

# Keynote Address: Electoral Accountability and Judicial Independence

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*After more than two centuries, American states are still struggling to find the right system for choosing state judges. In the early Republic, nearly all judges were initially appointed, either by the Governor or the Legislature. Beginning in the 1840s, however, the notion of popular elections as a way to improve the judiciary found widespread support. To reduce the influence of party bosses and eliminate partisan sweeps, the Progressives succeeded in making many of these elections non-partisan during the early twentieth century. But these elections often drew little voter interest, and reformers continued their march for a better way. In the 1960s and 1970s, it appeared that "merit selection," or the Missouri Plan, would sweep the country. But legislators and voters became disillusioned with "blue ribbon" nominating panels and pro forma retention elections, and the movement stalled. Meanwhile, judicial campaigns continue to become "nastier, noisier, and costlier," and public confidence in judicial fairness and impartiality suffers. The author, while still personally favoring merit selection, submits that public funding of judicial races might be a new paradigm, and that other reforms are available to mitigate the worst features of the current system.*

I am very honored to have been asked to participate in this remarkable symposium on judicial independence. I congratulate the League of Women Voters of Ohio, the John Glenn Institute, and The Ohio State University Moritz College of Law on undertaking this important initiative. I hope that this conference, and the published papers that come from it, will be of real assistance in understanding and fostering the elusive bundle of concepts we call judicial independence.

It is particularly important that Americans preserve judicial independence because, as Shirley Abrahamson reminded us at lunch, the whole world is watching. An independent judiciary has been the facet of American government most admired and most emulated by emerging democracies. Justice Breyer has described this as a "movement, almost worldwide, toward a realization that

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people's liberty and their prosperity depend in part upon strong judicial institutions."<sup>1</sup>

If any judiciary is to meet these lofty goals, it must operate with some degree of independence from both public and private pressures. Judges must be free, and must be perceived as being free, to render their decisions based on the law and facts of each case. To help this process, judges should enjoy some institutional insulation from popular or political reprisal for unpopular decisions.

At the same time, judges must be accountable for the performance of their official duties. Lazy, incompetent or biased judges must be disciplined or removed. Nothing is more corrosive to democracy than the roving judge, alert for the slightest pretext to impose his or her personal views upon a helpless public. In short, judicial independence must be balanced by judicial accountability.

The three branches of government struggle with finding this balance when they approach issues like court funding, court structure, and court administration. Earlier today, Chief Justice Abrahamson recounted some of the historic clashes between the courts and the other branches at the federal level, and Professor Geyh referenced some of the current battles in the states.

Perhaps nowhere is the tension between independence and accountability more visible than in the ongoing struggle over state judicial selection. After more than two hundred years, Americans still have not reached a consensus on the best method for choosing and retaining the one branch of government that must operate above politics: the judiciary. As I shall recount, there have been brief periods in history when reformers have coalesced around a particular approach, but that consensus has never persisted for more than several decades.

In the early Republic, no judges, or at least no judges with any substantial jurisdiction, were elected. The federal constitution provided for executive appointment with senatorial confirmation for a life term during good behavior,<sup>2</sup> while most states opted for legislative elections or appointments for limited terms.<sup>3</sup> But Georgia broke new ground in electing its trial judges in 1812,<sup>4</sup> and Indiana followed suit in 1816.<sup>5</sup> Mississippi's 1832 Constitution made all judges elected,<sup>6</sup> as did New York's in 1846.<sup>7</sup> After that, every new state until Alaska provided for elected judges, and more than two-thirds of the existing states moved to judicial elections in the fifteen years between the New York Convention and

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<sup>1</sup> Stephen G. Breyer, *Comment: Liberty, Prosperity, and a Strong Judicial Institution*, 61 LAW & CONTEMP. PROBS. 3, 3 (1998).

<sup>2</sup> U.S. CONST. art. II, § 2, cl. 2; *id.* art. III, § 1.

<sup>3</sup> *See, e.g.*, Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 12-13 (1995).

<sup>4</sup> GA. CONST. of 1798, amend. III (1812).

<sup>5</sup> IND. CONST. of 1816, art. V, § 7.

<sup>6</sup> MISS. CONST. of 1832, art. IV, §§ 2, 11, 16.

