Selecting Justice in State Courts: The Ballot Box or the Backroom?

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I. INTRODUCTION

When I first agreed to participate in this Symposium, I thought I would have something original to say. After yet one more ugly season of mudslinging by judicial candidates, with each year worse than the last, it was time for major change. At first take, the answer seemed obvious—states must replace judicial elections with some form of merit-based selection. The reasons seemed compelling: low voter turnout; distortions of thirty second sound bytes; spiraling campaign costs, to name a just a few. For most of the Twentieth Century, thoughtful critics have called for reforms to selecting the state judiciary.\(^1\) The chorus grows louder and larger with each campaign season.

Now, upon further reflection after extensive research, I humbly acknowledge that I am "adamantly ambivalent." Merit selection has its own problems, moving the politics to the backroom, with nomination and selection made by highly partisan actors, with the resulting appointments reflecting tradeoffs, paybacks for past support, and a myriad of considerations other than genuine merit. Empirical data yields mixed results, but it appears that merit selection, as implemented by the states, has not helped diversify the state court judiciary in terms of race, ethnicity or gender, as reflected by the local population.\(^2\) By contrast, there has been some successful progress at revising the electoral process through the use of subdistricts, which have increased the number of state court judges of color.\(^3\)

Stepping back from the minutiae of judicial selection, a more fundamental question of accountability and independence remains. Much of the debate is about judicial activism, perhaps more accurately phrased as something the "other side" is doing with which you do not

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3. See cases cited infra note 199.
agree. It is an opportune time for the nation to raise its collective sights and ask whether politicization of the courts is a necessary and permanent fixture in the American legal system. As an alternative, we might consider the process used by some other nations, which seems to have achieved greater stability, less uncertainty and a more independent judiciary that is somewhat removed from politics.

The data contrasting different types of judicial selection and retention is overwhelming, complex, and—on some issues—inconsistent or inconclusive. Borrowing a quote from Roy Schotland, "I am a bear of very little brain." I have struggled to make theoretical, empirical and political sense of the data. It leaves me with nagging concerns about both predominant methods of judicial selections (elections and merit selection) and also about the subsequent questions of evaluation and retention. Both selection systems are highly politicized, which likely promotes the judiciary's activist role in American society.

Why is the elected judicial system so resilient to change? What other methods of selection and retention would work better? Finally, what will it take to persuade the various decisionmakers that the alternatives are preferable and politically feasible? I attempt to shed

4. See Marcia Coyle, Campaign 2000 Focus is "Judicial Activism," NAT'L L.J., Aug. 21, 2000, at A1, A10 ("One person's activist is another's right thinker on the law.").

5. See, e.g., Mark C. Miller, Judicial Activism in Canada and the United States, 81 JUDICATURE 262, 265 (1998) (positing lack of judicial activism in Canada is attributable to less political selection process, or "low articulation" involving a smaller number of participants in initiation, screening and affirmation stages of recruitment process; suggests that other industrialized nations with the lowest judicial selection articulation levels and least activist judges include England, France and Japan); cf. J. Mark Ramseyer, The Puzzling (In)dependence of Courts: A Comparative Approach, 23 J. LEGAL STUd. 721, 743 (1994) (comparing pre and postwar Japan; where there was possibility of change in political power, judges were more independent and accountable because of implicit political threats of "getting even"; prisoner's dilemma analysis in which party expects to alternate power over the long term will therefore cooperate by protecting an independent judiciary). As applied to the United States, this analysis bodes poorly for jurisdictions which are dominated by a single political party. Whether through merit selection, with appointment by a governor with longevity, or through an election dominated by a single party, there can be little hope for a truly independent judiciary.

6. Roy A. Schotland, Comment, 61 LAW & CONTEMp. PROBS. 149, 149 (1998) (comparing himself to Winnie-the-Pooh) (quoting A. A. MILNE, WINNIE-THE-POOH 50 (E. P. Dutton 1960) (1926)) ("What does Crustimoney Proseedcake mean?" said Pooh. "For I am a Bear of Very Little Brain, and long words Bother me."). Schotland suggested that those arguing to abolish judicial elections also focus on correcting the system's problems. See id. Schotland is a wise and seasoned observer of state judicial elections. I am a newcomer to this topic.

7. See Miller, supra note 5, at 265 (suggesting highly politicized selection process involving large numbers of actors may increase judicial activism in policy making by courts in United States, as compared with those in Canada, England, Japan and France).
some light on these questions in the pages that follow.

Part II briefly describes and evaluates the basic systems for selection and retention of state court judges: appointment, partisan and nonpartisan elections, merit selection and hybrid methods. No system is perfect. To some extent, politics always plays a role. Part III considers the tension between fundamental principles relating to the judiciary's accountability for its decisions and its need for independence to determine the applicable rule of law in a fair and just society.

Part IV discusses the imperfections in both electoral and merit selections. Subpart A focuses on judicial elections. The amount and quality of accurate information to enable informed voter decisions is extremely limited, in part by ethical constraints on judicial campaign speech. Campaigns, often funded by special interest "war chests," are increasingly noisy and nasty through electronic media spots that distort rather than enlighten the relevant issues. More basic questions arise as to the suitability of the election format for offices in which the best able and most qualified candidates in terms of temperament, intelligence and deliberateness may be reluctant to do what it takes to get elected, or are otherwise "charismatically challenged." Campaign financing has become an enormous problem, causing a public perception that the finest justice goes to litigants whose lawyers contributed most heavily to the judge's campaign. The Voting Rights Act applies to judicial elections, although the litigation is exceptionally complex and uncertain in outcome. Nevertheless, it raises fundamental questions about the legitimacy of a legal system in which the presiding officials may have little empathy or understanding about the lives and communities involved in the cases they decide. Subpart B addresses the appointment process commonly referred to as merit selection, concluding that it is not a panacea to all that ails the electoral process. Inertia and public distrust may help explain the resistance to the sustained reform efforts. Data tends to show that judicial nominating commissions are comprised of partisan activists, and their decisions often reflect political considerations and compromises. While there may be significantly different outcomes

8. See discussion infra Part IV.A.1.
10. See discussion infra Part IV.A.4.
11. See discussion infra Part IV.A.5.
among state appointment systems, the empirical data raises doubt as to whether the merit system enhances diversity on the bench. Specific recommendations are made to open the door on the deliberative process, including proactive recruitment, clearly articulated criteria, expanded interview and opportunities for gathering information about candidates, and the development of a specialized examination for all judicial candidates. Subpart C discusses annual performance evaluations, which should be used regardless of the manner of selection. The article concludes with a prayer to depoliticize the selection process, by delegating to an independent entity the responsibility for screening candidates using objective, articulated and inclusive criteria. Such a process would eliminate candidates whose primary qualifications are political connections, not merit. States need to develop a regular process for evaluating judicial candidates based on their legal knowledge, administrative ability, integrity, wisdom and compassion. With greater assurance that the choice is limited to highly qualified candidates, it would make much less difference whether final selection is by appointment or election.

II. CURRENT SELECTION FORMATS

Popular election of judges was virtually unheard of until the early Nineteenth Century. On the federal level, the United States Constitution dictated both the manner of appointment and lifetime tenure without reduction of salary. Andrew Jackson's presidency triggered a new wave of populism which advocated voter control over all aspects of government. Thereafter, several states amended their constitutions, providing for selection by election, or partisan challenges to incumbent judges. Newer states tended to follow uncritically the populist electoral model based on the idea that courts

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15. See discussion infra Part IV.B.3.
18. See U.S. CONST. art. II, § 2, cl. 2; art. III, § 1.
19. See Grodin, supra note 17, at 1971 (describing Thomas Jefferson and Andrew Jackson's popular revolt against the judiciary) (citing E. HAYNES, THE SELECTION AND TENURE OF JUDGES 90-101 (1944)).
20. See id. at 1971 & n.9 (noting "swift and spectacular" change; in the ten years after New York's shift to elective system in 1846, 15 of the 29 existing states had so amended their constitutions); see also Croley, supra note 1, at 717 (amending their constitutions: Michigan, New York, Pennsylvania, Virginia, Maryland and Georgia).
should have some accountability to the electorate. This transformation was achieved "almost completely without regard for the particular considerations of policy and principle which arise out of the nature and functions of the judicial arm of the government." The pendulum swung back towards appointment starting in the 1920s. Missouri was the first state to implement what became known as "merit selection" in 1940.

Currently, there are four basic systems of judicial selection in the United States. Judges are chosen through either partisan or nonpartisan elections in twenty-one states; eleven additional states use elections for some judgeships, usually the lower courts. What has become known as merit selection is the sole selection method in fourteen states. Seven jurisdictions use a combination of merit and election methods with the remaining states using a combination of merit and appointive systems. At present, twenty-two states use merit selection for at least their highest appeals courts. This figure

21. See Croley, supra note 1, at 716–17 (noting that all states that joined the union between 1846–1958 provided for elected judiciaries in their constitutions).

22. EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 101 (Fred B. Rothman & Co. eds. 1981) (1944); see also Croley, supra note 1, at 717–19 & n.86 (summarizing other historical treatments which echo this statement).


26. See App. A.

27. See id.

28. See id.

can be misleading. Approximately eighty-seven percent of all state court judges are selected or retained on the basis of popular elections, although about eighty percent of all judicial offices are initially filled by appointment to compete unexpired terms.  

A. Appointment

The oldest method of judicial selection in the United States is appointment.  In the original thirteen states, to avoid giving exclusive power to one individual, the legislature, or the governor with legislative approval, appointed judges.  Today, most states use various combinations of the appointive system.  California judges, except for superior court judges, are appointed by the governor, and must then be approved by a commission on judicial appointments.  New Hampshire uses an elected executive council to approve appointments by the governor.  In New York, only court of appeals judges are appointed by the governor with the consent of the senate, while the remaining judges are chosen in partisan elections.  Most states fill interim vacancies by gubernatorial appointment.

B. Partisan Elections

Partisan election of judges began after Andrew Jackson's populist presidency.  Some authorities believe the move to elections was a response to widespread dissatisfaction with the perceived elitism of

Kansas, Massachusetts, Nebraska, Rhode Island, Utah, Vermont and Wyoming use the merit plan.  See id.  Arizona uses the merit plan in Pima and Maricopa counties, while Indiana uses it for the upper courts.  See id. at 135.

30. See Report and Recommendations of the American Bar Association Task Force on Lawyers' Political Contributions, Part II, at 3 n.1 (July 1998); see also Croley, supra note 1, at 725 (explaining that judges not electorally accountable in only 12 states: Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, Vermont and Virginia).

31. See Webster, supra note 25, at 12–13.


33. See App. A.

34. See BOOK OF STATES, supra note 29, at 135.

35. See id. at 136.

36. See id.


38. See Webster, supra note 25, at 16.
Proponents maintain that judicial elections assure accountability to the people and are the only reliable method for removing judges whose decisions are unacceptable to the populace. Voters may have little information on the individual judicial candidates. Partisan elections can cue voters on a candidate's ideology through the identification of political affiliation. The political party of the judicial candidate can be used for screening purposes. "Although it has been proven otherwise in some cases, it was thought that with the party 'footing the bill' for and controlling recruitment, special interests would be kept at arm's length from the process."

Some voters favor judicial elections because it gives them a choice between parties and a voice in the system. There is a greater electoral turnout when voters have more information on which to make a decision, such as political party cues. One unfortunate method of increasing voter participation is the heightened negativity of judicial campaigns. Wisconsin Supreme Court Justice Shirely Abrahamson faced blistering campaign attacks by opponent Sharren Rose in the 1999 race. Critics of partisan judicial elections claim that increased costs of campaigning and problematic funding sources


40. See Webster, supra note 25, at 17 & n.82.

41. See SARA MATHIAS, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS 17-18 (1990) (noting that an uninformed electorate is more susceptible to campaign tactics and will vote on improper bases instead of considering parties' experience and qualifications).


