to a variety of challenges, from attempts to unseat judges because of unpopular decisions to efforts to shorten terms or politicize judicial selection.

*This Essay focuses on judicial selection and particularly judicial elections, which are found in thirty-nine states and faced by 89% of our state judges. Since 2000, judicial elections have drawn unprecedented attention because of (1) noisier, nastier, and costlier campaigns; (2) more involvement of interest groups; and (3) starting with 2002's Supreme Court decision in *White v. Republican Party of Minnesota*, the courts' invalidation of limits on judicial candidates' campaign conduct. Those court decisions, which so far have had almost no impact on campaigns, came after the other changes were established and spreading.*

This Essay presents the changes and the new scene that opened in 2004; the context and history of state judicial selection methods and elections; the court decisions and their impact; and finally, the five steps that are being taken to meet the new challenges: lengthening terms, increasing outreach by judges and the Bar (such as recent action in Missouri led by corporate general counsels), official "Voter Guides," campaign conduct committees, and new attention to recusal practices.

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1. A.W. Terrell, *Recollections of General Sam Houston*, 16 Sw. Hist. Q. 113, 120 (1912).

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INTRODUCTION

“I’ve never seen the judiciary, national and state, so vulnerable.” That statement, made at the end of 2005, is from a leader of the judiciary in one of our largest states. Vulnerability is obvious for judges facing elections, but problems are increasing, recently with unusual intensity, in states with all types of selection systems.² Dissatisfaction with courts (sometimes because of judicial decisions made by courts outside the particular state) is unusually widespread at the grass roots and in the state legislatures. It is leading to a variety of challenges, from attempts to unseat judges because of unpopular decisions to efforts to change judicial selection or the judiciary’s powers.

This Essay’s focus is on judicial selection and particularly judicial elections, which since 2000 have drawn unprecedented attention because of more contentious and costly campaigns; more involvement of interest groups in the campaigns; and since 2002, federal court decisions holding that long-standing limits on judicial candidates’ campaign conduct are unconstitutional speech restrictions. Note at once that the court decisions came after the other changes were established and spreading. Furthermore, at least so far, the new First Amendment freedoms have produced floods of commentary but very little impact on campaigns. That impact, however, seems bound to rise.

This Essay looks first at the recent changes, then at the context and history of state judicial selection methods and elections, and last at the steps that are being taken to meet the new challenges.

But at the outset, let the author’s assumptions and values be explicit: First,

2. See David Rottman, *The State Courts in 2005: A Year of Living Dangerously*, in COUNCIL OF STATE GOV’TS, 38 THE BOOK OF THE STATES 237, 238 (2006) (citing numerous attacks on judicial independence).

every citizen has a right, in the unforgettable words of the Massachusetts Constitution, to “judges as free, impartial, and independent as the lot of humanity will admit.”³ Putting that in due process terms, the judge’s job is to “hold the balance nice, clear, and true.”⁴

Second, the separation of powers depends on keeping the judiciary distinct from the other branches. If judges were the electoral twins to the legislators, courts would lose the independence and the public confidence that are indispensable for them to carry out the constitutional duty of judicial review upon which our constitutional rights rely.⁵

Third, those two bedrock fundamentals of our system reflect that fact that judges, even elective judges, differ from other elective 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;” “[o]ther 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 casework,’ patronage, securing benefits for communities, etc.,” and almost all other elected officials face challenges in every election.⁶

Finally, fundraising by judicial candidates is uniquely constrained.

I. RECENT CHANGES IN JUDICIAL ELECTIONS

Traditionally, “political campaigns for judicial posts [were] as exciting as a game of checkers. . . . [p]layed by mail.”⁷ Indeed, judicial elections used to be “low-key affairs, conducted with civility and dignity.”⁸ But judicial elections, said ex-President William Howard Taft in 1913, are inherently “disgraceful” and “so shocking . . . that we ought to condemn them.”⁹ In 2002, two days after

3. The words are John Adams’s, in the original Massachusetts Constitution of 1780. See Hiller B. Zobel, *Judicial Independence and the Need to Please*, JUDGES’ J., Fall 2001, at 5, 8.

4. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

5. “[A]n independent judiciary with the final authority to interpret a written constitution. . . . is one of the crown jewels of our system of government today.” William H. Rehnquist, Chief Justice of the U.S. Supreme Court, Keynote Address at the American University Law Review Symposium: The Future of the Federal Courts (Apr. 9, 1996), in 46 AM. U. L. REV. 263, 274 (1996).

6. Robert M. O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 716–17 (2002) (quoting Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 LAW REV. MICH. ST. U.-D.C.L. 849, 857–61).

7. William C. Bayne, *Lynchard’s Candidacy, Ads Putting Spice into Justice Race*, COM. APPEAL (Memphis), Oct. 29, 2000, at DS1.

8. Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995).

9. William H. Taft, *The Selection and Tenure of Judges*, 38 A.B.A. REP. 418 (1913).

Ohio's hot election for two high court seats, with unusually disturbing ads by *non-candidate* groups on each side, Chief Justice Tom Moyer said, "Candidates were outraged. Citizens were outraged. I am outraged. Anybody who places their trust and confidence in a constitutional democracy should be outraged. We have been subjected to the dark side of democracy. . . ." ¹⁰

Changes in judicial elections started in 1978 in Los Angeles, where the deputy district attorneys ran an advertisement offering to support any candidate who would run against an unopposed trial judge, producing (just as they hoped) an unprecedented number of contests and defeated judges. Then, in the 1980s, Texas saw battles over tort law with unprecedentedly costly, heated races for its supreme court. The sea change came in 2000, when judicial candidates' campaign spending soared and interest groups were dimensionally more active than ever before, even dominating some races. ¹¹

Table 1: State Supreme Court Campaign Spending, 2000–2004¹²

	Number of seats up (Not counting retention ¹³)	Candidates' \$ (in millions, inflation-adjusted into 2004 dollars ¹⁴)	Number of States w/new \$ records	Non-candidates' \$ (in millions)	Number of States w/ television ads (candidates' & non-candidates')
2000	46, 20 States	\$50.5, 61% over prior peak (1998), and nearly double average-per-seat of 1990–1999	10	\$17.5 total (estimated)	4 (Non-candidates: 4)
2002	44, 20 States	\$30.5	?	\$2.3 on television	9 (Non-candidates: 6)
2004	49, 16 States	\$46.8	9	\$12 on television	16 (Non-candidates: 7)

10. Thomas J. Moyer, Chief Justice, Ohio Supreme Court, Speech to the Retail Merchants Association (Nov. 7, 2002), available at http://www.sconet.state.oh.us/Communications_Office/Speeches/2002/1107cjm.asp.

11. See *infra* tbl. 1.

12. Sources: Nat'l Inst. on Money in State Politics, and Justice At Stake, *The New Politics of Judicial Elections* (2000, 2002, 2004); Roy A. Schotland, *To The Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1405 (2003).

13. Retention elections involve almost no spending, except for California's 1986 record-setter. For 1986–2003 data on retention elections, see Schotland, *supra* note 12, at 1406–08 & nn. 39–40.

Note: We have full data about high-court races, but very little on lower courts. By far the most expensive trial-court campaigns are Florida's: In 2002, its trial-court candidates spent \$16 million, with 277 seats up and 43 contested; in 2000, Florida judicial candidates raised over \$8 million with only 182 seats up and merely 17 contested; in 2004, it fell back to under \$8 million. In 2002, Florida's trial-judge races spent 41% as much as their legislative races; in contrast, California's races spent 5% of the spending on its races for the state legislature. One big reason: Florida has many judicial campaign consultants. Roy Schotland, *Judicial Elections: Change and Challenge* 14 (rev. ed. July 11, 2005) (unpublished paper from the California Judicial Council Branch Planning Meeting) (on file with author).

14. Before adjustment, 2000's figures were \$45.6 and \$16; 2002's were \$29 and \$2.2.

Note on Regulation of Campaign Finance of Judicial Candidates

In almost all elective states, judicial candidates are subject to generally applicable law such as limits on contribution amounts and on who can contribute. Some states have specific provisions for judicial campaigns (either by statute as in Texas or by court rule as in Ohio).

Candidates' fundraising in almost all elective states is limited by Canons of Judicial Conduct: soliciting is to be done only by the candidate's campaign committee. In 2002, the Eleventh Circuit held that rule unconstitutional,¹⁵ and in 2005 the Eighth Circuit held it unconstitutional to bar candidates' soliciting by mail or to large groups.¹⁶

Two particular problems are pressing. Candidates may raise disturbingly large proportions of their funds from single law firms (through, for example, lawyers, spouses, and employees). Only Texas has an aggregate, inclusive limit on contributions from any single firm. Also, limits on direct contributions can be evaded by channeling contributions to PACs and parties, thus evading any recusal effort that might be triggered by unusually large contributions.¹⁷

Judicial elections have become nastier, noisier, and costlier. Indeed, the rise in cost and heat is so well-known that it has become a stuck record. But major new features that started in 2004 have drawn, at most, only local attention. The harbinger event was in South Dakota, where the state held a referendum on a constitutional amendment—that their legislature had passed all but unanimously—to change from contestable, nonpartisan elections for their *trial* judges to “merit” appointments followed by retention elections, as they have had since 1980 for their appellate judges. The state had been lucky: *no* troubled elections. But with *Republican Party of Minnesota v. White*¹⁸ arising next door in Minnesota and with several states' judicial races having been invaded by outside

15. *Weaver v. Bonner*, 309 F.3d 1312, 1322–23 (11th Cir. 2002).

16. *Republican Party of Minn. v. White*, 416 F.3d 738, 764–66 (8th Cir. 2005) (en banc), *cert. denied sub nom. Dimick v. Republican Party of Minn.*, 126 S. Ct. 1165 (2006).