<sup>7</sup> N.Y. CONST. of 1846, art. VI, §§ 2, 4, 12, 14.

the outbreak of the Civil War.<sup>8</sup> Among the states making this change were Texas in 1850<sup>9</sup> and Ohio in 1851.<sup>10</sup>

Logically, one might suppose that the move to elections was purely an assertion of increased accountability—that constitutional framers and ratifiers finally tired of arrogant, activist judges. This is the traditional explanation, articulated by scholars like Evan Haynes<sup>11</sup> and James Willard Hurst,<sup>12</sup> and no doubt it is at least in part true. Many framers shared the resentment of the Kentucky delegate to that state's 1849–1850 Convention who called appointed judges “the last dying kick of aristocracy.”<sup>13</sup>

But in recent years, other plausible explanations have been offered. Political scientist Kermit Hall has concluded that many reformers supported elections as a way to enhance judicial independence. Hall, formerly the provost of The Ohio State University, asserts that “[p]roponents of popular election insisted that the appellate judiciary had suffered because governors and legislators had distributed judgeships on the basis of ‘service to the party’ rather than on the ‘legal skills or judicial temperament’ of appointees.”<sup>14</sup> Thus, “[t]he rise of popular, partisan election of appellate judges is best understood as an essentially thoughtful response by constitutionally moderate lawyers and judges . . . [who] wanted the appellate judiciary to command more, rather than less, power and prestige.”<sup>15</sup> One Ohio advocate of judicial elections inquired if it were not true that “a blindfold[ed] man might . . . go into a crowd of fifty and select, at random, a man competent to fill the office of Governor of Ohio,” while a Supreme Court judge must possess “learning, ability, experience, purity of character.”<sup>16</sup>

<sup>8</sup> Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082–83 (1966); see also John L. Hill, Jr., *Taking Texas Judges out of Politics: An Argument for Merit Selection*, 40 BAYLOR L. REV. 339, 346 (1988).

<sup>9</sup> TEX. CONST. of 1845, amends. 1, 2 (1850).

<sup>10</sup> OHIO CONST. of 1851, art. III, § 1; *id.* art. IV, §§ 2, 3.

<sup>11</sup> EVAN HAYNES, *THE NATIONAL CONFERENCE OF JUDICIAL COUNCILS, THE SELECTION AND TENURE OF JUDGES* 89–90 (1944).

<sup>12</sup> JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 140–41 (1950).

<sup>13</sup> Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 191–92 nn.11–14 (1993) (quoting remarks of Richard Gholson in REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY, 1849–1850, at 297 (1850)).

<sup>14</sup> Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Justices, 1850–1920*, 1984 AM. B. FOUND. RES. J. 345, 348 (quoting SAMUEL MEDARY, *THE NEW CONSTITUTION* 171 (1849)).

<sup>15</sup> *Id.* at 347–48.

<sup>16</sup> 1850–1851 2 OHIO CONV. DEB. 354 (remarks of John L. Green, Jan. 20, 1851).

Yet another scholar, Caleb Nelson, has more recently asserted that the move to elections was intended neither to weaken nor to strengthen judicial power per se, but rather was part of a larger movement “[to] weaken[ ] officialdom as a whole” and “rein in the power of all officials to act independently of the people.”<sup>17</sup> As one Kentucky delegate, quoted by Nelson, complained: “[W]e have provided for the popular election of every public officer save the dog catcher, and if the dogs could vote, we should have that as well.”<sup>18</sup>

Whatever the reason, elected judges met with initial satisfaction, but disillusion soon set in. Many eminent judges, including Chief Justices and law school namesakes Thomas Cooley in Michigan and William Mitchell in Minnesota, were tossed out in partisan sweeps.<sup>19</sup> To some reformers’ apparent surprise, political caucuses and conventions proved as adept as governors in rewarding faithful hacks with judicial sinecures.<sup>20</sup> By the beginning of the twentieth century, many leaders of the bench and bar were calling for change.<sup>21</sup>

Many states, particularly those most influenced by the Progressive movement, moved to non-partisan elections, sometimes held at different times than other elections. Ohio adopted this change in 1911.<sup>22</sup> But nonpartisan elections had problems of their own, including low voter interest and the lack of a ready pool of campaign volunteers.<sup>23</sup>

In 1940, Missouri became the first state to adopt the so-called merit selection system for some of its judges.<sup>24</sup> Long advocated by the American Judicature Society, the plan called for initial appointment of judges by the Governor from a short list of nominees submitted by a panel of worthies, then periodic “yes/no”

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<sup>17</sup> Nelson, *supra* note 13, at 224.