43. Id.

44. See id. (noting that the partisan nature of a judicial election gives voters a choice).

45. See id.

46. See Webster, supra note 25, at 19 (suggesting that voters become more interested when the election becomes acrimonious); see also Anthony Champagne, The Selection and Retention of Judges in Texas, 40 SW. L.J. 53, 89 (1986) (pointing out one instance in Texas where an attorney who received an unfavorable verdict financed an opponent's campaign that eventually ousted an 18 year judicial veteran).

create an image of justice going to the highest bidder.\footnote{48} Special interest groups try to help elect judges favorable to their cause by pouring money into those judges' campaign coffers.\footnote{49} Six candidates spent almost six million dollars in 1990 Texas judicial campaigns.\footnote{50} Abrahamson and Rose spent over one million dollars on their campaigns.\footnote{51}

Another cost of judicial elections is time spent campaigning for office instead of fulfilling the judge's duties.\footnote{52} Successful lawyers may be reluctant to run for office, investing their reputation, time, money and effort seeking a job that is neither guaranteed nor highly paid.\footnote{53} Additionally, having to answer to political parties and vocal contributors can deter qualified individuals from running for a judicial position.\footnote{54}

It is debatable whether partisan elections in fact make judges accountable to the public. Most judges are initially appointed to fulfill vacant positions by the state governor, and run unopposed in the next periodic election.\footnote{55} This scenario effectively removes the voter from the equation. Even when there is opposition in a judicial race, voter turnout is typically low. Unless the judicial election takes place during the general election and has become a hotly contested race, most voters either do not vote for the judicial offices or vote with little information, evidenced by the fact that they cannot remember who they voted for immediately afterwards.\footnote{56}

\footnote{48. See discussion infra Part IV.A.5.}
\footnote{49. See Zuckerman, supra note 47, at 4; see also Webster, supra note 25, at 19–20 (giving a few examples of the astronomical contributions from the Plaintiff’s and Defendant’s bar).}
\footnote{50. See Webster, supra note 25, at 20 (citing Mark Hansen, The High Cost of Judging, A.B.A. J., Sept. 1991, at 44).}
\footnote{51. See Zuckerman, supra note 47, at 4.}
\footnote{52. See Hill, supra note 1, at 361–62 (“A survey of Texas judges in 1962 . . . revealed that . . . 70% thought that the work of the court was delayed because of the necessity of political campaigning.”).}
\footnote{53. See CHOOSING JUSTICE, supra note 42, at 70.}
\footnote{54. See id.}
\footnote{55. See Webster, supra note 25, at 18.}
\footnote{56. See Champagne, supra note 46, at 93 (noting one 1954 study finding that 30% of voters in Buffalo, New York could not identify the candidate for whom they voted immediately after placing their ballots); MATHIAS, supra note 41, at 17 (citing a 1979 study finding that only 14.2% of voters in Lubbock, Texas could identify a single candidate immediately after voting).}
C. Nonpartisan Elections

Thirteen states use nonpartisan elections for judicial offices, and seven additional states use it only for selected judicial offices. Ohio is unique in that it nominates judicial candidates in partisan primaries and then places them on a nonpartisan ballot for the general election. Supporters claim that nonpartisan elections remove the problem of politics entailed by partisan elections while keeping accountability to the voters. Adopted in response to the problem of judges controlled by party politics, nonpartisan elections were intended to involve voters in the process and exclude politics and special interests.

"Most commentators contend that, far from being an improvement upon partisan elections, nonpartisan elections are an inferior alternative to partisan elections because they possess all of the vices of partisan elections and none of the virtues." Voters lose their main cue for information on who to vote for and, lacking more relevant information on individual candidates, rely on other factors such as ballot position or name recognition. Candidates who served in prior political offices as prosecutor, legislator or county commissioner, have greater name recognition which helps them in later campaigns for judicial office. Voter apathy may be greater in nonpartisan elections, with lower turn-outs and voter roll-off (not voting in certain races), so that the judicial incumbents usually win. To counter this information problem, some jurisdictions print and distribute voter pamphlets, which greatly increases the election costs. Nonpartisan elections are becoming increasingly expensive and involve many of the same problems with campaign contributions as

57. See BOOK OF STATES, supra note 29, at 135–37.
58. See CHOOSING JUSTICE, supra note 42, at 45.
60. See CHOOSING JUSTICE, supra note 42, at 44.
61. Webster, supra note 25, at 26.
62. See id.
63. See CHOOSING JUSTICE, supra note 42, at 46.
64. See id. at 48; see also Webster, supra note 25, at 26.
65. See Webster, supra note 25, at 27 (noting a Florida race where $500,000 was spent on name recognition); see also CHOOSING JUSTICE, supra note 42, at 48 (stating that 87% of voters in Washington state’s 1994 nonpartisan judicial election received candidate information from the Secretary of State’s Official Voter Pamphlet).
partisan elections. The most obvious example is the highly politicized, nasty and expensive battle between Ohio Supreme Court incumbent Justice Alice Robie Resnick, a Democrat, and her Republican challenger District Court of Appeals Judge Terrence O'Donnell. Business and insurance groups, with generous backing from the Chamber of Commerce, targeted Resnick for defeat because of her votes in two controversial cases. While ultimately unsuccessful, the bruising fight has prompted state leaders to reconsider selection methods.

D. Merit Selection

Albert Kales, Northwestern University law professor, first called for merit selection of judges in 1914 when the American Judicature Society was founded.

Kales' plan called for (1) the nomination of judicial candidates based solely on merit by a commission of presiding judges, (2) the selection of judges from this list of nominees by an elected chief justice, and (3) retention elections conducted on a noncompetitive ... basis. In 1926, British political scientist Harold Laski suggested that the Kales plan be modified in certain respects. Laski recommended that the Governor rather than the chief justice appoint judges and that the advisory committee consist of a judge or judges from the state supreme court, the attorney general, and the president of the state bar association.

California was the first state to adopt a type of merit plan for its supreme court and intermediate courts; it is still in use today. The governor makes nominations to fill vacant positions which must be approved by a commission including the chief justice, present justice of court of appeals and the attorney general. After confirmation, the
judges must stand for retention at regular intervals. California is also noteworthy for having been the first state in which hotly contested retention elections resulted in the ouster of judges because of their unpopular decisions.

The most widely known merit selection plan, the "Missouri Plan," was first adopted in 1940. A judicial nominating committee makes recommendations to the governor who then chooses one of the nominees to fill a vacancy. Like many other states, Missouri now uses a "modified" merit system, in which appellate and metropolitan trial courts use a merit appointment process, but elections select the trial bench in rural areas. The judge must thereafter stand for retention at regular intervals. Missouri continues to use this system for its supreme court, courts of appeals and its trial courts in large metropolitan areas such as Kansas City and St. Louis. Three separate nominating commissions are used in Missouri: one for the appellate courts, and one each for Jackson county and St. Louis county circuit courts. Although repeal measures have been regularly introduced, the plan has yet to be revoked. All other state judges are selected in partisan elections.

Alaska was the first state to enact a merit plan for all state judges, in 1959. Rhode Island is the latest state to change to the merit plan for its trial judges in 1994. Delaware, Hawaii, Massachusetts, and Nebraska are the only other states which use merit selection for all judicial appointments.

Judicial nomination committees are composed of lawyers and laypersons. Some jurisdictions require the nominating commission

72. See id.; see also Webster, supra note 25, at 29-30.
73. See Grodin, supra note 17, at 1980-81 (explaining the California debacle in which voters ousted three supreme court justices because of the justices' stance on the death penalty).
74. See CHOOSING JUSTICE, supra note 42, at 127.
75. See Roll, supra note 32, at 843.
76. See id. (citing L. BERKSON ET AL., JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 6 (1980)).
77. See CHOOSING JUSTICE, supra note 42, at 127; see also BOOK OF STATES, supra note 29, at 136.
78. See CHOOSING JUSTICE, supra note 42, at 127.
79. See Champagne, supra note 46, at 61.
80. See BOOK OF STATES, supra note 29, at 136.
82. See id. at 20.
83. See id.
84. See CHOOSING JUSTICE, supra note 42, at 129-30.
be divided between political parties. According to Sheldon and Maule, the nomination committee lessens the political pressure on the appointing authority, usually the governor, so that the most qualified persons are submitted as finalists.

Merit selection proponents maintain that it: 1) removes politics from the selection process as much as possible, especially when there are effective controls for politics in the selection of nomination committee members; 2) removes the need to campaign for office and raise contributions; 3) results in more qualified applicants and selections; 4) removes the issue of voter apathy and the problem with ethical restrictions on judicial campaign speech; 5) allows accountability to voters by using retention elections to remove bad judges; and 6) increases minority representation on the bench. They contend it is the best method to reduce the influence of politics in judicial selection.

Opponents disagree with most of these assertions. They contend merit selection is elitist and merely moves the politics outside the light of the electoral system and into the backroom, allowing for private decisionmaking by politically-appointed nomination committees. They assert that retention elections are undemocratic, misleading to voters, and allow little meaningful choice. Campaign contributions must still be addressed if a judge up for retention is

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85. See id. at 130 (using the Nebraska Supreme Court and district court commissions as an example, where up to two of the four members elected by attorneys may be of the same party and up to two of the members appointed by the governor may be of the same political party).

86. See Roll, supra note 32, at 864.

87. See CHOOSING JUSTICE, supra at 129.

88. See, e.g., Webster, supra note 25, at 31; Goldschmidt, supra note 81, at 13–14; CHOOSING JUSTICE, supra note 42, at 128–34; Roll, supra note 32, at 855–859; see also Martha W. Barnett, The 1997-98 Florida Constitution Revision Commission: Judicial Election or Merit Selection, 52 Fl.A. L. Rev. 411, 424 (2000) (citing data that comparatively far fewer appointed than elected judges have been disciplined).

89. See Webster, supra note 25, at 32 (noting that both sides of the issue argue that the rules regarding the nominating commission's powers and composition will be the key to a successful merit plan); Goldschmidt, supra note 81, at 12–13 (arguing also that both partisan and nonpartisan elections distract judges from conducting their official court business); Roll, supra note 32, at 863–68 (“Chief Justice Cameron has observed that ‘[t]here are some who couldn’t be elected dog catcher, yet are good judges.’ The merit system offers these people the opportunity to enter the judiciary.”) (footnote omitted).

90. See Webster, supra note 25, at 32.

91. See Roll, supra note 32, at 863–68.
targeted by a special interest group based on an unpopular decision. A courageous judge may have a difficult time defending her record against an anonymously funded soft money campaign. In contested judicial elections, at least the voters are presented with a known alternative to the incumbent, enabling them to vote in a more meaningful way.

E. Hybrid Selection

Eight states use some combination of merit selection, appointment, or elections to fill their judicial positions. In South Carolina, for instance, a merit commission nominates candidates, but the judge is elected by the legislature. The legislature also elects the judges in Virginia. In Maine, judges are confirmed by the Senate after being appointed by the governor. In New Hampshire, judges are appointed by the governor, then confirmed by an elected five member executive council. Floridians recently amended their constitution to provide for counties to vote on whether to “opt-in” to selecting trial court judges through the merit system.