17. For examples of such problems, see generally Roy A. Schotland, *Proposed Legislation on Judicial Election Campaign Finance*, 64 OHIO ST. L.J. 127 (2003).

Lawyers are only a minor source of judicial campaigns' contributions, contrary to widespread belief. They accounted for 22% of contributions in 2000, 37% in 2002, and 22% in 2004—or 26% of those years aggregated. Email from Rachel Weiss, Commc'ns Dir., Nat'l Inst. on Money in Politics to author (July 21, 2006) (on file with author) (attaching data on lawyers' contributions to judicial campaigns in over 20 states from 2000 to 2004). Proportions above 50% were found almost nowhere. *See id.*

As the 1998 ABA Task Force stressed, “Often attorneys account for large proportions, often even over 75% . . . but it is also true that often attorneys' contributions total only a minor fraction.” TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, AM. BAR ASS'N, 2 REPORT AND RECOMMENDATIONS: REGARDING CONTRIBUTIONS TO JUDGES AND JUDICIAL CANDIDATES 89 (1998) [hereinafter ABA TASK FORCE REPORT].

18. 536 U.S. 765 (2002).

groups, all of South Dakota's judges worked hard for voter support. One city official typified the opposition to the amendment: "This is one of those proposals that's simply anti-baseball and apple pie. This is anti-American . . ." ¹⁹ But in fact, almost all South Dakota judges reach the bench by appointment to vacancies, and since 1982, only 21 of 109 seats were contested. Why not support having *all* judges *in fact* face the voters? The voters rejected the referendum, by a two to one margin—the same margin as in Ohio in 1987, and Florida voters in 2000 were even more opposed to ending contestable elections.

Each time, the defeat is explained as "the people won't give up their vote." The key setback in South Dakota was a speech by James Dobson (the influential leader of Focus on the Family) ²⁰ to an enormous rally. In 2003 at an Alabama rally for Chief Justice Roy Moore, Dobson discovered, it is said, surprisingly deep popular resentment of "liberal" court decisions. ²¹

People like those who won in South Dakota are now at work there and in eight other states to politicize all judicial *selection*, not just elections. So far, they have succeeded only in Georgia, where the nonpartisan judicial elections (only about 10% have been contested) were just moved from primary election time to November's general election, plus a run-off if needed. ²² That change will raise turnout, produce more judicial contests, and also—a key part of the goal—increase turnout for *nonjudicial* candidates supported by the people upset by what they deem "activist" judges.

The other states in which politicizing is being pushed actively—Arizona, Colorado, Indiana, Kansas, Missouri, Montana, Nebraska, Oregon, and South Dakota—have bills pending for a variety of steps; in some chambers, they already have majority support. Among the proposals: in Georgia, change from nonpartisan to partisan elections; in Colorado, limit terms, and in Missouri, shorten terms; in Colorado and Montana, make judges recallable; in Arizona and Kansas, where counties have local option, change more counties from "merit" appointment and retention elections to contestable elections; and in several states, add advice and consent for judicial appointments, which even

19. Carson Walker, *Justice: Measure Would Keep Judges Accountable*, ABERDEEN AM. NEWS, Oct. 18, 2004, at 4A (quoting Sam Kooiker, Alderman, Rapid City, South Dakota).

20. According to *The New York Times*, his daily radio commentaries are heard by 200 million people worldwide. Russell Shorto, *What's Their Real Problem with Gay Marriage? It's the Gay Part*, N.Y. TIMES, June 19, 2005, § 6 (Magazine), at 41.

21. Peter Harriman, *Dobson Urges Voters To Reject Proposition To Appoint Judges*, ARGUS LEADER (Sioux Falls), Sept. 5, 2004, at 1B; Jim Dallas Tucker & Christina L. Fischer, *Merit Selection: A Better Method to Select South Dakota's Circuit Court Judges*, 49 S.D. L. REV. 182, 187–90 (2004). Some of the South Dakota story also came from the author's talks with participants, who provided information on condition of anonymity.

22. We have also had subtler changes politicizing judicial selection. In Florida before 2001, the nine-member "merit" committees that screened nominations included three people named by the Governor, three people named by the Bar, and another three members named by the other six members. The 2001 amendments essentially gave the Governor authority to appoint all of the members: four must be selected from twelve nominations by the Bar, but the Governor has the authority to reject the entire slate of Bar nominees and call for a new one.

most appointive states do not have.²³ South Dakotans will vote on a ballot proposition called “JAIL for Judges,” a novel plan that would end “the arbitrary use of judicial immunity” by creating special thirteen-member grand juries able to indict judges (if a prosecutor files charges) or to strip them of the immunity defense in civil suits.²⁴ How far will any of these efforts get? As Samuel Goldwyn reputedly said, predicting is hard . . . especially the future.

In 2004, Illinois's and West Virginia's high court races were extraordinarily expensive and heated, drawing much attention. But utterly ignored so far is a new development, the heat in last year's *retention* elections: never before did we have retention fights in four states in one year. For the first time since the

23. On Colorado's term-limit proposal, see John Andrews, *Cross Country: "Ten Years and Out,"* WALL ST. J., Aug. 10, 2006, at A9.

Montana's recall proposal would require only a “justification statement” presenting “any reason acknowledging electoral dissatisfaction with a justice or judge notwithstanding good faith attempts to perform the duties of the office.” Andrew Cohen, Opinion, *Of Elections, Judges and Stupidity*, WASHINGTONPOST.COM, Oct. 7, 2006; see also Joshua Spivak, *War Against the Law: The Recall of Judges and Judicial Decisions*, MONT. LAW., Sept. 2006, at 7.

Senate advice and consent is required in 12 of the 29 states with gubernatorial appointment, and also for vacancy appointments in New York and Pennsylvania.

24. Justice O'Connor, interviewed in *USA Today*, said this:

[T]he concerns today are not only at the national but at state levels. Have you watched what's happening in a proposal in South Dakota? They're looking to remove all judicial immunity from judges for their judicial decision-making and want to subject them to civil and criminal lawsuits for their actions on the bench.

That would be a remarkable change in direction from what the framers of our Constitution intended.

Reflections of a Retired Justice: Sandra Day O'Connor Says Judicial Independence Is Imperiled and Electing Judges Is Not Wise, USA TODAY, June 8, 2006, at 21A.

On the South Dakota ballot, the JAIL proposal will appear in a statement by its Attorney General, as set forth immediately below. JAIL's sponsors lost their suit to overturn the Attorney General's statement; the Supreme Court unanimously affirmed the statement as modified by the trial court, to read as follows:

Citizens serving on juries, school boards, city councils, county commissions, or in similar capacities, and prosecutors and judges, are all required to make judicial decisions. Their decisions may be reversed on appeal, or they may be removed from office for misconduct or by election. However, they cannot be made to pay money damages for making such decisions. This allows them to do their job without fear or threat or reprisal from either side.

The proposed amendment to the State Constitution would allow thirteen [special grand jurors] to expose these decision makers to fines and jail, and strip them of public insurance coverage and up to one-half of their retirement benefits, for making decisions which break rules defined by the [special grand jurors]. [Special grand jurors] are drawn from those who submit their names and registered voters.

The proposed amendment is retroactive. The [special grand jurors] may penalize any decision-maker still alive for decisions made many years ago.

If approved, the proposed amendment will likely be challenged in court and may be declared to be in violation of the US Constitution. If so, the State may be required to pay attorneys fees and costs.

A vote “Yes” will change the Constitution.

A vote “No” will leave the Constitution as it is.

Stegmeier v. Long, No. HU06-322 (S.D. Cir. Ct. Aug. 21, 2006), available at http://www.tulanelink.com/jail/ruling_06a.htm.

famous Missouri Plan started in 1940, a justice who was simply deemed too liberal was opposed, with their Assembly Speaker among the lead attackers and about \$200,000 spent against this justice who was simply deemed too “liberal.” In Arizona, Iowa, and Kansas, trial judges were targeted because of specific decisions—abortion cases, a rape case, and a case involving two lesbians.²⁵ All these judges won with strong votes, but very important is the lesson drawn by the Missourians who led last year’s support for the retention of their justice: these attacks aim not at defeating incumbent judges, but rather at raising the turnout of people upset about what they call “activist judges.”²⁶

II. CONTEXT: JUDICIAL SELECTION METHODS

A. FACTS

Unlike the federal courts (the junior branch of America’s judiciary, because state courts came first), the only word for state judicial selection is variety.²⁷ Judges are appointed (all judges or almost all in eleven states), and/or face retention elections (all or some in nineteen states), and/or face contestable elections—some partisan (all or some in nineteen states), some nonpartisan (again, all or some in nineteen states).²⁸

More striking is how much the states vary the selection systems for their different courts. We end up with fifteen varieties (or more if we distinguish among appointment systems for whether or not there is “merit” screening or whether such screening is independent; still more if we add differences in length of term; yet more if limited jurisdiction courts are included). Just glancing at the details below shows a startling lack of consensus, prevailing for over 150 years:

25. Condemning campaign attacks on any judge because of a single decision, an ABA Task Force wrote this:

Never 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.

ABA TASK FORCE REPORT, *supra* note 17, at 6.

26. In 2005, Pennsylvania voters for the first time rejected retention for a justice. However, this stemmed from grassroots outrage over the way the legislature had enacted pay increases; two justices were the only state-wide candidates on the ballot. See Shira J. Goodman & Lynn A. Marks, *Lessons From an Unusual Retention Election*, CT. REV., Fall/Winter 2006, at 4, 7–11.

27. That the state courts are the “senior branch” is pointed out by that invaluable observer, Oregon’s Hans Linde.

With the exception of note 29 *infra*, this Essay deals with only appellate and general jurisdiction trial courts.