<sup>18</sup> *Id.* at 207 (citing Kermit Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337, 340-41 (1983)).

<sup>19</sup> See Everett S. Brown, *The Contribution of Thomas M. Cooley to Bryce's "American Commonwealth"*, 31 MICH. L. REV. 346, 346 n. 1 (1933); Kent A. Gernander, *Minnesota Bench & Bar, President's Page: Judicial Elections*, at [http://www2.mnbar.org/benchandbar/2000/oct00/prezpage\\_10-00.htm](http://www2.mnbar.org/benchandbar/2000/oct00/prezpage_10-00.htm) (October 2000).

<sup>20</sup> See John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 842-43 (1990); Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969 (1988).

<sup>21</sup> See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUD. SOC'Y 178, 186 (1936-1937) (originally published in A.B.A. PROC. 1906, at 395); Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 317 (1997); Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?*, 49 U. MIAMI L. REV. 1, 6 (1994).

<sup>22</sup> 1911 Ohio Laws 5 (providing for nonpartisan elections in Ohio).

<sup>23</sup> See Daugherty, *supra* note 20, at 317; Winters, *supra* note 8, at 1083.

<sup>24</sup> Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128, 131 (1990); Daugherty, *supra* note 20, at 318.

retention elections.<sup>25</sup> Most new constitutions in the 1960s and 1970s adopted this system,<sup>26</sup> and several states amended their constitutions to provide for it.<sup>27</sup> But critics asserted that the scheme was in essence a lifetime appointment, and indeed in many states no judge ever failed to be retained.<sup>28</sup> Many uninspiring or even corrupt judges stayed in office because the bar was unwilling to mount campaigns to beat somebody with nobody. In the 1980s and 1990s, three states adopted some form of merit selection,<sup>29</sup> but the movement to any kind of merit system stalled with crushing defeats at the polls in Ohio in 1987<sup>30</sup> and Florida in 2000.<sup>31</sup>

In many states, the judicial selection system still works to provide a stable, competent judiciary. But whether a judge faces a “good government” non-partisan election, as in Wisconsin<sup>32</sup> or Idaho,<sup>33</sup> a “phony” non-partisan election,

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<sup>25</sup> See Daugherty, *supra* note 20, at 318–19; Grodin, *supra* note 19, at 1971.

<sup>26</sup> See generally William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 340 (1987).

<sup>27</sup> See, e.g., Goldschmidt, *supra* note 21, at 10 (indicating that Iowa and Nebraska amended their constitutions to provide for the merit selection system for judges); A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643 (1998) (noting that Arizona amended its judiciary article in 1974); George Bundy Smith, *Essays on the Court of Appeals: Choosing Judges for a State's Highest Court*, 48 SYRACUSE L. REV. 1493, 1494 (1998) (noting N.Y. amended art. VI, § 6 to provide for merit selection). See also Am. Judicature Soc., *Characteristics of Merit Selection Plans: Scope of the Plans* (2002) (unpublished table in possession of the author and available from the American Judicature Society).

<sup>28</sup> See Bradley C. Canon, *Judicial Election and Appointment at the State Level: Commentary on State Election of Judges*, 77 KY. L.J. 747, 750 (1989).

<sup>29</sup> In 1988, New Mexico enacted a hybrid system of an initial partisan election followed by retention elections. N.M. CONST. art. VI, §§ 33–36; Leo M. Romero, *Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election*, 30 N.M. L. REV. 177, 177 (2000). In 1994, Rhode Island adopted a “pure” merit selection system that includes lifetime tenure without retention elections. R.I. CONST. art. X, §§ 4, 5; see Barton P. Jenks, III, *Rhode Island's New Judicial Merit Selection Law*, 1 ROGER WILLIAMS U. L. REV. 63 (1996); see also TENN. CODE ANN. § 17-4-101 to -116 (1994) (extending merit selection from intermediate appellate judges to its supreme court).

<sup>30</sup> Voters defeated Issue 3, a ballot initiative to adopt merit selection for appellate judges, by nearly a two to one margin. See John D. Felice, et al., *Judicial Reform in Ohio*, in JUDICIAL REFORM IN THE STATES 51, 65 (Champagne & Haydel eds., 1993).