III. INDEPENDENCE AND ACCOUNTABILITY: A DELICATE BALANCING ACT

A fundamental tenet of American democracy calls for a delicate balance among the three coordinate branches of government. Each operates as a check against the abuse of power by the others. Members of the legislative and executive branches are empowered to act by the people and are selected through democratic elections. Their actions are subject to review by the judicial branch. Alexander Hamilton stressed the importance of an independent judiciary in THE

92. See CHOOSING JUSTICE, supra note 42, 132.
93. See id.
94. See BOOK OF STATES, supra note 29, at 135–37.
95. See id. at 136.
96. See id. at 137.
97. See id. at 135.
98. See id. at 136.
99. See Barnett, supra note 88, at 423 (describing state’s hybrid selection format; in 1998 voters approved a constitutional revision which would give each county the option to use merit selection and retention for circuit and county court judges). Ironically, the initial opt-in vote took place at the November 2000 general election. See id.
100. See THE FEDERALIST NO. 51 (James Madison).
101. See id.
102. See THE FEDERALIST NO. 78 (Alexander Hamilton).
FEDERALIST NO. 78.103 Before his presidency, Thomas Jefferson staunchly supported life tenure for judges, subject to their good behavior.104 He was, of course, less sanguine about the issue while President, when the Supreme Court declared its power of judicial review to invalidate unconstitutional federal legislation.105 Despite episodic and politicized challenges to an independent judiciary, most mainstream constitutional and legal scholars today would agree that independence is crucial for a just and fair society which abides by the rule of law.106

On the other hand, if an independent judiciary could act arbitrarily to overcome legitimate exercises of legislative or executive power, it would then reign supreme—itself unrestrained by those branches most sensitive to popular will. Thus, it is argued, courts must be accountable to the public for the legitimacy of their decisions.107

The Florida Supreme Court's crucial, and disputed role in determining the 2000 presidential election exemplifies the importance of public trust and confidence that the judiciary can rise above partisan politics.108 A lingering and tragic consequence of those

103. See THE FEDERALIST NO. 78, at 491, 494–95 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating complete independence "is peculiarly essential in a limited Constitution."); courts should be considered "as the bulwarks of a limited Constitution against legislative encroachments"; and arguing life tenure on good behavior is appropriate, because judges holding temporary office cannot be expected to give "inflexible and uniform adherence to the rights of the Constitution, and of individuals").

104. See EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 93 (Fred B. Rothman & Co. 1981) (1944) (quoting Jefferson: "The judges ... should not be dependent upon any man or body of men. To these ends they should hold estates for life in their offices, or, in other words, their commissions should be during good behavior").

105. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("So if a law be in opposition to the constitution [sic] ... the court [sic] must determine which of these conflicting rules govern the case. This is the very essence of judicial duty.").

106. See, e.g., Erwin Chemerinsky, Evaluating Judicial Candidates, 61 S. CAL. L. REV. 1985, 1985 (1988) (commenting on the 1986 California Judicial Retention Election; arguing that voters should not vote against candidates based on judicial decisions, but should cast votes against judges who are "unfit for office, corrupt, or incompetent").


108. See David Barstow & Somini Sengupta, Counting the Vote: The Florida Legislature; Florida Legislators Consider Options to Aid Bush, N.Y. TIMES, Nov. 23, 2000, at A1 (describing Republican state legislators' "[o]penly contemptuous ... almost warlike air of defiance ... [and] deep antipathy toward the Florida Supreme Court, all of whose justices were appointed by Democratic governors"); Jeffrey Rosen, Florida's Justices Went Too Far, N.Y. TIMES, Nov. 23, 2000, at 43 (arguing that Republicans "would never accept a Gore victory won on the basis of a court decision" and that Florida court's "decision to change the counting rules has made the justices appear to be partisans rather than neutral arbiters").
political squabbles may be the demeaning of the judiciary.\textsuperscript{109} For those judges who are next up for a retention vote, they may experience first-hand the graphic metaphor of a crocodile in the bathtub.

Ignoring the political consequences of visible decisions is "like ignoring a crocodile in your bathtub." The ability to ignore the crocodile, of course, doubtless depends on how long before one has to bathe. When there is a substantial time gap between the review of ballot measure and the next retention election, the judge is likely to feel more courageous. It is no answer to say that judges who are unwilling to serve as crocodile food for the sake of preserving republican government should not be judges in the first place. It is precisely the most principled judges... whose candor and integrity will compel them to question their own fortitude in the face of the crocodile. The unprincipled ones will simply step out of the tub without telling us about it.\textsuperscript{110}

Electorally accountable state court judges most need protection of their independence when they confront "measures motivated by popular passion or prejudice."\textsuperscript{111} Sadly for us all, "[a] judiciary that is directly accountable to the identical political forces which shaped the judgment under review may find it difficult to provide sustained enforcement of more deliberative constitutional norms."\textsuperscript{112}

Independence and accountability exist in tension with each other.\textsuperscript{113} To the extent court decisions are dictated by the rule of law, but conflict with popular sentiments, one of the two values is compromised.\textsuperscript{114}

Alexander Bickel identified the undemocratic nature of judicial review as a "counter-majoritarian force in our system."\textsuperscript{115} He stated:

\begin{quote}
When the Supreme Court declares unconstitutional a
\end{quote}

\begin{itemize}
\item \textsuperscript{109} See David Broder, \textit{This Thanksgiving, Presidency May Have Been Lost}, \textit{Newsday}, Nov. 22, 2000, at A44 (lamenting palpable American loss from unfolding political spectacle as saddest Thanksgiving since John F. Kennedy's assassination in 1963; despite voters' generally positive views they had cast reasoned vote, dignified pursuit of presidency was lost and suggestions of judicial partisanship possibly demeaned judiciary); \textit{cf.} Robert E. Hirshon, \textit{The View From the Chair, Independent Judiciary: An American Success}, 26 BRIEF 2 (Spring 1997) (deploring scapejudging as "calculated assault on our judiciary by the extreme right wing").
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} See id. at 16–23.
\item \textsuperscript{114} See id. at 16–17, 20.
\item \textsuperscript{115} Id. at 16.
\end{itemize}
legislative act or the action of an elected executive, it thwarts
the will of representatives of the actual people of the here and
now; it exercises control, not [on] behalf of the prevailing
majority, but against it.

....

Judicial review ... is the power to apply and construe the
Constitution, in matters of the greatest moment, against the
wishes of a legislative majority, which is, in turn, powerless to
affect the judicial decision.116

Ultimately, Bickel and fellow constitutional theorist Bruce Ackerman
reconcile the conflict: "judicial review advances democracy by
ensuring that the majority's long-term, constitutive values are
represented in the heat of the moment."117 Summarizing three other
leading constitutional theorists, Larry Yackle states:

We neither have nor want a society ruled by raw
majoritarianism. To the contrary, we want and have a
governmental system in which politically accountable
institutions fashion public policy under a constitutional
injunction to treat all citizens as equals. Governmental
objectives that neglect disfavored individuals and groups are for
that reason constitutionally impermissible.118

The countermajoritarian difficulty remains a live concern. With
increased frequency, voters in judicial retention elections have voiced
their demands to limit perceived, illegitimate activism by state
courts.119 Arguably, by choosing some form of an electoral process for

116. Id. at 16-17, 20.
117. Croley, supra note 1, at 767 (citing Bruce A. Ackerman, The Storrs Lectures:
Discovering the Constitution, 93 YALE L.J. 1013, 1039 (1984)).
119. See Kevin M. Mulcahy, Modeling the Garden: How New Jersey Built the Most
Progressive State Supreme Court and What California Can Learn, 40 SANTA CLARA L.
REV. 863, 899 (2000). The 1986 ouster of California Supreme Court Justices Rose Bird,
Cruz Reynoso and Joseph Grodin is perhaps most notable because it resulted from an
organized campaign around the court's refusal to implement the death penalty. See id.
Since that time, similar battles have been fought around the country. Death penalty,
abortion and voter initiatives have been the primary battle grounds. See generally Gerald
F. Uelmen, Crocodiles in the Bathtub: Maintaining the Independence of State Supreme
(Identifying several contested retention elections in which death penalty, abortion and
public initiatives were the three crocodiles which spurred efforts to oust judges); Stephen
B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill
how an elected state judge can have his opinion in capital cases influenced by the local
constituency's hard line view on crime).
the judiciary, states have opted to give accountability greater priority than independence. Thus, Kathryn Abrams posits a continuum of accountability, with increasing risk to independence: 1) weak procedural checks on judicial qualifications and performance, such as honesty and temperament; 2) stronger procedural checks against erratic decisionmaking, reflecting "questionable wisdom" on role of precedent and state legislation; 3) indirect substantive influence on judicial deliberations, reflecting accountability to voters' "common sense"; and 4) the greatest level of accountability when judges are considered representative of the voters in the sense that they are "acting for" the populace, they are aware of the "attitudinal atmospherics of their jurisdiction" and in which the voters monitor judicial performance for conflicts with their perspectives and substantive choices.

If judges are held strictly accountable in the "acting for" sense, the majority will as voiced through the electoral process could dominate each branch of government. This could dilute courts' essential role as checks against fleeting populist passions. Disputes must be resolved in an orderly fashion, with reference to fairly determined facts and law, and as limited by constitutional and


121. Id. at 1427-31.

122. For popular culture examples, consider the infamous call to anarchy by Dick the Butcher in William Shakespeare's King Henry VI, Part II, Act 4, Scene 2: "The first thing we do, let's kill all the lawyers." WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2, Ins. 30-31 (William George Clark & William Aldis Wright eds., William Benton 1952). Rather than antipathy to lawyers, the battle cry was to cast aside existing social order by doing away with those who were literate and in a position to maintain a rule of law. See Gordon Baldwin, Memorandum on Historical Context (on file with author). Recall also the fictional character, Atticus Finch, who held at bay an angry mob threatening to lynch his client, Tom Robinson, a black man falsely accused of raping a white woman. HARPER LEE, TO KILL A MOCKINGBIRD 233 (1960). When convicted by an all-white jury, the lawyer held out hope for reversal on appeal. See id. Atticus tried to explain the injustice, and its foreboding consequences, to his son: "The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box." Id.

In the real world, populism also bears a malevolent streak. Witness events in Kosovo, the history of racial oppression in the United States, and the myriad violent acts of oppression by the majority against minorities. See generally JOHN THOMPSON, CLOSING THE FRONTIER: RADICAL RESPONSE IN OKLAHOMA 1889-1923 (1986) (describing where, in Oklahoma, a decidedly populist state, civil rights flourished during strong economic times, but were tightly constricted during weak local economies); see also Alfred L. Brophy, Reconstructing the Dreamland: Contemplating Civil Rights Actions and Reparations for the Tulsa Race Riots of 1921, Report to Tulsa Race Riot Commission, Feb. 2000 (on file with author).
legislative statements protecting individual and minority rights.

When judges are electorally accountable, the countermajoritarian problem subsides, giving rise to its mirror image, what Steven Croley calls the "majoritarian difficulty." He explains:

Insofar as judicial elections are salient—that is, to the extent the outcomes of judicial elections reflect majoritarian sentiment, or the will of "the impassioned majority" rather than "the enlightened majority"—and insofar as the (impassioned) majority casts its votes for judges according to criteria similar to those guiding their votes for candidates for other offices, elective judiciaries pose two problems for the constitutional democrat. First, the rights of individuals and unpopular minority groups may be compromised by an elective judiciary. Second, and more mundane but no less important, the impartial administration of "day-to-day" justice may be compromised.

Increasingly, judicial elections threaten the ability of state courts to decide cases fairly under the law and unimpaired by the majoritarian difficulty. As developed further below, too often it is moneyed political forces and single issue constituencies who dominate the discourse in judicial elections. The electoral outcome, then, reflects more the will of a vocal and powerful segment of the community than that of an enlightened majority.