28. For a state-by-state chart, see *infra* app. 1.

- Appointive all (9): Conn., Del., Haw., Mass., Me., N.H., N.J., R.I., Vt.²⁹
- Selection by the legislature (2): S.C., Va.
- Appointive for high court, partisan contestable elections for trial courts (1): N.Y.³⁰
- Retention elections after appointment, all (6): Alaska, Colo., Iowa, Neb., Utah, Wyo.
- Retention, after appointment, for appellate courts:
 - And for all trial courts, nonpartisan elections (4): Cal., Fla., Okla., S.D.
 - And for all trial courts, partisan elections (1): Md.
 - And for some trial courts, but others have nonpartisan elections (1): Ariz.
 - And for some trial courts, but others have partisan elections (2): Kan., Mo.
 - And in unique Indiana, nonpartisan elections for some counties' trial courts, partisan for others.
- Nonpartisan elections for all (13): Ark., Ga., Idaho, Ky., Minn., Miss., Mont., Nev., N.C., N.D., Or., Wash., Wis.
- Partisan elections for all (4): Ala., La., Tex., W. Va.
- Partisan elections for all, without party label on general election ballot (1): Ohio.³¹
- Partisan elections for high court, nonpartisan elections for trial courts, without party label on general-election ballot (1): Mich.³²
- Illinois and Pennsylvania have partisan elections for initial terms but retention elections for subsequent terms.
- New Mexico has a unique hybrid system with some partisan elections for initial terms and retention elections for all subsequent terms.

An important addition: Whatever the system, many judges initially reach the bench by appointment to fill a vacancy—in some states, as many as 90%.³³ In

29. In Connecticut, Maine, South Carolina, and Vermont, probate judges are elected.

30. New York's intermediate Appellate Division judges are appointed from elective trial judges and must stand for contestable partisan election when their term on the trial bench ends.

31. All Ohio candidates are selected in party primaries; the parties are active and the campaigns are clearly partisan.

32. Michigan's high court candidates are nominated at party conventions; the parties are active and those campaigns are clearly partisan. However, few if any of the trial court elections have partisan elements.

33. Of California's and Minnesota's trial judges, 90% reach the bench by appointment. For high courts in elective states between 1964 and 2004, 52% of judges were initially appointed. See Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments*, 27 JUST. SYS. J. 1, 1 (2006).

The only study on all judges was done in 1998 on thirteen elective states by the American Judicature Society and was unpublished. It found majorities appointed in most states and substantial minorities in the others. See Am. Judicature Society, *Initial Appointment Versus Election for State Judges* (2000) (unpublished table, on file with author).

most elective states, such appointees stand for election soon after appointment.

As with selection methods, judicial tenure varies widely between states. Judges serve during good behavior only in Massachusetts, New Hampshire, and Connecticut. (In Massachusetts and New Hampshire judges serve until age seventy. What a contrast with 1789, when nine states had life tenure!) Some state judges do have long terms: Maryland (fifteen years), New York (fourteen), Delaware (twelve), and the appellate courts in four states (twelve), and ten year terms in several more states. At the other extreme, 45% of state appellate judges have six year terms. And 74% of state trial judges have only six years or less—18% have only four year terms. Judicial selection reform has focused on appellate courts more than trial courts, even though trial judges routinely rule on potential lightning rod matters such as bail and sentencing.

B. VIEWS OF THE DIFFERENT SELECTION SYSTEMS

Legal groups—such as the American Bar Association and the American Judicature Society—have long espoused merit selection, as have reform groups, such as the National Municipal League and the Citizens for Independent Courts, and ad hoc groups. . . . Many sitting judges, who do not relish having to participate in political fund-raising and campaigning, have also urged that merit selection replace election. According to its proponents, merit selection encourages judicial independence, promotes informed choice in the selection of judges, and attracts more qualified attorneys to the bench. They insist that popular election of judges, particularly contested partisan elections, undermines judicial independence[,] . . . results in a less qualified bench, and gives the appearance of corruption, in that judges are perceived as beholden to those who support them in their campaigns. In contrast, proponents of judicial elections stress the importance of judicial accountability to the public, especially given the broad effects of judicial rulings on controversial issues. They also deny that merit selection eliminates politics from the selection process, insisting that it is merely a different sort of politics that operates under merit selection.

The evidence supporting these claims is largely anecdotal, and in fact it is hard to understand how, for example, one might prove that merit selection leads to a more qualified bench. During the 1960s and 1970s several states shifted to merit selection, but in recent decades voters have consistently opposed merit selection. . . . This loss of reform momentum has led groups such as the American Bar Association to seek ways of improving existing modes of selection rather than transforming them, at least in the short run.³⁴

34. G. ALAN TARR, *The Judicial Branch*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 85, 99–100 (G. Alan Tarr & Robert F. Williams eds., 2006) (footnotes omitted). How telling that, in 1988, Professor Tarr wrote of the movement *toward* “merit” systems. See G. ALAN TARR & MARY CORDELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 61 (1988).

C. EFFORTS TO EVALUATE PERFORMANCE OF THE DIFFERENT SELECTION SYSTEMS

Studies of the consequences of judicial selection methods have examined the behavior of judges and litigants in the different systems but are, unsurprisingly, not conclusive. A book-length study of six states' systems ended with "Cautious Conclusions" and "Musings—Throwing Caution to the Wind," but did find "criminal-procedure law the most revealing of judicial-selection-method impact."³⁵ Sentencing has drawn the most attention; also examined have been differences in tort awards and in frequency of litigation.³⁶

Different but surely notable is this: among judges disciplined in three elective states—California, Florida, and New York—a sharp distinction is found between the number of judges initially appointed and those initially elected. In California from 1990 to 1999, 496 trial judges and 3 appellate judges were disciplined. Of the 499, 418 had been initially appointed to the bench, 81 initially elected, a disciplinary rate per thousand judges of 29.8 for the initially

35. DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY* 129–31 (1995) (suggesting that while appointed judges favor "due-process model," elected judges favor "crime-control").

36. On sentencing, see, for example, John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999) (finding no statistically significant correlation between the type of judicial selection in a state and the treatment of death penalty appeals, and concluding that the frequency with which the death penalty is sought is a better indicator of the rate of reversal); 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*, 73 B.U. L. REV. 759 (1995) (providing striking anecdotes); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117 (1987) (including anonymous interviews with members of the Louisiana Supreme Court and data on death penalty decisions); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 42 AM. J. POL. SCI. 247, 253 (2004) (finding that Pennsylvania trial court judges became more punitive as retention election approached, based on sentencing for felony crimes for which judges had discretion in sentencing); Nancy J. King, *How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. CRIM. L.J. 195 (2004); Gerald F. Uelman, *Crocodiles in the Bathub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1137 (1997) ("[J]udges whose tenure is more secure are more willing to overturn a death penalty judgment[.]"); Sanford Clark Gordon & Gregory Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior* (undated, unpublished manuscript), <http://www.princeton.edu/csdp/events/pdfs/seminars/Gordon042706.pdf> (last visited Feb. 21, 2007) (finding, in a study of trial judges in Kansas where about half face partisan elections and half face retention elections, that the former sentence more severely).

On tort awards, see Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 348 (2002) (finding awards higher in elective states—especially against out-of-state businesses, and highest in partisan-election states, and arguing that "the explanation for [these] results lies in judges, not juries").

On the frequency of litigation, see generally F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election vs. Appointment of State Judges*, 28 J. LEGAL STUD. 205 (1999) (finding more litigation where judges are appointed and hypothesizing higher motivation to litigate where there is more uncertainty because judges are more "shielded").

On the higher frequency of discrimination suits where judges are appointed, see generally Timothy Besley & Abigail Payne, *Judicial Accountability and Economic Policy Outcomes: Evidence from Employment Discrimination Charges* (Inst. for Fiscal Studies, Working Paper No. W03/11, 2003), available at <http://www.ifs.org.uk/wps/wp0311.pdf>.

appointed category, 43.6 for the initially elected.³⁷ In Florida from 1970 to 2000, of the 69 judges who were disciplined, 70% of the judges who were reprimanded and 83% of those who were removed (or resigned with charges pending) had initially been elected.³⁸ And in New York City from 1977 to 2002, of the 41 limited jurisdiction judges who were disciplined, 80% had been elected (from among the 314 civil court judges) and only 20% appointed (from among the 288 family and criminal court judges).³⁹

III. JUDICIAL ELECTIONS

A. PERSPECTIVES ON JUDICIAL ELECTIONS

Four recent statements are illuminating:

(1) May I submit as the best statement ever on judicial elections, this following excerpt from the Florida Supreme Court's public reprimand of a judge's campaign conduct:

Every judicial election presents both a great opportunity and a great risk. Those elections present us with a great opportunity to educate our citizens about the proper role and responsibility of the Third Branch—and especially the role and responsibilities of the individual judges who serve that branch and that all judicial candidates in Florida will honor those responsibilities. Of course, absolute impartiality and freedom from partisan influences are the most important of these responsibilities.

At the same time, however, judicial elections present a great risk—a risk that the public will be misinformed about the proper role and responsibilities of judges and that because of that misinformation, confidence in our justice system will be undermined or shaken if the public perception is that judges may act in partisan manner—rather than strictly adhere to the Rule of Law.⁴⁰

(2) Defending judicial elections, Wisconsin's Chief Justice Shirley Abrahamson called electoral systems valuable tools to educate voters about judging and the importance of judicial independence, and quoted from Wisconsin's constitutional debate:

37. COMM'N ON JUDICIAL PERFORMANCE, STATE OF CAL., SUMMARY OF DISCIPLINE STATISTICS 1990–1999, at 6, 14 (undated), available at <http://cjp.ca.gov/Miscellaneous/Web%20Version.rtf> (last visited Feb. 21, 2007).

38. Martha W. Barnett, *The 1997–98 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411, 424 (2004).

39. 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, 808–10 (2004). In California, Florida, and New York the trial judges face contestable elections.