<sup>31</sup> Am. Judicature Soc., *Judicial Selection in the States: Recent Failed Reforms* (2002), at <http://www.ajs.org/js/FL.htm> (noting that Florida voters in each of the state's sixty-seven counties overwhelmingly rejected a constitutional option to utilize the merit selection process in selecting circuit and county court judges).

<sup>32</sup> WIS. CONST. art. VII, § 4; Michael Koehler, *Baseball, Apple Pie and Judicial Elections: An Analysis of the 1967 Wisconsin Supreme Court Race*, 85 MARQ. L. REV. 223, 225 (2001).

<sup>33</sup> IDAHO CONST. art. V, § 6.

as in Michigan<sup>34</sup> or Ohio,<sup>35</sup> a merit retention election, as in Florida<sup>36</sup> or Tennessee,<sup>37</sup> or a blatantly partisan election, as in Alabama<sup>38</sup> or Texas,<sup>39</sup> modern judicial elections have been manipulated and abused in ways that diminish respect for the rule of law. Each election cycle, additional states experience divisive, expensive, agenda-driven campaigns, increasingly accompanied by independent expenditures from national interest groups.<sup>40</sup> The problem is now national in scope, and it demands national attention. If we do nothing, we risk not just an erosion, but indeed a meltdown in respect for the courts and the rule of law.

Why did a judicial election system that reportedly worked well in Millard Fillmore's day cause dissatisfaction by the end of the nineteenth century, and become almost totally broken now? There may be many reasons, but I believe that, more than anything else, fundamental changes in the electoral process have made the traditional judicial election methods untenable. Let me try to explain.

In the 1850s, elections still had the flavor of Athenian democracy, or at least a New England town meeting. There were no filing deadlines, no secret ballots, no billboards. Aside from a few handbills and some libations for thirsty voters at the polls, candidates incurred no expenses. Small populations and a restricted franchise resulted in a very small electorate, who knew most of the candidates personally or by reputation. The Ohio Constitution of 1851, for example, provided for five Supreme Court justices and twenty-seven common pleas judges elected from nine districts.<sup>41</sup> Texas, being smaller, had even fewer judges.<sup>42</sup>

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<sup>34</sup> MICH. CONST. art. VI, § 2; Anthony Champagne, *National Summit on Improving Judicial Selection: Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1418–19 (2001); Marcia L. Proctor, *Michigan Judicial Selection History*, 74 MICH. B.J. 1010, 1011–12 (1995).

<sup>35</sup> Nicole C. Allbritain, *Noble Lies and the First Amendment: A Symposium on the Death of Discourse: Comment: One Step Closer to Merit-Based Judicial Selection: Ohio's New Limitations on Judicial Campaign Contributions and Expenditures*, 64 U. CIN. L. REV. 1323, 1323–24 (1996); Champagne, *supra* note 34, at 1418–19.

<sup>36</sup> FLA. CONST. art. V, § 10; Martha W. Barrett, *The 1997–98 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411, 412 (2000).

<sup>37</sup> TENN. CODE ANN. §§ 17-4-101 to -116 (Supp. 1993).

<sup>38</sup> ALA. CONST. art. VI, § 152; Smith, *supra* note 27 at 1496; see also Scott William Faulkner, *Still on the Backburner: Reforming the Judicial Selection Process in Alabama*, 52 ALA. L. REV. 1269 (2001).

<sup>39</sup> TEX. CONST. art. V, § 2; see also Hill, *supra* note 8, at 348.

<sup>40</sup> See, e.g., Marlene Arnold Nicholson & Norman Nicholson, *Funding Judicial Campaigns in Illinois*, 77 JUDICATURE 294, 294–95 (1994); Traci V. Reid, *PAC Participation in North Carolina Supreme Court Elections*, 80 JUDICATURE 21 (1996); Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849. See also William Glaberson, *A Spirited Campaign for Ohio Court Puts Judges on New Terrain*, N.Y. TIMES, July 7, 2000, at A15; William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1.

<sup>41</sup> OHIO CONST. of 1851, art. IV, §§ 2, 3 (as ratified in 1851).