The inherent tension between independence and accountability may be irreconcilable. Perhaps this is a good thing—the "delicate balance" that makes our system "a government of laws and not men." Institutional mechanisms hold state courts accountable to the rule of law. Decisions which erroneously interpret the federal law or constitution are on occasion subject to reversal by the United States Supreme Court. Deeply unpopular state court statutory

123. See Croley, supra note 1, at 694.
124. Id. at 726 (footnote omitted).
125. See discussion infra Part IV.A.5.
127. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Admittedly, the occasions for explicit consideration and reversal are becoming increasingly rare. See Linda Greenhouse, The Justices Decide Who's in Charge, N.Y. TIMES, June 27, 1999, § 4, at 1, 4 (summarizing 1998–99 term; few decisions rendered, with several important cases upholding states' rights). With some frequency, however, the Supreme Court summarily vacates opinions premised on federal law. At times the summary disposition has immense significance. See generally Jacoby v. Arkansas Dep't of Educ., 962 S.W.2d 773 (Ark. 1998) (holding Eleventh Amendment does not shield states from the Fair Labor Standards Act), vacated and remanded, 527 U.S. 1031 (1999); Whittington v. New Mexico Dep't of Pub. Safety, 966 P.2d 188 (N.M. Ct. App. 1998), judgment vacated, 527 U.S. 1031 (1999); Board of Regents of N.M. State Univ. v. Cockrell, 983 P.2d 427 (N.M. Ct. App. 1998), vacated and
interpretations and common law decisions can be legislatively overruled. State court interpretations of the local constitution require for accountability the more cumbersome method of constitutional amendment. It is only discretionary decisionmaking—that involving factual ambiguities or legal decisions at the boundaries of existing legal and constitutional principles—in which judges could arbitrarily go either way and not be subject to reversal.128 This, I would suggest, defines the proper category of judicial decisionmaking for which some accountability principle should operate.

Does accountability require that the selection and retention of state court judges be committed to the electoral process? I think not. Popular will, to the extent acted upon by voters, selects the legislative and executive representatives. At its best, participatory democracy foments public debate and thus helps shape governmental policy. The cacophony of public discourse is an essential and cherished part of American democracy. Nevertheless, by selecting elected representatives, the people delegate the duty to make wise and informed decisions. They expect their representatives to exercise that responsibility, not to abdicate it by succumbing to those with the loudest (or best-funded) voices. They tacitly realize that self-governance is a messy process and political compromises are often required.129 As for the judicial branch, however, they rightly expect that cases be decided fairly under the facts and law, by impartial judges who remain above the fray of politics.130 Judges who are erratic in their decisionmaking, who treat participants disrespectfully, or who are dismissive of established precedent or statute, are properly held accountable to the public at large.131 The essential question then, is

\[\text{remanded}, 527 \text{ U.S. 1032 (1999); (reversing in light of} \text{Alden v. Maine}, 527 \text{ U.S. 706 (1999)} \text{(holding that the Constitution's structure, history, and interpretations, rather than the limits of the Eleventh Amendment, are fundamental aspects of the sovereignty of the states and that Article I of the Constitution does not include the power to subject nonconsenting states to private suits for damages in the states' own courts)).} \]

128. Granted, a vast territory of judicial decisions are discretionary; that was a fundamental lesson of legal realism. See generally JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (Antheneum) (1949).

129. See Yackle, supra note 118, at 274 (discussing how raw majoritarianism may sacrifice interests of politically disadvantaged; representative process may degenerate into “bewildering political marketplace dominated by factions . . . . Effective accountability is owed primarily to the diligent, the organized, the historically dominant, and the well-heeled”).

130. See CODE OF JUD. CONDUCT Preamble (1990) (“Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us.”)

how to strike the correct balance, deterring judges from arbitrary or tyrannical impulses, while protecting the independent professional judgment of those whose conduct falls within acceptable parameters.

I submit that most thoughtful citizens today do not see judges in a representative capacity in the same way they view elected members of the legislative or executive branches. Perhaps society's views have changed over time. I am told that earlier in this century, when lawyers from outlying Oklahoma counties came to file an appeal in the state capitol, they would stop in and visit with "their judge" about the case. If the expectation was that "their judge" could be counted on for support, besides concerns for ex parte communications, this paints a distressingly jaundiced view of the legal system. There was, however, a more benign sense of representation—that the judges from each geographical district understood, and would take local concerns into account in their deliberations. If indeed, that is what Professor Abrams suggests in terms of "acting for" and judges' "attitudinal atmospherics" of the jurisdiction, this view probably remains true among many state court judges. This general expectation that judges understand the views of the local populace does not translate into an expectation that judicial decisions routinely bow to popular will.

Citizens expect that judges will conduct themselves reasonably well in public and private affairs, perform their tasks competently, without bias, and decide cases based upon accepted legal authorities. Absent public outcry over egregious conduct, most people are inclined to defer to the good judgment and skill of those delegated to perform a public task. To the extent they try to follow judicial

132. Then, as now, members of the Oklahoma Supreme Court come from geographical districts throughout the state. Ex parte communications were not seen as the problem they are today. Democratic politics heavily dominated all aspects of state government, the judiciary included. In 1960 it was revealed that several members of the court had accepted bribes from certain actors; the payments began as campaign contributions. See Judith L. Maute, Peavyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille, 89 NW. U. L. REV. 1341, 1455-70 (1995) (discussing bribe scandal); see also Allison Marston, Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association, 49 ALA. L. REV. 471, 491-92 (1998) (ex parte communications were a concern addressed in the first American legal ethics code).

133. See supra text accompanying note 121.

134. See How the Public Views the State Courts, A 1999 National Survey, National Center for the State Courts, May 14, 1999, at 8 [hereinafter NCSC Study]. Overall, 80% of respondents agreed with the statement that "Judges are generally honest and fair in deciding cases." Id. at 30. Notably, African-American and Hispanic respondents were significantly less likely to agree. See id. Two-thirds of respondents perceived a pro-business bias in the courts, and approximately one-half believed that African-American, Hispanic and non-English speaking people received poorer treatment from the courts. See id. at 36-37; see also generally Race and the Law: A Special Joint Report by the American
proceedings as portrayed by the media, most people trust that the decisionmakers fulfilled their duties in good faith, based on what was presented. Mainstream citizens view courts as serving a necessary public purpose.¹³⁵ Courts can be compared to tax collectors, public road work, and the administrative state: they may be inconvenient and sometimes irksome, but are respected for what they do, provided they are reasonably competent, honest and efficient. The public is reluctantly deferential to those who perform their delegated tasks.

Ironically, the electoral process may give a disproportionate voice to groups which are dissatisfied with the judiciary. Recent elections in several states have demonstrated that well-financed opposition campaigns may target for defeat sitting judges who have competently exercised judicial independence, and thereby incurred the wrath of special interest groups. The underlying strategy of negative attack ads may be to suppress voter turnout, by “sully[ing] the process so completely that the opponent’s supporters lose interest in voting altogether.”¹³⁶ For example, former Tennessee Supreme Court Justice Penny White was defeated in a retention election with an extremely low turnout, after an aggressive ouster campaign focused on her vote in one death penalty case.¹³⁷

IV. IMPERFECT SELECTION SYSTEMS

Subpart A identifies several defects in the electoral process: inadequate information available to voters, the distorting effect of campaign funding on the public debate and its adverse effects upon the quality, integrity and diversity of the judiciary. It suggests a package of reforms to address these problems, including public funding tied to limits on campaign contributions and spending, and the use of subdistricting to enhance racial diversity on the trial bench. Subpart B then considers why, with all its flaws, there is such strong resistance to replacing the electoral system with merit selection.

¹³⁵ This excludes individuals and groups on the outer fringe of American thought who suspect a conspiracy or corruption at every turn.
¹³⁶ See, e.g., Kerry Lauerman, Block the Vote, N.Y. TIMES MAG., Jan. 23, 2000, at 16 (noting a phony television commercial used in the 1996 New Jersey Senate race where the actress/anchor exposed the candidate’s scandals and questioned his qualifications).
¹³⁷ See Penny S. White, Judicial Independence: Second Steps, JUDGES’ J., Summer 1999, at 5, 6 (explaining how she was defeated by a 10% margin with less than 19% of eligible voters participating).
A. Defects in the Electoral Process

Judicial elections "are becoming nastier, noisier, and costlier."

1. Ethical Constraints on Judicial Campaign Speech

States impose substantial limits on permissible speech in judicial campaigns under the applicable rules of judicial and legal ethics. Candidates are admonished not to state their views on any legal issues which may come before the court, and to emphasize the "duty to uphold the law regardless of... personal views." The only pledges allowed are those to improve court administration. Candidates may accurately state their qualifications and experience, and may make truthful comparisons with opponents. First Amendment challenges to these ethical restrictions have met with mixed success. The

138. Schotland, supra note 6, at 150 (emphasis added).
139. See CODE OF JUD. CONDUCT Canon 5A(3)(d) (1990). The 1990 American Bar Association Code of Judicial Conduct prohibits a judicial candidate from:
   (i) mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or (iii) knowingly misrepresent[ing] the identity, qualifications, present position or other fact concerning the candidate or an opponent.

Id. A sitting judge must generally refrain from public comment on any pending or impending proceeding that could affect its outcome or fairness. See id. Canon 3B(9). A lawyer is subject to discipline for knowingly or recklessly making a false statement about the qualifications or integrity of a judge or judicial candidate. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2 (1999).

140. CODE OF JUD. CONDUCT Canon 5A cmt.
141. See id.
142. See id. Canon 5A(3)(d)(iii).
restrictions seemingly have chilled the campaign speech of sitting judges far more than their opposition. Armed only with the benefit of incumbency, and whatever support can be garnished from one’s track record, sitting judges can be like ducks on a pond in hunting season. While defensive replies are allowed by the Code of Judicial Conduct, it would seem to be an exercise in futility for a judge to explain the basis for a ruling outside the context of a judicial opinion.

Assuming, arguendo, these restrictions can withstand constitutional scrutiny, they undoubtedly inhibit the kind of public debate that would make for an interested and informed electorate. It is perhaps no coincidence that the organized bar leadership which supports these restrictions also supports merit selection on the grounds that the public lacks adequate information for responsible voting. Whether these restrictions should remain in place is beyond the scope of this article. Nevertheless, they raise critical questions which must be addressed as states consider reform of judicial selection methods.

Historically, judicial elections—particularly those involving retention of an incumbent judge—have been “low salience” events. The restraint encouraged by the ethics rules give little room to stir up public debate. Advisory opinions routinely disapproved of questionnaires from political organizations which surveyed candidates’ views on specific issues like gun control, abortion and right to work. Thus, it is not surprising that many voters felt uninformed and incapable of making responsible voting decisions. This undoubtedly helps explain why, in a general election, a large number of voters do not vote on judicial candidates.


144. See CODE OF JUDICIAL CONDUCT Canon 5A(3)(e) (1990) (providing that a candidate for judicial office “may respond to personal attacks or attacks on the candidate’s record as long as the response does not violate Section 5A(3)(d)”).

145. See Croley, supra note 1, at 732 n.132 (“What is most obviously interesting about judicial elections—even those to the highest of the state courts—is that they seem so very uninteresting. They are typically placid affairs of low salience, involving [candidates] usually obscure to the general public.”) (alteration in original) (quoting JACK LADINSKY & ALLAN SILVER, POPULAR DEMOCRACY AND JUDICIAL INDEPENDENCE: ELECTORATE AND ELITE REACTIONS TO TWO WISCONSIN SUPREME COURT ELECTIONS, 132 (1966)).

146. See SHAMAN, supra note 143, at 373 (citing FLA. SUP. CT. STANDARDS OF CONDUCT GOVERNING JUDGES Op. 80-13 (1980)).

147. See William K. Hall & Larry T. Aspin, The Roll-Off Effect in Judicial Elections,
2. Inadequate Information Precludes Informed Voting

This problem is closely related to, but not caused solely by, the ethical constraints on judicial candidates’ speech. Apathy and inattentiveness to civic matters are widespread phenomena. Voter turnout in national presidential elections, the most salient of American elections, is only half of registered voters. Several states include judicial offices with the general election for the executive and legislative branches. While this increases voter turnout, the “roll-off” phenomenon recognizes that many voters do not cast votes on judicial candidates and other lower-salience issues. Perhaps voters self-select, and only participate in judicial elections when they feel adequately informed to make responsible choices. By contrast,

24 SOC. SCI. J. 415, 415 (1987) (finding a mean roll-off of 32.6%). Role-off measures “those voters who cast ballots in the major partisan race such as president, governor, or U.S. Senator, but who do not cast ballots in the judicial election.” Id. My informal surveys supports this finding, that many persons who are not confident about exercising a responsible choice about judicial candidates will opt out of voting in those particular contests.