40. *Court Publicly Reprimands Judge Angel*, FLA. BAR NEWS, July 1, 2004, at 12 (reprinting verbal reprimand administered on June 11, 2004, by Harry Lee Anstead, Chief Justice, Florida Supreme Court); see also *In re Angel*, 867 So. 2d 379 (Fla. 2004).

“[W]e should look with more of hope and confidence than of doubt and apprehension to the working of an elective judiciary.” “[T]he people will support [judges] who oppose their wishes on the bench when such opposition is exercised conscientiously. Boldness men admire, even when opposed to their wills”⁴¹

(3) In an amicus brief in 2005 supporting Minnesota’s limits on partisan conduct in judicial campaigns, the Conference of Chief Justices (CCJ) pointed out the “hazards” of partisan judicial elections. The brief nonetheless stressed that CCJ deemed partisan elections a “reasonable, constitutionally defensible method[.]”⁴² These hazards include: “decisions explainable only by partisanship;”⁴³ “decisions grounded in re-election concerns;”⁴⁴ “undue emphasis on party service in selecting candidates for the bench;”⁴⁵ “election results

41. Shirley S. Abrahamson, Chief Justice, Wis. Supreme Court, *The Ballot and the Bench*, Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice (Mar. 15, 2000), in 76 N.Y.U. L. REV. 973, 1003–04 (2001) (quoting *THE MOVEMENT FOR STATEHOOD 1845–1846*, at 202 (Milo M. Quaife ed., 1918) and *THE STRUGGLE OVER RATIFICATION 1846–1847*, at 495 (Milo M. Quaife ed., 1920), respectively).

42. Brief of Conference of Chief Justices Amicus Curiae in Support of Defendants/Appellees at 13–15, *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005) (No. 99-4021), 2002 WL 32737305 [hereinafter CCJ Brief].

43. *Id.* at 13 (citing *People ex rel. Burriss v. Ryan*, 588 N.E.2d 1033 (Ill. 1992) (“*Ryan II*”); *People ex rel. Burriss v. Ryan*, 588 N.E.2d 1023 (Ill. 1991) (“*Ryan I*”). The brief goes on to explain that

[i]n *Ryan-I*, Democratic Justices voted down a Republican-drafted redistricting map. In *Ryan-II*, one justice, a Democrat, changed his vote and the Republican map was upheld. See generally *People ex rel. Burriss v. Ryan*, 634 N.E.2d 1066 (Ill. 1994) (Bilandic and Harrison, JJ., dissenting from denial of petition for post-judgment relief) (alleging that when the Democrat switched his vote, he did so to gain the Republican nomination in the next election).

Id. at 13 n.9 (corrections made to original without notation).

Another example of this phenomenon cited in the brief is *In re Reapportionment of the Michigan Legislature*, 197 N.W.2d 249 (Mich. 1972), a case in which “[a] majority of three Republican judges and one Democrat upheld a redistricting plan favorable to the Republicans. Four years later, that Democrat, by then chief justice, was denied renomination by his party but won as an independent after the Bar rallied behind him.” CCJ Brief at 13 n.9. The brief also cites *Norman v. Reed*, 502 U.S. 279 (1992), a case that reversed the “Illinois Supreme Court’s 4-3 decision, without opinion and on party lines, that had upheld Cook County Democrats’ efforts to block a new party formed by activists.” CCJ Brief at 13 n.9.

44. *Id.* at 13 (citing RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* 4 (1988) (“As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else’s money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.”); Eric Helland & Alexander Tabarrok, *Exporting Tort Awards*, REGULATION, Jan. 2000, at 21, 21–22). The brief explains that “[s]everal studies find ‘strong evidence that in cases with out-of-state defendants [tort] awards are much higher in partisan elected states than in other types of judicial systems.’” CCJ Brief at 13 n.10 (quoting Alex Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. ECON. 157, 186 (1999)).

45. CCJ Brief at 13 (citing, at n.11, Jackson Williams, *Irreconcilable Principles: Law, Politics, and the Illinois Supreme Court*, 18 N. ILL. U. L. REV. 267, 276 (1998) (arguing that “the fact that so many justices came to prominence as politicians rather than as lawyers, scholars or jurists” has probably added to the negative perception of the Illinois Supreme Court, and noting that “Justices Ward, Clark, Simon, Calvo and Bilandic . . . made their marks as elected Democratic party officeholders in state or

reflecting the ‘landslide’ effect of strong top-of-ticket candidates;”⁴⁶ “links with party leaders that interfere with the administration of the courts and justice;”⁴⁷ and “far costlier campaigns.”⁴⁸ For these reasons,

[i]t is understandable that lawyers in the one State featuring partisan, nonpartisan and retention elections ranked partisan elections last when polled on their views of selection systems.⁴⁹

Since 1911, 20 states have opted for nonpartisan elections. Since 1940, 19 have chosen retention elections. . . . However, [these] are reasonable, constitutionally defensible methods designed to balance electoral accountability with the deeply compelling state interest in judicial independence.⁵⁰

(4) In 2005, a conference of thirty-eight states’ chief justices, justices, judges, and others, sent to the CCJ a Call to Action that included this:

The fact—which becomes constantly clearer and more widespread—is that whatever may be the view of a State’s courts and lawyers, “Don’t let them take away your vote” (to use the phrasing of ads in more than one State) has been an insuperable hurdle. In the end each State must make its own decisions on what is a suitable judicial selection system. Any reasoned approach to the problems of judicial elections must start from the premise that where there are contestable elections, they are unlikely to end within the foreseeable future.⁵¹

local government . . .”; explaining that when they appear before Democratic Party slatemakers, Cook County candidates for the bench “stress[] their, or their family’s, history of Democratic affiliation”).

46. CCJ Brief at 14. For example, the brief explains, in 1885 “Michigan’s Republican Chief Justice Thomas Cooley, icon of the American bench, lost his seat of more than 20 years in a “Democratic Deluge” that defeated every GOP candidate.” *Id.* at 14 n.12 (citing PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION 66–67 (1999)).

47. CCJ Brief at 14 (citing, at n.13, Editorial, *Court Dismissed: A Familiar Pattern Surfaces at the Akron Municipal Court*, AKRON BEACON J., June 18, 2003, at B-2, explaining that “[i]n Akron, Ohio, the Republican county chair ‘pledged changes at the . . . Municipal Court once Republicans gained control, as they did last month. . . . [Employee] dismissals at the municipal court arrived last week.’ Earlier in the year when a Democrat replaced a Republican, the new judge dismissed 9 employees.”; Public Admonition of Hon. James Funke Jr., Jennings Superior Court (July 8, 1999), <http://www.in.gov/judiciary/jud-qual/docs/admonitions/funke-7-8-99.pdf> (reprinting the reprimand of an Indiana trial judge who set up an ex parte contact with a colleague for local party chairman Sleepy Speer, whose son’s case was pending before that colleague).

48. CCJ Brief at 14. The average amounts raised in partisan supreme court campaigns in 2000 and 2002 were \$715,883 and \$455,614, respectively; the averages raised in nonpartisan campaigns were \$166,554 and \$155,072, respectively. *See* Email from Rachel Weiss, Commc’ns Dir., Nat’l Instit. on Money in Politics, to author (Jan. 22, 2007) (on file with author) (providing a correction to the data contained in DEBORAH GOLDBERG & SAMANTHA SANCHEZ, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002 (2004)).

49. CCJ Brief at 14–15 (citing, at n.15, Cary Solida & Scott Olson, *The Two Sides of Merit Selection*, IND. LAWYER, Sept. 16, 1998, at 1).

50. CCJ Brief at 15.

51. Call To Action, 2005 (Feb. 2005) (unpublished paper submitted to the CCJ by the participants in the National Symposium on Judicial Speech, post-*White*, at the National Judicial College) (on file with author). The CCJ passed a Resolution and Declaration adopting, in substance, this Call To Action. *See* Tony Mauro, *Chief Justices Sound Alarm on Judicial Elections*, LEGAL TIMES, Aug. 21, 2006.

To those four statements, one more aspect must be noted: 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 election route. Two current examples are Minnesota's Justice Alan Page, long regarded as outstanding by all aware of his work, and California's relatively new superior court judge Mildred Escobedo.

Page's tale is a dramatic illustration of how closed an appointive process can be.⁵² Page is an iconic hero, both in Minnesota and nationally, because of his football Hall of Fame performance as a Minnesota Viking. When he sought an appointment to Minnesota's trial bench he could not overcome being viewed as a mere token African American. Minnesota's judges face contestable, nonpartisan elections, but in fact over 90% of the judges reach the bench by appointment to fill vacancies.⁵³ "[A]ll but one of the present members of [their] high court and twenty-three of the last twenty-five Supreme Court Justices ascended to the Minnesota bench in this manner."⁵⁴ Page is the one that was elected. From 1983 to 1989, he had applied for virtually every judicial opening in his judicial district, where "[t]hroughout this time period, people of color were under-represented on the courts," and the nomination screening commissions were all white.⁵⁵ After those years, believing that his "skills, abilities, and interests fit more with serving on an appellate court" and that "if [he] was ever going to have an opportunity to serve as a judge in Minnesota, [his] only way of getting to the bench would be through election," he filed for a supreme court seat.⁵⁶ As Page described it:

As the [election] campaign played itself out . . . the rhetoric became less subtle and more direct. "He's just a football player." "He's just a dumb football player." And, implicit but unstated, "He's just a dumb, Black, football player."

Being subject to these campaign tactics made for some dark, difficult days. . . .

Ultimately, in my case, the politics of race did not have a significant impact. On election day, one million, two hundred-plus thousand voters, more than 61% of those who cast a ballot, voted for me. I was fortunate that, to some degree, because of my celebrity the voters knew who I was and

52. Page faced obstacle after obstacle in his path to the bench. *See, e.g.*, *Page v. Carlson*, 488 N.W.2d 274 (Minn. 1992) (invalidating governor's action to delay a judicial vacancy and the secretary of state's subsequent refusal to place Page's name on the judicial ballot).