Today, urban voters face massive ballots. In 1994, for example, the general election ballot in Harris County, Texas featured fifty-five contested judicial races.<sup>43</sup> Most voters probably did not know any of the candidates, and many may not have recognized a single candidate's name. Almost without exception, judicial campaigns generate few issues and no free media. Candidates must inform the voters through their own campaigns, and that isn't easy. If judicial candidates could get a few minutes on the public address systems during the Michigan-Ohio State halftime, maybe they could get their message out. But in a nation that increasingly is "bowling alone,"<sup>44</sup> the traditional venues of county fairs, Rotary meetings and political rallies are almost pathetically ineffective in reaching voters. As the Supreme Court observed in *Buckley v. Valeo*,<sup>45</sup> "virtually every means of communicating ideas in today's mass society requires the expenditure of money."<sup>46</sup> You may call a candidate who thinks otherwise many things, but you probably will never call him or her "judge."

This state of affairs has diminished our judiciary in many ways, of which I will mention three. First, it discourages many of our best lawyers from becoming state judges. Whenever a federal bench opens in Texas, literally dozens of qualified lawyers make known their availability to serve. Justices on both the Ohio and Texas Supreme Court are currently awaiting Senate confirmation for a "promotion" to an intermediate federal bench.<sup>47</sup> Open seats for state courts seldom draw a crowd. Two Texas Supreme Court justices are retiring at the end of their terms this year; a total of four Republicans and two Democrats filed to succeed them.

Second, increasingly competitive elections have destabilized the judiciary, at least in some states. We learned today from Professor Baum that about 20% of partisan judges are defeated if they are opposed for re-election. In Texas, it has

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<sup>42</sup> See TEX. CONST. of 1876, art. V, §§ 2, 7 (providing for only three Supreme Court justices and twenty-six district judges).

<sup>43</sup> *Election At a Glance*, HOUS. CHRON., Nov. 10, 1994, at 31A.

<sup>44</sup> See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

<sup>45</sup> 424 U.S. 1 (1976) (per curiam).

<sup>46</sup> *Id.* at 19.

<sup>47</sup> President George W. Bush, Remarks by the President During Federal Judicial Appointees Announcement (May 9, 2001), available at <http://www.whitehouse.gov/news/releases/2001/05/print/20010509-3.html> (President George W. Bush nominated Texas Supreme Court Justice Priscilla R. Owen to the Fifth Circuit and Ohio Supreme Court Justice Deborah Cook to the Sixth Circuit on May 9, 2001. At the time this speech was given, the Senate Judiciary Committee had not scheduled hearings on either nominee). On September 5, 2002, the Committee rejected Justice Owen's nomination by a 10-9 vote along party lines. See Gary Martin, *Senate Committee Rejects Texas Judge for Court of Appeals*, SAN ANTONIO EXPRESS NEWS, Sept. 6, 2002, at 3A. Both judges were renominated by President Bush on January 7, 2003. See Julie Mason, *White House Again Taps Owen, Pickering*, HOUS. CHRON., Jan. 8, 2003, at 1A.

been higher. Between 1980 and 2000, 208 state trial and appellate judges have been defeated at the polls.<sup>48</sup> That amounts to a loss rate of 29% of our district judges and 41% of our appellate judges when opposed.<sup>49</sup> Need I add that performance in office has seldom, if ever, been decisive to the outcome? When this electoral instability affects the state's supreme court, it is particularly likely to produce jurisprudential instability. Who can argue that more pronounced swings have not occurred in the judicial philosophy of elected high courts in Texas, Ohio, Michigan, Alabama, and Mississippi, for example, than in any five merit selection supreme courts that one cares to name?

Third, and most significantly, judicial elections are undermining public confidence in the fairness and impartiality of the courts. Long ago, Chief Justice John Jay said, "[n]ext to doing right, the great object in the administration of justice should be to give public satisfaction."<sup>50</sup> That is because the authority of "the least dangerous branch" rests almost entirely on the voluntary compliance with its rulings by the other branches of government and by the public at large. How can judges convince the public that their only constituency is the law when their tenure in office depends on campaign contributions from lawyers and litigants?