149. See id.

150. See Hall & Aspin, supra note 147, at 419 (reporting findings of voters who voted for candidates in the high salience elections on the ballot but did not vote in the judicial race on the same ballot).

151. See id. and text accompanying note 147.

152. See Nicholas P. Lovrich et al., Citizen Knowledge and Voting in Judicial Elections, 73 JUDICATURE 28, 32–33 (1989) (discussing study of Spokane voters in nonpartisan primary, low salience judicial election; despite low voter turnout and considerable roll-off for judicial races, study found that those voting for judicial candidates self-selected based on their self-imagined and actual knowledge about courts). They conclude: [P]opular elections should not be seen as infrequent gatherings of the great unwashed, wherein rational outcomes are a matter largely of chance occurrence. Rather the judicial electorates involve a rather self-selected group of voting participants. These participants are likely to be atypical of the general public with regard to their uncommon interest in public affairs, their years of experience following local affairs in their own area and their level of knowledge about local government.

Id. at 33. But see Marie Hojnacki & Lawrence Baum, Choosing Judicial Candidates: How Voters Explain Their Decisions, 75 JUDICATURE 300, 301 (1992) (citing to victory of unknown, non-campaigning challenger to incumbent Washington Supreme Court justice; apparent result of voters’ reactions to candidates’ names); see also Charles H. Sheldon & Nicholas P. Lovrich, Jr., Voter Knowledge, Behavior and Attitudes in Primary and General Judicial Elections, 82 JUDICATURE 216, 220 (1999) (comparing voters in Washington state primary and general elections; found no statistically significant differences except higher priority given to judicial independence by primary voters versus higher priority given to judicial accountability by voters in general election). They reported that 42% of registered voters went to the polls for the September 1996 primary, with 22% roll-off, and 75% of...
some evidence suggests that voters typically know little of their choices in judicial contests, and take cues from their perceptions of candidates' party affiliations and name recognition. To the extent that selection is determined with reference to inaccurate, low information cues, it does not further the accountability, the independence or the quality of judges. While reference to cues may be rational to individuals, it imposes external costs that are not optimal for society.

How does the public acquire reliable information about individual judicial candidates? In the usual low salience elections, there is little television or newspaper coverage to provide unbiased comparative information. Pre-election editorials offer some cues, but tend to reflect the editor's political biases. As typical for electoral politics, the burden falls on the candidate and any organized support or opposition. Where the voting district is geographically or numerically large, successful communication requires paid political advertisements through the mass media. Candidates who are wealthy, or who have rich war chests can reach more potential voters and define the debate. Absent other sources of reliable information, voters are especially vulnerable to deceptive or questionable campaign tactics.

By contrast, where the potential voter pool is small and geographically confined, community-based campaigns can be highly effective. Imperfect information is less of a problem. The adage, "what goes around, comes around" has real meaning in smaller communities where past conduct is remembered. Colorable but unproven allegations of dishonesty made by trusted citizens may weigh heavily in an election. Where individual voters may lack eligible voters participating in the general election, with 25% roll-off on judicial contests. See id. This unusually high voter turn-out and the nonpartisan nature of Washington's judicial elections raises doubt as to whether the findings on voter self-selection fairly can be generalized to other states.

153. See generally Hojnacki & Baum, supra note 152 (studying 1986 and 1988 Ohio Supreme Court contests; low information cues, such as party affiliation, were used whether or not stated on ballot; high information cues based on candidates' issue positions, were uncommon for all levels of contests; most respondents reported low level of information).


155. See MATHIAS, supra note 41, at 31–34 (describing three campaigning tactics that interfere with the voters decision: "(1) false or misleading materials; (2) campaign promises to act in particular ways; and (3) improper appeals to voters' self-interest, emotions, and biases").

sufficient information, they have greater confidence in relying upon the recommendation of others whose judgment they respect.

If states decide to retain judicial elections, they must confront the challenge of making widely available accurate information about candidates. Several viable reforms have been proposed, but they are costly and involve other difficulties. Voter pamphlets describing candidates’ qualifications could be distributed by the state or citizens’ groups. Public forums to “meet-the-candidates” could be held in local communities, and possibly broadcast by television and radio stations. While this holds great potential in reaching large numbers of potential voters, such forums would require widespread cooperation by candidates, citizens’ groups and the media. It remains to be seen whether voters would avail themselves of the opportunity to evaluate judicial candidates. Finally, states should create systems to gather input from those with first-hand information about incumbent judges and other candidates. Whether this is done through a poll or survey of participants in the local courts, or through a judicial evaluation commission, great care is needed to insure that the assessments are based on sound methodology, using job-related criteria, and are not subject to ideological distortion.

insufficient evidence to support jury finding that judicial candidate published defamatory falsehoods about incumbent opponent with reckless disregard as to falsity; widow of incumbent judge’s former client wrote letter detailing how he had defrauded husband; opponent’s judicial campaign committee republished charges).

157. See MATHIAS, supra note 41, at 18–27.
158. See id. at 18–20 (discussing rejected Texas proposal because projected annual cost was seven and three quarters million dollars if pamphlets provided for all elective judicial positions; voter pamphlets may be most economically feasible in states with lower voting populations and fewer elections, even though they are most needed in highly populated urban areas with many electoral races).
159. See id. at 23–24.
160. See id. at 23.
161. See id. (stating that most voters historically do not rely on meet-the-candidate programs as a source of information).
162. See id. at 25–27 (noting that scores of states and local bar associations use bar polls to inform the public of how their members view the judicial candidate).
163. See id. Mathias suggests, as a starting place, the criteria identified by the ABA Special Committee on Evaluation of Judicial Performance Guidelines: integrity, knowledge and understanding of the law; communication skills; courtroom demeanor; management skills; punctuality; service to the public and legal profession; and effectiveness in working with others. See id. at 25–26. Judicial performance review commissions can present complex problems and may involve politically charged threats to judicial independence. Compare A. John Pelander, Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns, 30 ARIZ. ST. L.J. 645, 725 (1998) (giving enthusiastic support; promotes evaluation commissions’ public accountability without unduly interfering with independence and a positive step toward achieving informed electorate, high quality judges, and fair and efficient system of justice), with Jacqueline R. Griffin,
3. Nastier & Noisier Elections

Over the last fifteen years judicial campaigns have increasingly become “high salience” events—those generating widespread public interest. Political consultants (a/k/a spin doctors) help devise campaign strategies to arouse public concerns, but may do so in a simplistic way that obscures reasoned debate. Challengers target attacks on the incumbent’s conduct in office, often taking out of context the judge’s vote or language in an opinion, to inflame public passion on hot political issues. A common strategy targets appellate judges who are allegedly “soft on crime,” featuring televised personal appeals by a murder victim’s family member. Sensationalist attacks may trigger unreflective, visceral public reactions, but not rational discussion on the merits of the issues and their relevance to the particular judicial office. The problem is compounded in some jurisdictions, where geography or the number of potential voters requires communication over the airwaves. Opponents may launch simplistic attacks on the outcome of litigation; a judge’s reasoned analysis of a complex case can seldom be reduced to a pithy reply in a thirty second sound byte.

Judging the Judges, LITIGATION, Spring 1995, at 5, 7 (suggesting that judicial evaluation commissions may be more politically charged than selection commissions, with individual members seeking to punish judge for unpopular decisions).

164. See Croley, supra note 1, at 734–36 (developing hunch that nation is on cusp of era of increasingly salient judicial elections).

165. See MATHIAS, supra note 41, at 33 (“The hallmark of campaigns based on improper appeals is the absence of discussion, not only of candidates’ qualifications, but of the merits of the issues and their relevance to the particular judicial office.”).

166. See id.

167. See id. at 31–32 (summarizing lurid advertising campaigns). Wisconsin Supreme Court Justice Shirley Abrahamson was portrayed as “pro-child molester” in TV ads by her opponent, family lawyer Sharren Rose. See id. at 32. Rose also used the grandmother of a murdered child in a TV ad against her opponent, regardless of the fact that Abrahamson was not involved in that case. See id.; see also Zuckerman, supra note 47, at 4. Justice Abrahamson also suffered attacks from colleague Justice William Bablitch, who supported Rose while criticizing Abrahamson’s working relationship with the Court. See Richard P. Jones, Bablitch, Like Rose, Appears to be Loser in Higher Court Race: Many View his Opposition to Abrahamson as a Serious Miscalculation, MILWAUKEE J. SENTINEL, Apr. 12, 1999, at 1.

168. See MATHIAS, supra note 41, at 33.

4. **Criteria for Quality Judges**

Besides objective criteria such as minimum level of education and experience, what other qualifications are relevant? Although there might be consensus on some general criteria, individual assessment is not easily susceptible to objective measurement and may vary widely among those with access to first-hand information about the candidates. In the abstract, most persons would likely agree that a judge should have a competent mastery of the law, good moral character, intelligence, impartiality, maturity, emotional stability, courtesy, decisiveness, and administrative ability. They would probably also agree that it is proper to consider a candidate’s judicial philosophy and approach to legal interpretation.

Who is better positioned to evaluate judicial candidates—the voting electorate or designated representatives on judicial nominating commissions? One may question whether intelligence, analytic abilities, attention to detail and other personality traits relevant to judicial qualifications would shine under the political spotlight of forums and other public campaign events. Strong political personalities do not necessarily make good judges; the converse does not hold. Superb judges may be charismatically challenged. On the campaign trail, the political charisma of an otherwise unexceptional candidate may overshadow a better qualified candidate with a quiet and deliberative personality. Seasoned observers can recall numerous instances in which the voters elected judges who were poorly suited to the office. Sometimes aberrant personalities have been elected, and have then wrought havoc on the local legal system. Good politicians can make bad judges.

Merit selection proponents are convinced that the appointment
process yields better qualified judges. By way of proof, they claim that discipline for judicial misconduct almost invariably involves elected, not appointed judges.

At the risk of incurring the wrath of many, I suggest that states consider developing special examinations to be administered to all judicial aspirants, whether elected or appointed, and to those up for retention or renewal of appointment. The National Conference of Bar Examiners, or another professional test-drafting organization, could be commissioned to design an exam format to test for competent mastery over the categories of law encountered by different types of courts, making distinctions among trial and appellate courts, and the context in which procedural, substantive and ethical questions are likely to arise. For example, consultants with testing expertise prepared and administered an exam to all sitting judges in the emerging Republic of Georgia as part of sweeping legal reforms. This could be a feasible undertaking as a pilot project if a few states joined forces to define the scope of exam coverage. States could also administer essay questions designed to test applicants' mastery over unique aspects of state law. Practical skills components may also be used to evaluate candidates' higher order skills involving judgment, time management and diplomacy. No lawyer relishes the thought of taking another bar exam. The professional and personal lives of many lawyers are shaped by their desire to avoid a recurrence of this unpleasant time. And yet, given the awesome power and responsibility exercised by state court judges, is it not appropriate to have an objective measurement testing candidates' mastery of relevant law and procedure?

174. See Webster, supra note 25, at 13–14 ("This argument is based upon the proposition that the electorate does not have the necessary background to comprehend what qualities make a 'good' judge and that, as a result, voters are unqualified to make such decisions.").