53. Pam Louwagie, *Handpicked Justice; Bypassing Voter Judgment; Despite Elections, Public Rarely Decides Who Takes Bench*, STAR TRIB. (Minneapolis-St. Paul), Aug. 3, 2003, at A1 (noting that "[o]f the state's 297 sitting district and appellate judges," 9% (27) are elected and 91% (270) are appointed into office).

54. *Republican Party of Minn. v. White*, 416 F.3d 738, 760 n.11 (8th Cir. 2005) (en banc), *cert. denied sub nom. Dimick v. Republican Party of Minn.*, 126 S. Ct. 1165 (2006).

55. Justice Alan C. Page, Address at the Summit on Improving Judicial Selection (Dec. 8-9, 2000) (transcript on file with author).

56. *Id.*

something about me. It made me more human and allowed me to overcome accusations of being a mere token.⁵⁷

In each of 39 states, all or some of the appellate and trial judges face elections of some type, now totaling 89% of these judges.⁵⁸ *The Economist* recently stressed that electing state judges has long been the overwhelming norm:

Back in 1906, Roscoe Pound, a scholar at Harvard Law School, started a campaign to have judges appointed by saying: "Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench." When he spoke, eight in ten American judges stood for election. Today, the figure is 87%.⁵⁹

In fact, judicial elections, even when contestable, are only "quasi-elections."⁶⁰ *First*, in many states, they are held at times with low turnout and also suffer high "drop-off," with many voters not casting votes for these down-ballot offices. *Second*, contests, except for high courts, are rare. In 408 contestable high court elections (from 1980 to 2000), 58% were contested; by comparison, 85% of U.S. House seats were contested in those years.⁶¹ On trial courts there is no comprehensive study, but California's superior court "elections" are typical: since 1996, far fewer than 5% of the seats have been contested. From 1972 to 2002, only two years had high rates; 5.1% in 1978 (two years after Rose Bird won retention) and 3.2% in 1988 (two years after she was defeated). Of 67 superior court judges challenged between 1996 and 2004, only nine lost. In the last three elections, 39 were challenged and four lost, one of them because he abused his wife. Of those 39, 21 won over 65% landslides, and another twelve got over 55%.⁶² *Third*, polls over many years have shown startling voter unawareness of even the most visible judicial candidates. Perhaps this is because judicial candidates have no favors to offer constituents. *Finally*, because judicial races rarely attract media attention, voters depend heavily on party cues if available, bought advertising, and/or candidates' names.

57. *Id.*

58. *See infra* app. 2.

59. *Guilty, Your Honour?*, *ECONOMIST*, July 24, 2004, at 28–29; *see also My Judge Is a Party Animal*, *ECONOMIST*, Jan. 1, 2005, at 20.

60. New York's system of contestable elections for its supreme court justices has allowed so little participation by voters that it was held unconstitutional. *See Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 170, 187–89 (2d Cir. 2006).

61. Melinda Gann Hall, *Judging the Election Returns: Competition As Accountability in State Supreme Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* (Matthew Streb ed., forthcoming 2007).

62. The California data presented here is from Roy Schotland, *Judicial Elections: Change and Challenge 28* (rev. ed. July 11, 2005) (unpublished paper from the California Judicial Council Branch Planning Meeting, on file with the author). Other states' trial court elections are similarly uncompetitive but available data are less complete.

Whatever one's view of name familiarity in elections generally, in judicial elections they are often the entire game because these candidates have such low visibility. For example, in last year's California's June primary, 20-year veteran judge Dzintra Janavs ("particularly vulnerable—and even [perhaps] targeted—because of her unusual name") lost to bagel shop owner Lynn Diane Olson.⁶³ While Janavs was a leader in complex litigation and endorsed by the district attorney, sheriff, county supervisors, and 18 sitting judges, Olson self-funded her campaign with \$100,000 for "slate mailers" and had only reactivated her bar membership the year before (she had practiced for four years more than a decade earlier).⁶⁴ In 1990, in Washington State, highly regarded Chief Justice Keith Callow lost to an unknown Tacoma lawyer who did not campaign and spent only \$500, but had the same name as a Tacoma TV news anchorman. That same year, in San Antonio, a judge so highly regarded that he was supported by both sides of a divisive tort-law battle was defeated for a supreme court nomination by a lawyer new to the area—a recent retiree from the Army whose name was Gene Kelly.⁶⁵ And in 1982, an Alabama Supreme Court primary was narrowly won by incumbent Oscar Adams, the state's first black justice, beating a three-year practitioner from an unaccredited law school who had the same name as a well-known local baking company. The Justice said: "Our surveys showed a substantial number favored [my opponent] because they thought he was the bakery man."⁶⁶ Ohio has the strongest pattern: their high court candidates for over 30 years included nine last-named Brown, four last-named Herbert, and most recently the fortunate—and fortunately very able—Justice Herbert Brown.⁶⁷

B. THE HISTORY OF JUDICIAL ELECTIONS

Judicial elections began in 1789 in Georgia localities, then in 1793 in Vermont localities, and in 1832 Mississippi adopted it for all state judges. Between 1846 and 1860, twenty-one states had constitutional conventions, and all but Massachusetts and New Hampshire chose judicial elections.⁶⁸ The choice of elections was *not* (as myth holds) "an unthinking 'emotional response' rooted in . . . Jacksonian Democracy" that somehow "assumed that popular election of judges constituted a radical measure intended to break judicial power through an infusion of popular will and majority control."⁶⁹ On the contrary, the

63. Megan Garvey, *Judge's Loss Stuns Experts*, L.A. TIMES, June 8, 2006, at B1.

64. *Id.* Three days after that election, Governor Schwarzenegger appointed Judge Janavs to fill a vacancy. See Jessica Garrison, *Gov. Is the Judge: Janavs Back to the Bench*, L.A. TIMES, June 10, 2006, at B1.

65. ABA TASK FORCE REPORT, *supra* note 17, at 11.

66. *Id.* at 12 (citing Roy A. Schotland, *Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 88–89 (1985)).

67. *See id.*

68. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 44 HISTORIAN 337, 337–38 (1983).

69. *Id.* at 338–39.

history of constitutional conventions shows that the move to judicial elections was led by moderate lawyer-delegates to increase judicial independence and stature. Their goal was a judiciary “free from the corrosive effects of politics and able to restrain legislative power.”⁷⁰

Moderate reformers built consensus among delegates by adopting constitutional devices designed to limit the potentially disruptive consequences of popular election. For example, provisions rendering judges ineligible to run for other offices while serving on the bench were intended to prevent the political use of judicial office to win other offices. Similarly, long terms (and later, nonpartisan or retention elections), served the goal of restricting the “impact of party and majority rule.”⁷¹

Today, the constitutions of the thirty-nine states in which judges face elections of some type have an array of provisions, unique to the judiciary, that would be unthinkable for other elected officials in the legislative and executive branches.⁷² For example, in all thirty-nine states, judges’ terms are longer than any other elective officials’, and almost all of these states have six additional constitutional provisions unique to the judiciary.⁷³ The thirty-nine states decided that treating judicial elections like other elections would not further their purpose in adopting the popular election of judges, but would “undermine[] the judiciaries’ independent role under their constitutions.”⁷⁴

IV. SOURCES AND SHAPE OF THE NEW CHALLENGES

The changes in judicial elections stem from four causes. First, more and more people—from 1978’s Los Angeles deputy district attorneys, to today’s James Dobson and his legions—are beginning to realize that court decisions have increasingly high stakes and serious consequences.⁷⁵ The divisiveness of our U.S. Senate confirmation battles reflect this as well. Second, non-candidate groups, many from out of state, are providing enormous sums of money for judicial races and promoting ugly, even damaging campaigns. Third, these first two causes are making judicial campaigns more like *non*-judicial campaigns, bringing new elements like campaign consultants and a Win-At-Any-Cost approach.⁷⁶ The fourth reason for changes in judicial elections, which is deeply

70. *Id.* at 343.

71. *Id.* at 352. By 1860, 21 of the thirty states elected judges. *Id.* at 338.

72. On the differences between judges’ jobs and other officials’ jobs, see *supra* text accompanying note 6.

73. In 37 states, only judges are subject to both impeachment and special disciplinary process. In 33 states, judges are the only elective state officials subject to requirements of training, experience, or both (except that in 10 of those, the attorney general is subject to similar requirements). See Brief of Amicus Curiae Conference of Chief Justices in Support of Respondents at 6–7 & nn.6–10, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (No. 01-521) (citing state constitutional provisions).

74. *Id.* at 8.

75. That judicial decisions do matter is indispensable in the rule of law, at least in America.

76. California’s highly regarded Joe Cerrell began to employ this approach in 1978, but far different are consultants like some in Florida. (Cerrell started as a consultant in judicial elections in 1978 in Los

important but too new to have had notable impact so far, stems from lower federal court decisions after *Republican Party of Minnesota v. White*. In *White*, the Court, in a 5-4 decision, held unconstitutional under the First Amendment a Minnesota law barring a judicial candidate from “announc[ing] his or her views on disputed legal or political issues.”⁷⁷ Justice Scalia’s majority opinion included explicit limitations, which we put aside here because the lower courts have overread *White* to strike much more of the widespread regulation of judicial campaign conduct.