There is widespread public skepticism that elected judges can be more than mere politicians in robes. While general public confidence in our courts remains high, polls commissioned for the National Center for State Court's initiative on Public Trust and Confidence in the Courts reveal that about three-fourths of Americans believe that judicial outcomes are affected by campaign contributions.<sup>51</sup> A new nationwide poll, released just last month by Greenberg Quinlan Rosner Research for the Justice at Stake Campaign, confirms those findings.<sup>52</sup> Moreover, the Greenberg poll showed additional, albeit inconclusive,

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<sup>48</sup> Tex. Office of Court Admin., *Incumbents in Texas Judicial Races, 1980–2000* (Dec. 7, 2000) (unpublished study) (on file with author).

<sup>49</sup> *Id.* The continuity of the Texas judiciary has been salvaged only because, during the same period, 69% of the district judges, and 43% of the appellate judges had neither a primary nor a general election opponent.

<sup>50</sup> Chief Justice William H. Rehnquist, Keynote Address, National Conference on Public Trust and Confidence in the Justice System (May 15, 1999) (transcript on file with author) (quoting Chief Justice John Jay).

<sup>51</sup> NAT'L CTR. FOR STATE COURTS, *HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 8* (1999), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PublicViewCrtsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf) (finding that 78% of respondents agree that "Elected judges are influenced by having to raise campaign funds.").

<sup>52</sup> Memorandum from Stan Greenberg, Chairman and CEO, Greenberg Quinlan Rosner Research, Inc. & Linda A. DiVall, President, American Viewpoint, to Geri Palast, Executive Director, Justice at Stake Campaign 1 (Feb. 14, 2002), <http://www.greenbergresearch.com/publications/reports/rJASsummary.pdf> [hereinafter Greenberg Memorandum] ("Seventy-six percent of voters . . . believe that campaign contributions made to judges have at least some influence on their decisions.").

evidence of further public cynicism about the courts in states with elected judiciaries.<sup>53</sup>

Yet the Greenberg poll shows clearly that voters cherish their franchise and in elected states they generally prefer to retain it by a two to one margin.<sup>54</sup> They support merit selection only when the question stresses the component that every judge gets to face every voter in the district at frequent intervals.<sup>55</sup>

If merit selection is a good idea that cannot be compressed into a marketable "sound bite," what, then, is to be done? First, we can reduce the number of judicial elections by lengthening judicial terms.<sup>56</sup> Second, where the Voting Rights Act permits, we can enhance qualifications for judicial office. Third, we

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<sup>53</sup> Greenberg Quinlan Rosner Research, Inc., *Justice at Stake: National Surveys of American Voters and State Judges 49* (poll conducted Oct. 30 - Nov. 7, 2001; results published Feb. 2002) (on file with author). In particular, 37% of respondents from states with elected judges believed that judicial decisions were based more on politics and pressure than on facts and law, while only 23% of respondents from states with appointed judges felt the same way. *Id.* In fairness, however, the poll found no statistically significant difference on several other questions involving judicial fairness and integrity.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* Interestingly, the level of voter support for merit selection in elected states appears to depend on how much the question emphasizes the fact that voters will have regular opportunities to recall every judge. In the Greenberg poll, this issue was covered in three different questions. Half of the respondents were asked to choose which of the following two statements came closer to their own view: (1) "judges in my state should be elected to office" and (2) "judges in my state should be appointed to office." In elected states, voters preferred election 78% to 17%. *Id.* The other half of the respondents were asked to choose between these two statements: (1) "judges in my state should be elected to office" and (2) "judges in my state should be initially appointed to office, then voters should have a chance to decide whether the judge stays in office." In elected states, voters still preferred election, but only by a margin of 55% to 40%. *Id.* All respondents were also asked whether they would support the following proposal:

Under this proposal, a non-partisan panel of citizens, legal professionals, and civic leaders evaluates and recommends potential judges to the governor. The governor then chooses a nominee from the list who must then be confirmed by the state legislature. After each term, the public then votes on whether a judge should keep the seat or be removed from office. If a judge is rejected, the selection process starts again.

*Id.* In elected states, voters supported the proposal 70% to 27%. This would suggest that, while voters prize the right to vote on judges, they would be more than satisfied with retention rather than contested elections. Nevertheless, the difficulty of explaining merit selection remains the chief obstacle to its adoption. When the question is asked in twenty-four words, the voters don't buy it; it takes a seventy-word explanation to make merit selection palpable.