175. Telephone Interview with Harold Conyers, Oklahoma State Court Administrator (Oct. 11, 1999).


Lurid tales of interest-driven campaign contributions cause widespread public skepticism about state court biases. \(^{177}\) For example, one study reports that “[f]orty percent of the $9.2 million in campaign contributions raised by seven justices elected to the Texas Supreme Court since 1994 came from parties and lawyers with cases before the court or contributors closely linked to these parties . . . .”\(^{178}\) Within the legal community, stories abound of judges fleecing lawyers who practice before them to support their re-election campaigns. Meanwhile, large amounts from anonymous donors are spent to fund “informational” challenges by special interest groups which seek the ouster of sitting judges. \(^{179}\)

For more than twenty years, efforts at campaign finance reform have been frustrated both by lack of political will and the Supreme Court’s decision in *Buckley v. Valeo*, \(^{180}\) which upheld limits on contributions, but struck limits on expenditures. \(^{181}\) Relatively large sums of money are needed to fuel campaigns for state trial and appellate courts. Wealthy candidates may, without restriction, fund their own campaigns. Candidates who lack independent means must

\(^{177}\) See generally James Eisenstein, *Financing Pennsylvania’s Supreme Court Candidates*, 84 JUDICATURE 20 (2000) (arguing for a system in which judges in Pennsylvania receive only public, and not private contributions for their campaigns); Kyle Cheeck & Anthony Champagne, *Money in Texas Supreme Court Elections 1980–1998*, 84 JUDICATURE 20 (2000) (explaining that the primary factor in electoral success appears to be the amount of money raised, and not party affiliation or incumbency; predicts that “[m]oney will continue to be the dark side of Texas Supreme Court politics”).


\(^{179}\) See, e.g., *Election for the Ohio Supreme Court That’s Raising Concerns about the Effect of Campaign Money on Judicial Independence* (Nat’l Pub. Radio, Morning Edition, Aug. 29, 2000) (addressing influence of big-money politics on an independent judiciary; conservative political activists and business groups are trying to raise millions in soft money to defeat Ohio Supreme Court Justice Alice Robie Resnick because of her votes on school funding and tort reform); Spencer Hunt, *Business, GOP Work to Boot Resnick*, THE CINCINNATI ENQUIRER, June 25, 2000, at A1 (Resnick’s voting record infuriated Republicans and their business allies who have launched an unprecedented campaign for her ouster; group planned to raise up to $100 million in anonymous gifts of soft money used for issue advocacy); see also Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 860–66 (1998) (conceding that mandated anonymity of campaign contributions would likely increase independent issue ads, which tend to be “particularly negative and reckless” because candidates are not accountable for what is said by these “independent” campaigns).

\(^{180}\) 424 U.S. 1 (1976) (per curiam).

\(^{181}\) See id. at 143.
garner outside support. Among the lay public, many believe that the impartiality of state court judges is compromised by their need to curry the favor of financial contributors. 182 Meanwhile, many lawyers complain that they only want a level playing field when litigating in state courts, and bristle at the notion that they should have to pay to insure impartiality. 183 The judicial ethics rules purport to insulate judicial candidates from direct fund-raising activities. 184 Nevertheless, there is no pretense that the candidates remain ignorant about who did, and who did not contribute to their campaigns. 185

A recent decision of the United States Supreme Court may allow states increased latitude in limiting campaign contributions and otherwise regulating campaign expenditures. 186 In *Nixon v. Shrink Missouri Government PAC*, the 6-3 decision upheld against a First Amendment challenge Missouri’s $1,075 limit on individual campaign contributions for statewide political offices. 187 The dollar limit on contributions did not significantly impair communications, and furthered legitimate governmental interests in preventing corruption, “the perception of impropriety . . . and the cynical assumption that large donors call the tune [which] could jeopardize the willingness of voters to take part in democratic governance.” 188 Justice Souter’s majority opinion stated the test was not a fixed or indexed dollar amount, but whether a contribution limit was so low “as to render political association ineffective, drive the sound of a candidate’s voice

182. See NCSC Study, *supra* note 134 at 3, 8. There is a strong public perception that elected judges are influenced by the need to raise campaign funds, and this may impair their integrity and impartiality. *See id.* The vast majority of respondents in one study believed that politics influence court decisions. *See id.; see also* Josh P. Hamilton & Charles Gasparino, *Studies Suggest Lawyers Benefit in Donating to Judicial Campaigns*, WALL ST. J., July 21, 1998, at B17 (summarizing several studies that indicate lawyers make campaign contributions to judges in exchange for favorable treatment in the courts).

183. Comment from a member of the audience at the Oklahoma Bar Association annual meeting plenary session (Nov. 11, 1999) (evoking loud applause).


185. *See* id. at Canon 5C(2) (prohibiting a judicial candidate from personally soliciting or accepting campaign contributions; instead this is done through campaign committees). Judges are not prohibited from knowing the identity of contributors, although this may be relevant to whether the judge should be disqualified from presiding in a matter involving a known donor. *See id.* cmt. Indeed, campaign disclosure rules typically require that the identity, residency and amount of donations be filed with election officials, and these disclosures are commonly reported in the newspaper. *See* OK. JUD. ETH. 1998-16, OCSN Op. (judicial candidate may properly write thank you notes to contributors) (copy on file with author); *Contrast,* Ayres & Bulow, *supra* note 179, at 870–75 (discussing experimental programs in ten states to mandate donor anonymity in judicial elections).


187. *See* id. at 383–85.

188. *Id.* at 390.
below the level of notice, and render contributions pointless."^{189} The closely-watched case did not directly challenge the continued vitality of *Buckley*, which many have blamed "for the tide of independent expenditures as well as unregulated ‘soft money’ contributions that appear increasingly likely to swamp the political system."^{190}

Justice Thomas’ dissent, joined by Justice Scalia, would overrule *Buckley* and strike the patently unconstitutional contribution limits.^{191} Justice Kennedy’s separate dissent was also critical of *Buckley*, which set the stage for a new kind of speech to enter the political system. It is covert speech. The Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits, limits which take no account of rising campaign costs.^{192}

Justice Kennedy would overrule *Buckley* “and then free Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so.”^{193}

News commentators and advocates of campaign finance reform herald the decision as signaling a possible shift on the Court, willingness to overrule *Buckley* and deferring to legislative judgments limiting both contributions and expenditures.^{194} Various groups within the American Bar Association have advocated for greater regulation of judicial campaign finance. One proposal that would appear to pass muster encourages states to 1) set judicial campaign contribution limits; 2) require disclosure of campaign contributions at levels lower than those provided for under general campaign finance regulations; and 3) require disqualification of judges from matters in which lawyers or parties had made contributions to the judges’ campaigns in excess of the prescribed limits.^{195} If state legislatures have the political

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189. *Id.* at 397.
192. *Id.* at 406.
193. *Id.* at 409–10.
195. See Around the ABA, *Proposed Amendments of the ABA Standing Committee on Ethics and Professional Responsibility and Special Committee on Judicial Independence and the Judicial Division*, 10 THE PROF’L LAW. 23, 23 (Summer 1999). The ABA House of Delegates rejected a proposed amendment to the Model Rules regulating “pay-to-play” political contributions by lawyers to officials from whom they may obtain government legal engagements. See *id.*
will to tackle judicial campaign finance reform, they might consider requiring disclosure of all contributions of $100 or more, including contributions of soft money to informational interest groups, impose $1,000 per person contribution limits, and consider instituting a program of public financing for candidates willing to limit total campaign expenditures under a stated amount.196

6. Voting Rights Act: Application to State Court Judicial Elections

The Supreme Court's decision in Chisom v. Roemer197 removed any lingering doubt: judicial elections are subject to the Voting Rights Act of 1965.198 Since 1991 there have been several challenges to single-member judicial districts, alleging that at-large elections diluted the voting strength of minority communities.199 The legal and factual issues presented in these cases are exceptionally complex, and hence may demand "an enormous commitment of time and financial resources ... [in] bringing such a case, with a relatively low likelihood of success."200 The statute prohibits all forms of voting discrimination so that the electoral process is equally open to members of the

196. In the Wisconsin Supreme Court race, Rose and Abrahamson initially agreed to abide by a $215,625 spending limit in order to qualify for state funds. See Zuckerman, supra note 47, at 4. However, Rose backed out of the agreement in order to spend more money. See id. The total public funds available a $1.00 checkoff on the Wisconsin tax returns, a mere $27,005, went to Abrahamson. Wisconsin Citizen Action (WCA), a watchdog group, has called for campaign finance reform, citing the disturbing trend of candidates using their own wealth and money from special interest groups. See Richard P. Jones, Court Race Limited to Wealthiest, Group Says Most Campaign Money Comes from Few Donors, MILWAUKEE J. SENTINEL, Apr. 26, 1999, at 2. A WCA-sponsored poll showed 76.2% of voters supported public funding of elections. See id.
199. See, e.g., Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194 (7th Cir. 1997) (totality of circumstances, no vote dilution); White v. Alabama, 74 F.3d 1058 (11th Cir. 1996) (rejecting proposed consent decree); Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc) (finding vote dilution in election of Florida trial courts of general jurisdiction; rejected proposed remedies of sub-districts, separate district with persons of color in voting majority, and cumulative voting); LULAC v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc) (denying entry of consent decree because no VRA violation); Houston Lawyers' Ass'n v. Attorney General of Tex., 501 U.S. 419 (1991) (companion case) (at-large judicial elections; held, subject to section 2 challenge) (on remand).
protected classes of racial or language minorities.\textsuperscript{201}

While current statutory interpretation does not recognize a right of proportional representation of minority communities to elected office, I submit that states have a moral duty to achieve greater diversity on the bench. Demographic changes in the nation's population are profound: ethnic groups which previously were considered "minorities" are the "majority" in some areas.\textsuperscript{202} Preliminary data from the 2000 census estimates that in California, 49.9\% of the population is white, non-Hispanic.\textsuperscript{203} Combined Latino, Asian, African-American and American Indian populations comprise 50.1\%.\textsuperscript{204} In Texas, ethnic communities are 44.7\% of the population, and white non-Hispanic are 55.3\%.\textsuperscript{205} Experts believe that the trend will continue, and extend nationwide in the near future.\textsuperscript{206}

Empirical studies on perceptions of the court system reflect significant racial disparities in the level of trust and confidence that cases will be fairly decided.\textsuperscript{207} The organized legal profession is beginning to recognize these concerns. William Paul, 1999–2000 ABA President, undertook diversity as a key initiative during his tenure in office: "'Either we all work harder and make greater progress' in achieving true diversity at all levels of the legal system 'or we all risk a serious disconnect between it and the society it serves.'\textsuperscript{208} His predecessor, Philip Anderson, suggested that the underrepresentation of minorities on the bench "can easily be remedied" because "[s]tate and federal officials are fully aware of that and change can be expected."\textsuperscript{209} I am not so sanguine. Consent decrees entered in

\begin{footnotes}
\footnotetext[201]{See id. at 56 n.16; see also 42 U.S.C. § 1973 (1994).}
\footnotetext[203]{See id.}
\footnotetext[205]{See id.}
\footnotetext[206]{See Nelson & O'Reilley, supra note 202, at 1.}
\footnotetext[207]{See generally \textit{Race and the Law: A Special Joint Report by the American Bar Ass'n Journal and National Bar Ass'n Magazine}, A.B.A. J., Feb. 1999, at 41 ("The contrast in perceptions of black and white lawyers as to how bias-free our legal system is today is, frankly, stark."); NCSC Study, supra note 134, at 8, 22, 30 (80\% of respondents agreed that "[j]udges are generally honest and fair in deciding cases"; as compared to Whites and Non-Hispanics, both African-Americans and Hispanics were significantly less likely to agree, with 32\% of African-Americans and 25\% of Hispanics stating moderate or strong disagreement with statement).}
\end{footnotes}
connection with the Voting Rights Act have encountered difficulties in obtaining court approval. Notwithstanding the many defects in the electoral process, thoughtful political leaders in some minority communities strongly prefer election over appointment of state judges. As state leaders ponder solutions, they should seriously consider options which may enhance diversity on the bench, and the perceived legitimacy of state courts. Legislative solutions designed to achieve this end may, in the end, produce outcomes which are more acceptable to all.