First, an activist panel of the Eleventh Circuit *sua sponte* struck down a Canon—law in almost thirty states—requiring that campaign funds be raised by a campaign committee, not by judicial candidates personally.⁷⁸ The panel (a) did this although the provision had not been challenged by the plaintiff at trial nor on the appeal about a different issue; (b) said, ignoring a limitation in the Scalia opinion, that “the distinction between judicial elections and other elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns”;⁷⁹ (c) simply ignored three contrary decisions; and (d) wrongly chose strict scrutiny.⁸⁰

More recently, in the *White* remand (on issues not reviewed by the Supreme Court), the Eighth Circuit en banc, 11-3, struck down Minnesota’s limit on partisan conduct by judicial candidates (law, in one form or another, in nineteen states), and narrowed the limit on candidates’ personal solicitation of campaign

Angeles. See Kenneth Ofgang, *After 40 Years in the Field, He’s ‘King’ of Political Consultants*, METROPOLITAN NEWS-ENTERPRISE (L.A.), Jan. 4, 2007, <http://www.metnews.com/articles/2007/cerre010407.htm>. He was later praised as “king of the judges” by the distinguished Court of Appeal Presiding Justice Harry Low, President of the California Judges Association at that time. *Id.*) Today, judicial campaigners in Miami-Dade County have the most active consultants—some even specializing along ethnic lines. Potential challengers often hire a consultant and remain as “floaters” until moments before the deadline for filing to be a candidate so that they can see which incumbents have no challenger or no strong challenger (Cook County, Illinois has the same practice). One consultant even assures any potential client who is an incumbent that none of his “floater” clients will run against another of his clients.

In Texas, campaign consultants figured importantly in a legislative effort regarding judicial elections in 2003–2004. The Senate had passed a bill to change most judgeships from elective to appointive positions and the House was about to vote, when the proposed change ran into two hurdles. First, some members of the GOP grassroots, especially people opposed to reproductive choice, believed they would have less impact if judges were appointed. Additionally, House members were contacted by their own campaign consultants (many of whom also worked or hoped to work in judicial campaigns), saying that if the member voted for the bill, he or she would be likely to have opposition in the primary. The House did not bring the bill up for a vote.

77. 536 U.S. 765, 768, 788 (2002) (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002)). This same canon was law in only nine states, with about twenty-five others having repealed it after 1990 when the ABA deleted it from the Model Code precisely because of concern about its constitutionality. In any case, the canon had never been enforced.

78. See *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), *reh’g and en banc review denied*, 57 F. App’x 416 (11th Cir. 2003).

79. *Id.* at 1321.

80. See *id.* at 1319.

funds (law in almost thirty states).⁸¹ Federal courts in Alaska, Kansas, Kentucky, and North Dakota have also recently rejected the widespread limits on candidates' making "Pledges or Promises" and "commitments."⁸²

Meanwhile, response to *White* by the state courts has been dramatically different. In many states the Canons have been amended, and the ABA is vigorously working on revising the Model Code. But at the same time, sanctions against campaign misconduct have been strongly enforced.⁸³

These federal court decisions have drawn a great deal of commentary, with two essential perspectives on the decisions emerging. First, supporters take the strong position that an election is an election and political speech is the core of the First Amendment. Second, opponents have said that these elections are different because the judge's job is so different from the work of other elective officials, and public confidence in the judiciary depends on protecting that difference.

So far few candidates have taken advantage of *White*, although there are myths to the contrary—particularly about a Pennsylvania Supreme Court victory in 2003 by a Democratic candidate who spoke out as both pro-choice and pro-gun. The losing candidate, who did not speak out, was Pennsylvania's first Republican judicial candidate to lose in eighteen races. However, as a leading local judicial reformer said, "It was turnout, turnout, turnout in the right places for Democrats."⁸⁴ Philadelphia voters swarmed for two reasons that had nothing to do with this race: the FBI had wiretapped their mayor's phones and he was up for re-election, and America Coming Together (one of the first and largest of the Democratic 527 organizations) chose Philadelphia for their first get-out-the-vote drive, producing remarkable new registrations and turnout.

This report from Florida is typical:

[*White*] had surprisingly little impact . . . in [2004 in] Miami-Dade County
 . . . [T]he legal and civic culture in Miami-Dade County explicitly and implicitly discourages candidates from engaging in issue-oriented speech. . . .

81. See *Republican Party of Minn. v. White*, 416 F.3d 738, 754, 765–66 (8th Cir. 2005) (en banc), cert. denied sub nom. *Dimick v. Republican Party of Minn.*, 126 S. Ct. 1165 (2006).

82. See *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1228 (D. Kan. 2006) (describing the progress of these cases). A similar suit in Indiana is pending, as is a follow-up attack on more Canons in Kentucky. Plaintiffs in Pennsylvania were held to lack standing. The Alaska and Pennsylvania cases are now on appeal.

Representing plaintiffs in those cases was James Bopp, who represented plaintiffs in the *White* Supreme Court stage and beyond. For his work in *White*, he was awarded \$867,000 of the \$1,375,000 awarded to plaintiffs' various counsel by the Eighth Circuit. (The availability of such fee awards to attorneys for plaintiffs who prevail in a civil rights suit (under 42 U.S.C. § 1988(b) (2000)), supports the bringing of such suits, as surely it is intended to do—and as endorsed by any supporter of the availability of judicial redress for any such grievance.)

83. See *In re Angel*, 867 So. 2d 379, 382 (Fla. 2004); *In re Kinsey*, 842 So. 2d 77, 92 (Fla. 2003); *In re Raab*, 793 N.E.2d 1287, 1293 (N.Y. 2003); *In re Watson*, 794 N.E.2d 1, 8 (N.Y. 2003).

84. Carrie Budoff, *Democrats Statedwide Ride Big Turnout Wave*, PHILA. INQUIRER, Nov. 6, 2003, at A1 (quoting Lynn Marks, Executive Director, Pennsylvanians for Modern Courts).

[G]iven the nature of Miami-Dade's electorate, a campaign strategy focusing on legal experience and judicial temperament is preferred by the candidates over one that emphasizes politically divisive issues.

...
 ... Even those who knew or should have known that candidates had a bit more freedom to discuss their personal views were unwilling to break with tradition. ... Many judicial candidates will likely choose not to enjoy the freedom granted by *White*. Traditions die hard.⁸⁵

To date the largest impact of *White* has been the increase in "questionnaires" sent to candidates by interest groups; in some states, few or no judges and candidates reply, in other states some or many reply.⁸⁶ But traditional norms are bound to loosen. That began this year in two Arkansas high court campaigns and perhaps also in Alabama's primary election for chief justice. One day after the U.S. Supreme Court denied review of the Eighth Circuit's en banc decision narrowing a Minnesota Canon (found in almost all elective states) that barred candidates from personally soliciting campaign funds, an Arkansan took advantage of that decision. Shortly thereafter, another Arkansas candidate relied on *White* to speak out about an unpopular pending case on school funding—a step that almost certainly backfired.⁸⁷

85. Rebecca Mae Salokar, *After White: An Insider's Thoughts on Judicial Campaign Speech*, 26 JUST. SYS. J. 149, 149, 160 (2005).

86. For example, this June in Tennessee, "of 64 . . . judges who received questionnaires [from an interest group], 25 sent letters declining to respond (some citing Chief Justice Roberts, and almost all giving biographic information), 35 did not respond, and 3 gave limited responses (e.g., that Reagan and Rehnquist best represent their political or judicial philosophy among the listed Presidents and Justices)." Nat'l Ad Hoc Advisory Comm. on Judicial Campaign Oversight, Nat'l Ctr. for State Courts, *How Should Judicial Candidates Respond to Questionnaires?: An Advisory Memorandum* (Aug. 28, 2006), available at http://www.judicialcampaignconduct.org/Advice_on_Questionnaires-Final.pdf; see *id.* (including excerpts from some of the Tennessee judges' letters); see also Marcia Coyle, *Judicial Surveys Vex the Bench: Courts Getting Advice on Answers*, NAT'L L.J., Sept. 4, 2006; Andy Sher, *Judges Give Little Response to Fowler Questionnaire*, CHATTANOOGA TIMES FREE PRESS, July 21, 2006, at B2.

87. In Arkansas in January 2006, the day after the Supreme Court denied review of the Eighth Circuit decision in the *White* remand, see *Dimick v. Republican Party of Minn.*, 126 S. Ct. 1165 (2006), intermediate appellate Judge Wendell Griffen personally sent emails soliciting funds to support his campaign for an open seat on their high court. Griffen also indicated that the new decision protects the right of judges to be forthright with the public. Candidates' personal soliciting of funds was barred by an Arkansas Canon (as in almost all elective states), but the Eighth Circuit had held it unconstitutional to bar solicitations to large groups or by letter. Whether Griffen's emails were protected solicitation is at issue in one of two pending Arkansas Judicial Discipline and Disability Commission proceedings involving him. According to the Eighth Circuit, there is no reason to bar allowing "the candidate's personal signature . . . at the foot of the letter." *Republican Party of Minn. v. White*, 416 F.3d 738, 765 n.16 (8th Cir. 2005). But the court assumed that any such letter would be sent by the candidate's committee: the letter "will not magically endow him or her with a power to divine . . . to whom that letter was sent." *Id.* at 765.