<sup>56</sup> Currently, elected states most commonly provide for six-year terms for their highest courts. The longest elected terms are in West Virginia, with twelve-year terms, and in Illinois, Louisiana, Pennsylvania, and Wisconsin, with ten-year terms for high-court judges. AM. JUDICATURE SOC'Y, *JUDICIAL SELECTION AND THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS* (2002), available at [http://www.ajs.org/cart/thumbnail.asp?subject\\_id=3](http://www.ajs.org/cart/thumbnail.asp?subject_id=3) (available for purchase) (on file with author).

can elevate the tenor of judicial campaigns by clarifying our codes of judicial conduct,<sup>57</sup> improving our systems of judicial discipline, encouraging voluntary aspirational codes, and by following Ohio's lead in creating citizens' campaign monitoring groups.<sup>58</sup> To the extent the United States Supreme Court will permit, we should require disclosure of all independent expenditures that pertain to judicial elections or elected judges. Fourth, and of paramount importance, we should educate voters about judicial candidates in ways that reduce the need for campaign contributions. Every state should prepare and distribute judicial voters' guides, at no cost to the candidates, in print and electronic form. Congress should provide a free frank for mailing these guides. The media and other groups should sponsor candidate forums and debates, which should be broadcast on television or radio and over the Internet. Finally, we should work toward full public funding of judicial elections, at least for the highest state courts.

The Greenberg poll shows widespread public support for public funding of judicial races: 80% are for it, and 77% would favor eliminating any private contributions in such a system.<sup>59</sup> Interestingly, an accompanying Greenberg poll of over 2400 state judges revealed support for full public funding by 61% to 29%, while merit selection was opposed, 50% to 45%.<sup>60</sup> The ninety-nine Ohio judges surveyed favored public financing, 57% to 39%, while they opposed merit selection, 30% to 66%.<sup>61</sup> Even the 110 Texas judges favored public financing by a 10% margin but merit selection, long the first choice of our reform movement, by only a statistically insignificant 1%.<sup>62</sup>

Just as partisan elections swept the country in the mid-1850s, and nonpartisan elections and merit selection later found favor, it may be time for a new paradigm in state judicial selection. At least at the supreme court level, it seems that the

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<sup>57</sup> This speech predated the recent United States Supreme Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (holding that Canon 5(1) of Minnesota's code of Judicial Conduct violated the First Amendment because it prohibited judicial candidates from announcing their views on disputed legal and political issues).

<sup>58</sup> See *Report of the Citizens' Committee on Judicial Elections (Ohio) (1995)*, PBS FRONTLINE: JUSTICE FOR SALE: SUMMARIES OF SELECTED STUDIES, at <http://www.pbs.org/wgbh/pages/frontline/shows/justice/que/studies.html> (1999).

<sup>59</sup> GREENBERG QUINLAN ROSNER RESEARCH & AMERICAN VIEWPOINT, JUSTICE AT STAKE CAMPAIGN: JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE (National Survey Results) 11 (2001) (questions 75 & 78), available at <http://www.greenbergresearch.com/publications/reports/fqJASnational.pdf>.

<sup>60</sup> GREENBERG QUINLAN ROSNER RESEARCH & AMERICAN VIEWPOINT, JUSTICE AT STAKE CAMPAIGN: JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE (State Judges Survey Results) 12–13 (2002) (questions 35 & 36), available at <http://www.greenbergresearch.com/publications/reports/fqJASjudges.pdf>.

<sup>61</sup> Greenberg Memorandum, *supra* note 52.

<sup>62</sup> *Id.*

paradigm could be public financing.<sup>63</sup> State high courts make enough public policy through their judicial opinions and their administrative responsibilities that popular choice can be intellectually defended, and the state could fund this limited number of contests at minimal expense. For lower courts, I believe that merit selection is still the most viable option. But if states are not ready to go that far, certainly the incremental reforms that Professor Schotland has advocated should be implemented without delay. The ultimate goal is judicial independence, and this Symposium will surely help advance the dialogue of how best to achieve it.

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<sup>63</sup> As this article was going to press, the North Carolina General Assembly passed a bill adopting voluntary full public financing for appellate judicial campaigns. The bill was passed by both the House and the Senate and was presented to the Governor on October 3, 2002. S. 1054, Gen. Assem., 2001–2002 Sess. (N.C. 2002).