B. Merit Selection: The Solution to All That Ails Judicial Selection?

States could avoid the uncertainty of messy judicial elections by switching to appointive systems. Dicta in Chisom twice suggested that this would exclude the state judiciary from the Voting Rights Act, and "enable its judges to be indifferent to popular opinion." Some form of merit selection is preferred by most bar leaders—both national and statewide, and by most legal scholars. A slim majority of states

210. See, e.g., LULAC v. Clements, 999 F.2d 831, 847 (5th Cir. 1993) (en banc) (rejecting consent decree).
211. Telephone Interview with Opio Toure, Representative to Oklahoma House of Representatives (July 1999); see also Sherrilyn A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 B.C. L. REV. 95, 98-99 (1997) ("[T]he Fourteenth Amendment’s judicial impartiality mandate is violated by the persistent presence of an all-white bench in jurisdictions with significant minority population.").
212. For example, the legislature could create subdistricts for selection of district judges in every judicial district where there are three or more district court judges and an ethnic minority population of ten percent or more. See Judith L. Maute, Recommendation to Oklahoma Joint Task Force on Judicial Selection (Nov. 12, 1999) (unpublished summary of comments) (on file with author).
215. See, e.g., cases cited supra note 1 and accompanying text; see also Paul D. Carrington, Judicial Independence and Democratic Accountability in Highest State Courts, 61 LAW & CONTEMP. PROBS. 79, 96 (1998) (reviewing various methods of handling campaigns for the highest state courts); Erwin Chemerinsky, Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections, 74 CHI.-KENT. L. REV. 133, 149 (1998) ("Despite the tremendous advantages to merit selection of judges, voters in the thirty-eight states with electoral review of judges are unlikely to disenfranchise themselves and amend their state constitutions to remove judges from the political process."). The ABA has made a pragmatic shift in its approach to judicial selection, recognizing that "[n]otwithstanding [its] on-going preference for merit selection, it is recognized that a majority of judges are elected . . . ."

appoint their high court justices. Because more than eighty percent of all judicial offices are initially filled by appointment to complete unexpired terms, the electoral system usually operates in the shadow of interim appointments, giving the appointee the dubious benefit of incumbency. If the public and its elected representatives were convinced that appointments resulted in better judges, a formal switch to an appointive system would be the obvious cure for the pervasive defects in the electoral system.

Why is the electoral system so resilient to change?

1. The Power of Inertia

By careful design, the constitutional system of government is cumbersome to change. Administrative or executive fiat cannot upset a democratic process built into the constitutional structure. States which made the switch have overcome the power of inertia by carefully forging political compromises that assuaged deep-seated concerns. Absent compelling proof that the cure is better than the disease, established political voices have successfully countered efforts to replace elections with appointments. Uncertainty about how the appointment process might affect independence, accountability,
access to and fairness of the legal system all combine to make inertia a powerful source of resistance to change.  

2. **Democracy & Distrust**

The accountability and independence debate certainly has played an important role. Especially in states with strong populist traditions, voters have been reluctant to relinquish their role in judicial selection to an appointment process where their opportunity for input is limited or non-existent. Judges have “awesome powers in this society.” They decide issues of far-ranging importance to the parties, the state, and the nation: election disputes, intimate family matters, business disputes, criminal culpability, and the extent of state governmental powers and individual rights. While the highest appeals court, in theory, remains available to correct lower court errors, the functional reality is that state trial judges largely determine final outcome in the vast majority of litigation. Retention elections are largely symbolic events, with minimal likelihood of ousting incompetent or biased judges, and yet threaten to punish those with courage to “follow the law” despite the risk of adverse public reaction.

Merit selection reformers contend that judicial nominating commissions are better able to weed out unsuitable candidates, objectively evaluate applicant credentials, and identify the most qualified for final selection by the governor or other appointing entity. Judges who take the bench through this less political process, they contend, have greater independence to exercise their best impartial judgement, and are less concerned about partisan recriminations for their conduct in office. No state which has moved

218. See Hess, *supra* note 200, at 52; cf. Hanssen, *supra* note 23, at 232 (using an economic model to analyze appointed and elected systems; finding increased uncertainty, and hence increased litigation, occurs in jurisdictions which appoint high courts, and concluding this is “a price we pay for protecting our judges from political influence”).


220. See *id.* (“How tremendously frightening it would be to think that judgments were motivated by personal gain, that the interests of others were routinely sacrificed to the advance judges’ self-serving goals.”).

221. Susan M. Olson & Christina Batjer, *Competing Narratives in a Judicial Retention Election: Feminism Versus Judicial Independence*, 33 L. & SOC’Y REV. 123, 137–39 (1999) (addressing ultimately unsuccessful grassroots campaign to unseat trial judge with pervasive pattern of misogynist rulings and a 50% reversal rate; authors suggest the power of this competing narrative may be evidence of constitutive change where the public showed the capacity to evaluate and mobilize in a retention election).


223. See Webster, *supra* note 25, at 31 (“The principal argument made by proponents
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224. See Goldschmidt, supra note 81, at 78; see also Roll, supra note 32, at 885-90 (outlining the repeated failed attempts in Arizona to revert back to the electoral process).
225. See Beth M. Henschen et al., Judicial Nominating Commissioners: A National Profile, 73 Judicature 328, 331-33 (1990).
226. See id.
227. Id. at 334.
228. See id. at 330-31.
229. See Franklin S. Spears, Selection of Appellate Judges, 40 Baylor L. Rev. 501, 510 (1998); see also Henschen, supra note 225, at 331-33.
230. See Spears, supra note 229, at 510.
Precatory admonitions are not sufficient. Absent explicit diversity requirements, little careful attention will be given to such matters, with the composition of the commission poorly reflecting community-wide demographics and viewpoints. Lawyer domination may be for good reason: unique access to and understanding of the legal system, and familiarity with the past conduct of candidates for judicial office. That said, it is all the more important that there be diversity among both the non-lawyer and lawyer members of JNC's.

For the present, I make two suggestions. One, judicial nominating committees must reflect the diversity of the state's population based on gender, race, ethnicity and religion. Where there are multiple appointing authorities, there must be some requirement of consultation and coordination in order to achieve this end. This recommendation extends beyond existing “gender-balance” provisions in numerous state laws. Courts, as antimajoritarian institutions, can only do their jobs wisely if their deliberations are enhanced by the array of experiences and viewpoints of the state. Particularly in jurisdictions where political life is dominated by distinct religious, economic, class or ethnic groups, the non-dominant views need to be heard in the judicial selection process; if they are not, the resulting appointments will predictably reflect only the narrower,


232. See Goldschmidt, supra note 81, at 68 (noting that some states specifically require a certain number of minority commissioners).

233. Detailed recommendations on how to achieve this end are beyond the scope of this article.

234. In Tennessee, where the speakers of both legislative houses choose some of the commissioners from a list of nominees submitted by various groups, including the state bar, the statute requires that the list of suggested nominees reflect the diversity in the state's population; if it does not, “the speaker shall reject the entire list of a group and require the group to resubmit its list of nominees.” TENN. CODE ANN. §17-4-102(b)(2) (1994); see also IOWA CODE ANN. § 69.16A (2000) (“All appointive boards, commissions, committees and councils of the state . . . shall be gender balanced.”); IOWA COURT RULE 214 decrees:

It is a policy of the judicial branch that all boards, commissions, and committees to which appointments are made or confirmed by any part of the judicial branch shall reflect, as much as possible, a gender balance. If there are multiple appointing authorities for a board, commission or committee, they shall consult with each other to avoid contravention of this policy.

IOWA CT. R. 214.
dominant perspectives. Second, I propose that states adopt an open meeting and public hearing component for judicial nominating commissions. To the extent that the public (either in person, or through the media) has an opportunity to attend and be heard at some time before names are submitted to the appointing authority, there will be greater confidence that the selection process was open, and considered a wide range of input. Clouds of suspicion about backroom political deals can be dissipated with the light of day. This is not to suggest that all meetings of the nominating commission should be open to the public. Closed meetings are appropriate for individual interviews with candidates. Final deliberations, may also be conducted which may require sensitive and frank discussions of candidates' qualifications and past conduct in private.

3. Is “Merit” a Misnomer?

Defining qualifications for judicial office, collecting information on candidates, and evaluating their relative standing are closely related to the process questions discussed above. Published prerequisites for the job tend to be general. Beyond the minimal formal requirements of legal education, residency and license to practice, they identify criteria which is difficult to evaluate on an objective basis. Inevitably, subjective evaluations of individual commissioners enter the equation. Political considerations are also taken into account. While merit selection clearly does better than elections at eliminating unqualified candidates, it cannot be shown to result in appointment of the “best able and most qualified” candidates. In that respect, the term “merit selection” is inaccurate, and may perpetuate a myth of meritocracy which veils biases and privileges inherent in the legal system and the society at large.

235. Utah Governor Michael Leavitt recently broke a long tradition of having at least one non-Mormon sit on the Utah State Supreme Court. When the sole non-Mormon resigned, Governor Leavitt appointed a Mormon as his replacement. See B. Drummond Ayres, Jr., Religion in Utah On the High Court?, N.Y. TIMES, May 14, 2000, at A24.

236. See Goldschmidt, supra note 81, at 29 (listing attributes: integrity and moral courage; legal ability and experience; intelligence and wisdom; deliberate and fair-minded; prompt and industrious; personal habits compatible with office; likelihood that would be courteous and considerate on the bench).

237. For a provocative post-post-modern narrative challenging the hegemonic assumptions of merit selection and retention, see generally Olson & Batjer, supra note 221. Hegemony, they define as “the state in which certain ideas or arrangements, ‘being presumptively shared, are not normally the subject of explication or argument’ and thus silence people by putting challenges ‘beyond the limits of the rational and thus credible.’” Id. at 125 (quoting JEAN COMAROFF & JOHN COMAROFF, OF REVELATION AND
Those appointed to serve likely reflect the social, economic and ideological views of those controlling the process. If proponents of merit selection truly wish to bring about reform in judicial selection, the process must undergo some structural changes to achieve a more balanced, representative and open process with greater public accountability.

Just as there is significant variance among state commissions in their demographic composition, there is also a great variance in the process used to solicit and evaluate applications. Some JNC's are proactive and have rules that encourage external recruitment of qualified applicants. If those recruited applications are seriously considered for appointment, it can only improve the caliber of the judiciary. If, however, the JNC is only "going through the motions," then such efforts are a waste of time for all concerned. In some states, lawyers may perceive the appointment process as "wired" and do not apply unless they have friends in high places who will spend the political capital lobbying behind the scenes on their behalf. Their reticence is understandable, especially when they or those they know have invested considerable effort in applying, they appear "qualified" according to the stated criteria, but they have not been seriously considered or given the opportunity for a personal interview.

In some places, the appointment process has tended to exclude applicants of color, women, and those without influential political connections. It may be no accident that such traditional "outsiders" have lacked the political savvy or wherewithal to have the nominating commissioners lobbied on their behalf. Empirically, data on the diversity effects of merit selection is equivocal. One study found that

REVOLUTION VOL. I 125 (1991)). Olson & Batjer explain:

[T]he discourse of judicial independence and impartiality can constitute a hegemonic tale . . . that judges chosen through the mechanism known as merit selection are necessarily good judges (minimally, impartial ones) and therefore deserve insulation from accountability through mechanisms that protect the independence of their decisions . . . [T]his tale contains all three elements . . . [of] hegemonic narratives: they are "mechanisms of social control," they "conceal the social organization of their production and plausibility," and they "colonize consciousness."

Id. at 139 (quoting Patricia Ewick & Susan S. Silbey, Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative, 29 L. & SOC'Y REV. 213–14 (1995)).