Griffen for years has been so outspoken that he has been the subject of eleven disciplinary matters. See Jake Bleed, *Griffen Followed Path into Law, Army Service Then Became Minister*, ARK. DEMOCRAT-GAZETTE, May 15, 2006. A minister himself, he called James Dobson, Jerry Falwell, and Pat Robertson "pimps of piety"; publicly supported abortion rights; and has "targeted President Bush, Vice President

A second perspective on *White* avoids a “good old days” view of pre-*White* judicial campaigns. First, candidates don’t need to inflame, it’s done for them. For example, in 2000:

In Michigan, Democratic Party ads featured animated trees shuddering about the incumbent justices as a voice-over said the court “ruled against families and for corporations 82% of the time.” A Detroit Free Press review of that analysis found that it “borders on the bogus.” For example, in fourteen of the forty-three “anti-family” cases, the Democratic justices agreed with the result. “State party officials said [that] defining a family or corporate entity [is not] an exact science.” On the other side, a GOP ad attacked a challenger (an intermediate appellate judge) for having joined in upholding a light sentence for a pedophile. In the ad, “[t]he word ‘pedophile’ in huge type flashes close to the judge’s name.” The GOP’s reply was, “[w]e don’t call him (a pedophile).”⁸⁸

As for ads by judicial candidates:

[■] “Maximum Marion” Bloss: “You do the crime, you do the time.” (Texas, 1998)

[■] “Mike Burns is a tough, no-nonsense Prosecutor who believes in law and order. If elected, Mike understands his duty to uphold the law regardless of his personal views.” (Florida, 1998)

Cheney, the ‘Christian right,’ Supreme Court Justice Clarence Thomas, the late President Reagan and others.” Debra Hale-Shelton, *In NAACP Speech, Judge Blasts [Katrina] Response*, ARK. DEMOCRAT-GAZETTE, Sept. 11, 2005. The one time Griffen was sanctioned (for urging black legislators to withhold support from the University of Arkansas for what he saw as discriminatory hiring and promoting practices), a 4-3 Arkansas Supreme Court majority held that the Canon relied upon was unconstitutionally vague. See *Griffen v. Judicial Discipline Comm.*, 130 S.W.3d 524 (Ark. 2003); Doug Smith, *The Church and Politics*, ARK. TIMES, Aug. 5, 2004. When Griffen ran in 2004 to become chief justice, he lost 63% to 37%; running in 2006 for an open seat, he lost 57% to 43%.

When the U.S. Supreme Court denied review of the Eighth Circuit remand decision, Griffen “said judicial candidates should not discuss cases that are pending, or likely to come before a judge’s court.” *Pending Appeal Could Affect Arkansas Rules on Judges*, ASSOCIATED PRESS, Jan. 23, 2006. Meanwhile, another candidate—running against an incumbent justice who was identified with an unpopular school-funding decision—spoke out attacking that still-pending decision. Whether or not he was any more outspoken in the campaign because of *White*, that justice (like Griffen’s opponent for the open seat) took a strong position against commenting on specific issues and won, 63% to 37%. Thoughtful local observers believe that the candidate who spoke out on the pending case was unlikely to win in any event but was hurt badly (and lastingly) by speaking out.

In Alabama, Justice Tom Parker, challenging their chief justice, advocated independence of U.S. Supreme Court rulings, a position which surely could be taken before *White*. When Parker’s advocacy was made the subject of a formal complaint, the Judicial Inquiry Commission ruled that Parker was protected (ironically?) by *White*. However, that same result could have rested on a pre-*White* Alabama Supreme Court decision that had narrowed the applicable Canon, *Butler v. Judicial Inquiry Commission*, 802 So. 2d 207 (2001).

Both Parker and the chief justice made much of “family values.” Local observers believe that without *White*, the chief justice (who won overwhelmingly) would have been more restrained in his campaign. In the general election, he lost.

88. Schotland, *supra* note 6, at 871–72 (footnotes omitted) (alterations in original).

[▪] “Sent more criminals—rapists, murderers, felons—to prison than any other judge in Contra Costa County history.” (California, 1984)

[▪] “Over 90% Convicted Criminals Sentenced. . . . Prison Commitment Rate is More Than Twice the State Average.” (California, 1984)⁸⁹

The scene was summarized by one of our wisest judges: “Every judge’s campaign slogan, in advertisements and on billboards, is some variation of ‘tough on crime.’ The liberal candidate is the one who advertises: ‘Tough but fair.’ Television campaigns have featured judges in their robes slamming shut a prison cell door.”⁹⁰

In Nevada in 1996, a supreme court justice campaigned for re-election with advertisements that he had a “record of fighting crime,” which included voting to uphold the death penalty seventy-six times. As one of his colleagues wrote after that election, dissenting from the court’s refusal to require that justice to withdraw from a capital case: “Judges are supposed to be judging crime, not fighting it.”⁹¹

V. STEPS TO MEET THE NEW CHALLENGES

A. LENGTHEN TERMS, WHATEVER THE SELECTION SYSTEM

Short terms have fatal flaws.⁹² In any selection system, they reduce judicial independence. California’s Justice Kaus memorably described the dilemma of deciding controversial cases while facing a retention election, comparing it to “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.”⁹³ He made this famous comment in 1985, the year before Chief Justice Rose Elizabeth Bird was denied retention, along with

89. Task Force on Selecting State Court Judges, Citizens for Indep. Courts, *Choosing Justice: Reforming the Selection of State Judges*, in CITIZENS FOR INDEP. COURTS, THE CONSTITUTION PROJECT, UNCERTAIN JUSTICE: POLITICS AND AMERICA’S COURTS, 77, 101–102 (2000).

90. Hans A. Linde, Comment, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1988).

91. *Nevius v. Warden*, Nev. State Prison, 944 P.2d 858, 860 (Nev. 1997) (Springer, J., dissenting).

92. For details of the varied length of judicial terms, see *supra* Part II.A.

93. Uelmen, *supra* note 36, at 1133. In 1996, Nebraska’s Justice David Lanphier and Tennessee’s Justice Penny White were denied retention. Lanphier had authored an unanimous opinion striking down term limits; soon after, supporters of term limits spent an estimated \$200,000 against him (virtually all the funds came from out of state; no disclosure report was filed). White was attacked for joining a strong majority of her court to reverse one death sentence; only about \$25,000 was spent against her. See ABA TASK FORCE REPORT, *supra* note 17, at 6 n.6. The attack on White involved her vote in only one case, not an unyielding course of conduct like Rose Bird’s. The governor, and others who sought to defeat White in order to gain an appointment opportunity, exploited her vote in one capital case as a weapon and succeeded with a low-cost campaign of direct mail and mass faxing. When a reporter asked the governor after the election whether he didn’t think the defeat would cause judges to look over their shoulders, he answered: “I hope so.” Pamela Wade, *White’s Defeat Poses Legal Dilemma; How Is a Replacement Justice Picked?*, COM. APPEAL (Memphis), Aug. 3, 1996, at 1A.

two of her colleagues. Imagine a trial judge facing re-election or reappointment who may have to rule on a high visibility bail matter or motion to suppress evidence, let alone conduct a high visibility trial.

Longer terms also have other benefits over shorter terms. In elective systems, short terms also damage job performance, because for at least one-quarter or one-sixth of every term, the judge is too likely to give less priority to sitting on the bench than to standing at a parade of podiums. Longer terms also mean fewer elections, less need to campaign, raise funds and grapple with the ever-more-daunting questions about campaign conduct, and less concern about decisions' vulnerability to distortion. Another element, which some would say is the most important of all and which everyone would agree matters mightily: term length affects who wants to come on the bench and who will stay there.

In sum, every judicial selection system has pluses and minuses, and every aspect of any system has pluses and minuses. But longer terms are, on balance, a clear plus. Perhaps for these reasons, Ohio's Chief Justice Moyer, actively pursuing judicial reform for several years, has made lengthening Ohio's terms from six years his top priority.

B. INCREASE "OUTREACH" TO THE PUBLIC, WHATEVER THE SELECTION SYSTEM

We constantly recite the deep truth that the courts depend on public confidence, but we must do more to educate the public about the role of the courts. A recent survey of New York judges found that 80% consider outreach indispensable—but fewer than 50% engage in it. Is it naïve to suggest that each judge's outreach efforts should be a matter of public record? Of course we need not only outreach by judges—the best move the ABA and state bars can take to support the rule of law is to increase their fine work on outreach. We cannot go to the people only in campaigns; we need *organized, constant* work to help the public understand the differences between judges and other officials. In many states, courts conduct hearings outside their courtrooms. Many states have well-organized outreach efforts, like California's Judges' Nights, when groups of judges fill high school auditoriums to talk about what they do.

Surely our schools, which once upon a time taught "Civics," ought to be encouraged to teach about the rule of law and role of courts. Chief Justice Roberts is already engaged directly in educational outreach efforts, and the ABA efforts on "Youth Education for Citizenship" and their new commission co-chaired by Justice O'Connor and ex-Senator Bradley deserve increased support.

Meanwhile, in Arizona and Missouri new 501(c)(3) organizations will work directly on public education about courts and law. Indeed, in Missouri, the general counsels of major corporations—and through them, the corporate community and its very effective lobbyists—have been a key group in converting attacks on the judiciary to support for it. One general counsel put it this way to legislative leaders in a private session: "We don't expect to win every case. But we do need judges who are well-qualified, free of improper political pressure,

and able to decide cases promptly.” That support has helped stop efforts to politicize Missouri’s system of judicial selection.

C. IN ELECTIVE SYSTEMS, EDUCATE THE VOTERS ABOUT THE CANDIDATES

In 2000, seventeen chief justices recommended, after a summit on judicial selection, that:

State and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters before any judicial election at no cost to judicial candidates. Such guides should provide information that will be useful to voters in comparing the candidates.

Congress should provide a free federal mailing frank to any voters’ guide sponsored by a state or local government.⁹⁴

Judicial campaigns attract no or almost no media coverage, and most voters either do not vote for judicial candidates or vote on such bases as name familiarity. In California, Oregon, Washington, Alaska, and Colorado (plus New York City since 1991 and North Carolina since 2004 for judicial appellate candidates) every voter is mailed a state-produced “Voters’ Guide” (“VG”) with a page on each major candidate and part of a page on others. This practice goes back generations in Oregon and Washington. Exit polls and other studies have showed that the VGs are, far and away, the favorite source of information about candidates—especially for “down-ballot” races.

The major cost in getting out VGs is simply postage. To increase not only voter turnout but informed turnout—that is, to increase participation and reduce negative views of government—the federal government should grant the franking privilege to any state or locality that sends its voters a VG. As a fallback, several states are already using online VGs, an extremely low cost way to help inform voters.