238. See Goldschmidt, supra note 81, at 28 (noting that Hawaii commissioners are required actively to seek out qualified applicants).

239. See id.

240. Comment from prominent jurist at diversity meeting held at Oklahoma Bar Association 1999 Annual Meeting (Nov. 11, 1999) (name withheld for reasons of discretion).
the hybrid Missouri plan, with nomination by a commission and gubernatorial appointment, worked to the greatest advantage of white trial court judges, and possibly worked against increased opportunities for blacks on the state bench.\footnote{241} Other studies report that the largest proportion of African-Americans and women attained judicial office through merit plans.\footnote{242} Yet other studies conclude that differences in selection methods do not account for underrepresentation of black and Hispanic judges on state courts, but rather the most important factor is the proportion of black and Hispanic lawyers in the state.\footnote{243} Anecdotally, in Oklahoma, few African-American, Hispanic or women candidates make it out of the nominating commission.\footnote{244} At

\begin{footnotesize}
\footnote{241. See Barbara Luck Graham, Do Judicial Selection Systems Matter? A Study of Black Representation on State Courts, 18 AM. POL. Q. 316, 332-33 (1990) (noting gubernatorial and legislative appointment systems, without nomination commissions, increased black representation on state trial courts; judicial elections with at-large districts have been less successful); see also Robert C. Luskin et al., How Minority Judges Fare in Retention Elections, 77 JUDICATURE 316, 321 (noting unlikelihood that greater minority representation will be achieved through merit selection; probable shortfall occurring in nominating process).

\footnote{242. See Goldschmidt, supra note 81, at 66-67 & nn.449-57; see also Brown, supra note 169, at 323 (noting that 56% of women and 59% of African-Americans on state appeals courts were appointed, with or without commission process; 29% of women were elected by popular vote, and 27% of African-Americans on state appeals courts were elected by popular vote or by state legislature).


\footnote{id}. In the Oklahoma appellate courts, which are nominated by a JNC and appointed by the governor, of the 24 justices and judges, three women serve, one of whom is adopted into the Cheyenne-Arapaho tribe. See Letter from The Honorable Janice P. Dreiling, 1999 President of the Oklahoma Judicial Conference, to the membership (Nov. 8, 1999) (on file with author); The Supreme Court of the State of Oklahoma, Justice Yvonne Kauger, District No. 4 (visited Nov. 8, 2000) <http://www.oscn.net/oscn/schome/kauger.htm> (bio describing Oklahoma Supreme Court Justice Kauger). Governor Frank Keating appointed Tom Colbert to the Oklahoma Court of Civil Appeals in Spring 2000; Judge Colbert is the first African-American to sit on an Oklahoman appellate court. See John Greiner, Black Attorney Takes Oath as Appellate Judge, THE DAILY OKLAHOMAN, Apr. 25, 2000, at A5. On the elected trial bench, of the 71 district judges, 15 are women and four are black; of the 77 associate district judges, seven are women and none are black; of the 77 special district judges (appointed by a presiding judge), 15 are women and two are black.}
\end{footnotesize}
the federal level, since former president Jimmy Carter's administration, merit selection has significantly expanded diversity on the bench.\textsuperscript{245} The priority given to diversifying the state court judiciary is a profound question which policy-makers should openly address. Delicate questions of racism, sexism and other biases are too easily ignored in debates about the manner of judicial selection. As one task force report aptly stated:

[D]iversity benefits the judiciary both by enhancing perspectives that bear on governance and by giving people of differing backgrounds a sense of assurance that persons with similar life experiences are in positions of authority... appointing authorities might wish to appoint women and minority judges in greater numbers; and that diversity in judicial appointments should remain a continuing goal.\textsuperscript{246}

Given the changing population trends, ethnic and gender diversity among state court judges is of paramount importance.

C. Performance Evaluations & Retention Elections: Much Ado, Minimal Accountability?

Most states which initially appoint judges for a term of years use periodic retention elections—at least in principle—as a public mechanism for judicial accountability.\textsuperscript{247} Other commentators have addressed how, in a few notorious instances, special interest forces have seized control of the debate, to mount serious, and sometimes successful, campaigns to oust independent judges for their legally correct, but unpopular decisions.\textsuperscript{248} Elsewhere, sitting judges are

\textit{See} Dreiling letter, \textit{supra}. Thus, Oklahoma appellate courts include 4.17\% ethnic minorities and 12.5\% women judges. \textit{See id.} Among elected district court trial court judges, there are 5.63\% ethnic minorities and 21.13\% women; of the elected associate district judges, located in less populated areas, 9.09\% are women and 0\% are minorities. \textit{See id.} Of the appointed special district judges, 2.6\% are minorities and 19.48\% are women. \textit{See id.}


\textsuperscript{247} \textit{See} Webster, \textit{supra} note 25, at 12–14.

\textsuperscript{248} \textit{See}, e.g., Grodin, \textit{supra} note 17, at 1979–80 (stating that immediately after the 1986 California Supreme Court affirmed the imposition of the death penalty, an opposition group held a press conference claiming that two judges acted for political reasons); \textit{see also} Stephen B. Bright, \textit{Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?}, \textit{72} N.Y.U. L. REV. 308, 308 (1997) ("The increasing political attacks on the judiciary by both major political
vulnerable to contested partisan or nonpartisan elections. Research has shown that the fact of retention elections has a pronounced effect on judicial behavior. Until recently, retention elections were "political non-events." Since the 1986 ouster of three California Supreme Court Justices, the landscape has changed dramatically. There is now a substantial risk that judges will "receive and act upon" the message "that if they want to avoid negative votes, it is best to produce results with which the voters will agree." Whether this is conscious or not is beside the point. In critical cases, "the potential that the pendency or threat of a judicial election is likely to have for distorting the proper exercise of the judicial function is substantial, and palpable."

Another option would delegate judicial performance evaluations to commissions, with term renewal automatic upon a majority vote by the commission. Besides lingering questions of public accountability, evaluation commissions may also threaten independence. One critic of such commissions voiced concern about politically charged threats to judicial independence, particularly where special interests can influence the decision whether to recommend retention of an incumbent. As for selection, there is no clear

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250. See Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 313 (1994). Despite the very low risk of loss, 60% of judicial respondents believed that retention elections had a pronounced effect on judicial behavior. See id. Specific responses included greater sensitivity to public opinion (27%); less arrogant to jurors, lawyers, litigants (16%); avoid controversial decisions before elections (15%); greater motivation to do a good job (12%); and be nicer to lawyers before bar polls (9%). See id.

251. See Grodin, supra note 17, at 1972.

252. Id. at 1980.

253. Id.


255. See Jacqueline Griffin, *Judging the Judges*, 21 LITIGATION 5, 61–62 (1995) (stating judicial evaluation commissions may be more politically charged than selection commissions, with individual members seeking to punish judge for unpopular decisions); see also generally Pelander, *supra* note 163, at 725 (supporting strongly judicial performance review system designed to improve quality of judging and provide assessment
solution. Any evaluation and retention process must strike a balance between accountability and independence.

Regardless of the method of judicial selection, a bona fide system of evaluating judges is essential. The office has far too much power and responsibility to be free of any public accountability. Most major employers conduct annual performance evaluations which identify areas needing improvement and note strengths deserving acknowledgment. In the context of state court judges, the difficult question is how to create an evaluation process that can improve the quality of judging, include an appropriate amount of public accountability, and not impair independent professional judgment to decide cases correctly under the law. It is beyond the scope of this work to tackle such questions. Nevertheless, a few suggestions are possible. First, input should be sought from the full array of persons who interact with the judge in an official capacity, including lawyers, other judges, litigants, witnesses, jurors and court personnel. Bar polls, which gather input only from practicing lawyers, arguably are too narrow, may reflect lawyers’ self-interest, and lack public credibility. Second, the evaluative criteria should be defined carefully, to exclude the risk of negative assessment for professionally competent but unpopular decisions. For example, the ABA Judicial Performance Review Guidelines identify “integrity; knowledge and understanding of the law; communication skills; preparation; attentiveness; control over proceedings; managerial skills; punctuality; service to the profession and public; and effectiveness in working with other judges.” Third, the system should be structured to distinguish between information gathered for the purpose of improving individual performance (especially anonymous comments and personal

for voters as to whether individual judge meets judicial performance standards; promotes public accountability without unduly interfering with independence).

256. See Aspin & Hall, supra note 250, at 313. Significant differences exist among bar polls. Some have little credibility, and are seen as popularity contests among lawyers. See id. Positive ratings in bar polls may have less influence than negative ratings on the outcome of elections. See id. at 310, 314. The Houston Bar Association administers a Judicial Evaluation Questionnaire completed by lawyers who certify their opinions are based on firsthand knowledge with the various judges. Trial judges are rated overall and on specific aspects of their conduct, including: follows the law; decisive and timely rulings; courtesy and attentiveness; impartiality; efficient use of attorneys’ time; appropriate use of magistrates; and preparedness. Appellate judges are rated overall: attentiveness to oral arguments; constructive interaction during oral arguments; reasoning, clarity and soundness of written opinions; impartiality and open-minded on legal issues. (copy on file with author).

interviews) and that which is suitable for public distribution to educate the electorate.

V. CONCLUSION

I conclude where I began, with a bit of whimsy. Winnie-the-Pooh’s simple wisdom can help shed light on the ordinary way of doing things. And so, I suggest that states rethink why, and whether it is a good thing that judicial selection has become so politicized. If, as I think it is, the mainstream of judging is about being fair, impartial, honest, compassionate, legally competent and administratively efficient, then why should judicial selection be relegated to the vagaries of a process deeply influenced by political considerations? If, indeed, we most highly value “equal justice under the law” could we not devise a selection process that strives to identify, from a more objective standpoint, which candidates are “best able and most qualified” to achieve the goals of wise, fair and representative judging? With some misgivings about the risk of abdicating important choices to other bureaucratic and arbitrary processes, I ask whether there are viable alternatives to the current, highly political selection systems.

Thoughtful observers probably agree on the broad qualifications: distinguished legal experience, integrity and judicial temperament, and overall an inclusive and independent judiciary. As always, the devil is in the details. The new ABA Selection Standards are on the right track, recommending that an independent and representative body evaluate the qualifications of judicial candidates before final selection by appointment or election. Might not the public be willing to delegate authority to a respected, politically independent and fairly representative entity charged with responsibility to evaluate prospective judges, according to publicly-announced, objective and inclusive criteria? This suggestion is hardly radical; it merely reinforces the importance of using sound personnel practices in making hiring decisions. Initial screening of candidates could be done through use of non-discriminatory and job-related standardized tests evaluating minimum expected competency in relevant areas of law and procedure. No veterans preference would give some categories of applicants a decisive advantage over others. Second tier screening

258. See, e.g., ABA Standards on State Judicial Selection, supra note 215.
259. See id.
could be done by evaluating candidates' verifiable credentials according to how well they satisfy the articulated criteria. After identifying those candidates who are most qualified, consideration could then be given to their judicial philosophy and approach to statutory and constitutional interpretation. Whether final selection is made through appointment or election, this tiered screening process would give the public greater assurance that those who take the bench will be able, wise and compassionate.
## APPENDIX A

### JUDICIAL SELECTION METHODS

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This table outlines various judicial selection methods in state courts across different states in the United States.
*Arizona uses Merit Selection for its most populated counties, Pima and Maricopa, and Non-Partisan Elections for its Superior Court Judges in the smaller, more rural counties.

† Missouri uses Merit Selection for its largest counties and Partisan elections for the less populated counties.

# Oklahoma uses Merit Selection for its appellate courts and statewide courts of limited jurisdiction. District Judges are elected on a Non-Partisan ballot.

In November 2000, Arkansas voters approved a judicial reform amendment to the state constitution which would [inter alia] provide for Non-Partisan judicial elections.