D. IN ELECTIVE SYSTEMS, READIER RESORT TO RECUSAL

The best response to *White* came from Missouri’s supreme court, the first to act, whose order repealing their “announce clause” closed with this:

Recusal [which in Missouri includes disqualification], or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct.⁹⁵

94. *Call To Action: Statement of the National Summit on Improving Judicial Selection*, 34 *LOY. L.A. L. REV.* 1353, 1357 (2001).

95. *In re Enforcement of Rule 2.03, Canon 5.B.(1)(c) (Mo. 2002)* (en banc), available at http://www.courts.mo.gov/_862565ec0057e8f0.nsf/0/f1c626db4da8b14086256bfa0073b302?OpenDocument&HighLight=2.03. More than half of Missouri’s trial judges run in partisan elections.

That is an inspired step. It supports the overwhelming majority of candidates who want to campaign judiciously—they will be able to say “I know what you would like me to say, but if I go into that then I will be unable to sit in just the cases you care about most.” In addition, the Missouri order enables any candidate whose opponent has stretched the envelope (with some variant of “I believe that anyone convicted of child abuse should receive the maximum sentence allowed by law,” or “I am a tenant, not a landlord”) to respond “My opponent has told you what he thinks you want, but has not told you that he will not be able to deliver because he will be disqualified from the cases you care about.”⁹⁶

Remembering the role of recusal is just what Justice Kennedy called for in *White*. He joined the majority but would have stricken more than they did, viewing judicial elections as like nonjudicial elections (or not materially different). But he added that states “may adopt recusal standards [that are] more rigorous than due process requires, and censure judges who violate these standards.”⁹⁷ The lower court decisions extending *White* have made much of the availability of recusal.⁹⁸

In fact, peremptory challenges to judges are provided in seventeen of the thirty-nine elective states⁹⁹ (plus one nonelective, Hawaii). For example, Alaska allows each side to challenge one judge without any allegations or proof. In Florida, special concern is shown for disqualifying a judge because of campaign involvements.¹⁰⁰ Given the new openness for campaign statements, doubtless more states will consider their own procedures and grounds for disqualification.

Of course the recusal route is far from problem free. Recusal does not help the litigant who is unaware of reasons to seek a judge’s withdrawal, and the litigant bears burdens of raising and litigating the issue. Recusal also imposes costs and delays on the public and other litigants as cases are shuffled from judge to judge.¹⁰¹

96. Alabama’s Chief Justice Nabers, after last year’s primary campaign, reportedly told a group of professionals that he would have to withdraw from abortion cases. *See supra* note 87.

97. *Republican Party of Minn. v. White*, 536 U.S. 765, 792, 794 (2002) (Kennedy, J., concurring).

98. *See, e.g., Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672, 705–12 (E.D. Ky. 2004).

On the distinguishable issue of judges’ refusals to withdraw because of large campaign contributions, the Supreme Court has denied review three times. *See Avery v. State Farm Mutual Auto Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied* 126 S. Ct. 1470 (2006); *Consol. Rail Corp. v. Wightman*, 715 N.E.2d 546 (Ohio 1999), *cert. denied* 529 U.S. 1012 (2000); *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. denied* 485 U.S. 994 (1988).

99. The states are Alaska, Arizona, California, Florida, Idaho, Illinois, Indiana, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

100. *See, e.g., Neiman Marcus Group, Inc. v. Robinson*, 829 So. 2d 967, 968 (Fla. Dist. Ct. App. 2002) (per curiam).

101. Recusal is even more problematic in low-population jurisdictions. There, it is inevitable that the judges have contacts, even nonprofessional relationships and often past professional relationships with, as well as campaign support from, most of the lawyers who appear before them. Compounding the problem, to shuffle cases from one judge to another is far harder there than in urban jurisdictions.

On appellate recusal, see generally Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges*

E. IN ELECTIVE SYSTEMS, CAMPAIGN CONDUCT COMMITTEES

A very different step is to establish campaign conduct committees, which several states and localities already have done. Again, Justice Kennedy addressed what can be done to meet injudicious conduct in judicial campaigns, stating that “[t]he 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.”¹⁰² The same point was made by Justice Stevens (dissenting for four), adding that 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.”¹⁰³

Strikingly, Ohio’s 2004 election was *entirely free* of the ads by noncandidates that in 2002 had outraged their chief justice and so many voters, because in 2002 a new committee begun by the Ohio State Bar had publicly condemned the ads and in 2004 that committee’s mere presence on the scene prevented trouble.

The ABA House of Delegates has recommended campaign conduct committees. Although most likely to be *initiated* by the Bar, such committees will have more credibility if, as in Ohio, their membership and leadership includes nonlawyers who are diverse, representative community leaders.¹⁰⁴ Probably the major contribution of such committees is to educate judicial candidates in order to head off inappropriate campaign conduct. For a decade Ohio has required judicial candidates to attend a session on campaign ethics. New York took the same step last year, and Florida, though not requiring attendance, conducts exemplary sessions for virtually all candidates and their campaign leaders.

By such steps, as former ABA President William Ide has stressed, we change the *culture* of judicial elections. With such steps, we try to prevent corrosive judicial elections and the consequent degrading of the bench, lest the public see more reason than ever to view judges as “just more pols.”

Some people dismiss such efforts as “band-aids.” But given the prevalence of judicial elections and the high likelihood that they will stay with us, incrementalism is the *only* feasible or—at the very least—the most likely way to protect the hard-to-secure balance between judicial independence and judicial accountability.

and Fair Appeals for Litigants: Appellate Recusal in a Post-*White* World (paper presented at the 2006 State & Federal Appeals Conference, Univ. of Tex. School of Law, June 1–2, 2006, on file with author).

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

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

104. For more on campaign conduct committees, see generally Richard A. Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 *LOX. L.A. L. REV.* 1447 (2001); Barbara Reed & Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 *IND. L. REV.* 781 (2002).

**APPENDIX 1: STATES AND THE TYPES OF JUDICIAL ELECTIONS THEY HOLD
FOR SOME OR ALL OF THEIR JUDGES**

Partisan, 16 States (a)	Retention, 19 States (b)	Nonpartisan, 20 states	No Judicial Elections, 11 States (c)
Alabama	Alaska	Arkansas	Connecticut
Illinois*	Arizona*	Arizona*	Delaware
Indiana*	California*	California*	Hawaii
Kansas*	Colorado	Florida*	Massachusetts
Louisiana	Florida*	Georgia	Maine
Maryland*	Illinois*		New Hampshire
Michigan*	Indiana*	Indiana*	New Jersey
Missouri*	Iowa	Kentucky	Rhode Island
New Mexico*	Kansas*	Michigan*	South Carolina
New York*	Maryland*	Minnesota	Vermont
North Carolina*	Missouri*	Mississippi	Virginia
Ohio	Nebraska	Montana	
Pennsylvania*	New Mexico*	Nevada	
Tennessee*	Oklahoma*	North Carolina	
Texas	Pennsylvania*	North Dakota	
West Virginia	South Dakota*	Oklahoma*	
	Tennessee*	Oregon	
	Utah	South Dakota*	
	Wyoming	Washington	
		Wisconsin	

Source: Roy A. Schotland, *2002 Elections and State Court Reforms*, in COUNCIL OF STATE GOV'TS, 35 THE BOOK OF THE STATES 233, 235 tbl.A (2003) (with updating corrections).

Key:

*State has different judges facing different types of elections.

(a) In Ohio, judicial candidates, appear on the general election ballot without party labels, but their selection and campaigns are otherwise partisan. The same is true for Michigan's Supreme Court.

(b) In Illinois and Pennsylvania judges are initially elected in partisan elections, but their continuance is determined in retention elections; New Mexico has a uniquely hybrid process.

(c) Included here are Connecticut, Maine, South Carolina and Vermont, which elect probate judges. Except for this note, this table includes only appellate and general-jurisdiction trial judges.

APPENDIX 2: PERCENTAGES OF STATE JUDGES IN EACH SELECTION SYSTEM¹

These new data are as of 2004, compiled by the National Center for State Courts, updating the much-cited earlier data from the ABA's 1998 Report of the Task Force on Lawyers' Political Contributions.

While recent moves from partisan to nonpartisan elections have occurred in Arkansas and North Carolina, the main difference between the new data and the old simply reflects reorganizations of courts in California and Oregon, where many limited-jurisdiction courts became general-jurisdiction courts. Also, the number of added judges of course varies among states. (One error in the 1998 Report has been corrected, slightly increasing the partisan proportion of appellate judges.)

Aggregating the new data, we come out with totals close, naturally, to those found in that 1998 Report (the earlier totals are in the parentheses): Of all state judges (appellate and general-jurisdiction trial courts), 89% (87) face the voters in some type of election. Facing contestable elections are 60% (53) of our appellate judges and 80% (77) of our trial judges; facing only retention elections are another 26% (34) of appellate and 9% (10) of trial judges.

	INITIAL TERMS			SUBSEQUENT TERMS		
	Appointed	Non-partisan	Partisan	Retention	Non-partisan	Partisan
Appellate, 1,280 judges	47%	20%	33%	42%	20%	25%
Trial, (general jurisdiction) 9,606 judges	21%	41%	38%	19%	41%	29%

1. The 1998 data was updated based on the numbers of judges reported in COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2005: SUPPLEMENT TO EXAMINING THE WORK OF STATE COURTS, 2005 fig.G (2006), available at http://www.ncsconline.org/D_research/CSP/2005_files/State%20Court%20Caseload%20Statistics. David Rottman, a Principal Court Research Consultant at the National Center for State Courts, assigned judges to the appropriate method of judicial selection for 2004. The classification criteria are described in David Rottmann et al., *Judicial Selection 101: What Varies and What Matters*, CASELOAD HIGHLIGHTS (Nat'l Ctr. for State Courts, Williamsburg, Va.), Oct. 2006, at 1, available at http://www.ncsconline.org/D_Research/csp/Highlights/Vol13No2.pdf.