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CONTENTS

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# JUDICIAL ACCOUNTABILITY MUST SAFEGUARD, NOT THREATEN, JUDICIAL INDEPENDENCE: AN INTRODUCTION

SANDRA DAY O'CONNOR†

This issue of the *Denver University Law Review* is devoted to an important subject: judicial accountability. Properly understood, judicial accountability is a fundamental democratic requirement of our federal and State governments. Put simply, judges must be accountable to the public for their constitutional role of applying the law fairly and impartially. Judicial accountability, however, is a concept that is frequently misunderstood at best and abused at worst. It has become a rallying cry for those who want in reality to dictate substantive judicial outcomes. The notion of accountability is superficially attractive: judges who reach outcomes that part ways with the will of the majority—often mislabeled "activist" judges—should be held "accountable."

This simplistic understanding of accountability—judicial accountability for the majority's desired substantive outcomes—ignores the role of the judiciary and indeed the very structure of our democratic governments, State and federal. Worse, this perversion of the concept of judicial accountability threatens to undermine the safeguards of democracy and liberty that were so brilliantly conceived by those who first designed our governmental institutions and drafted our Constitution. In short, "[p]opulist, substance-based accountability for judges is precisely what the Founders feared[.]"[1] The Framers placed at the core of the judiciary's design the concept of judicial independence as a means to guarantee the Rule of Law. Judicial independence is the vital mechanism that empowers judges to make decisions that may be unpopular but nonetheless correct. In so doing, the judiciary vindicates the principle that no person or group, however powerful, is above the law. And it gives life to the promise that the Rule of Law safeguards the minority from the tyranny of the majority.[2]

Alexander Hamilton, one of the Framers of the United States Constitution, wrote in *The Federalist No. 78* to defend the role of the judiciary in the constitutional structure. He emphasized that "'there is no liberty, if the power of judging be not separated from the legislative and

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† United States Supreme Court Justice, Retired.

1. Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 8 (2008).

2. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Ch. VI (Henry Reeve trans., 1835).

executive powers.' . . . [L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments."[3] Only with judicial independence can the reality and the appearance of zealous adherence to the Rule of Law be guaranteed to the people. As former U.S. President Woodrow Wilson wrote, government "keeps its promises, or does not keep them, in its courts. For the individual, therefore, . . . the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts."[4]

This principle undergirds the place of the judiciary in the United States. The Founders of the United States recognized that it is essential to the effective functioning of the judiciary that it not be subject to domination by other parts of the government. To accomplish this goal, the United States Constitution established an independent federal judiciary by separating the law-making function of the legislative branch from the law-applying role of the judicial branch. This separation of the legislative and judicial powers has proven essential in maintaining the Rule of Law. When the roles of lawmaker and judge are played by different state actors, the danger of government arbitrariness is greatly diminished. When the power to make laws is separated from the power to interpret and apply them, the very foundation of the Rule of Law—that controversies are adjudicated on the basis of previously established rules—is strengthened.

An independent judiciary requires both that individual judges are independent in the exercise of their powers, and that the judiciary as a whole is independent, its sphere of authority protected from wrongful interference by the other two branches of government. Judicial independence has both individual and institutional aspects. As for the independence of individual judges, there are at least two avenues for securing that independence: First, judges must be protected from the threat of reprisals, so that fear does not direct their decision-making. Second, the method by which judges are selected, and the ethical principles imposed upon them, must be constructed so as to minimize the risk of corruption and outside influence. The first endeavor is to protect judicial independence from outside threats. The second is to ensure that judicial authority is not abused, and it is the core concern of the enterprise of judicial accountability.

I regret that threats to judicial independence seem to be occurring with record frequency. Members of Congress have faulted the courts for their decisions on various issues. There have been demands for "mass

3. THE FEDERALIST NO. 78, at 425 (Alexander Hamilton) (E.H. Scott ed., William S. Hein & Co. 2002).

4. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 17 (Columbia Univ. Press 1911).

impeachment," stripping the courts of jurisdiction to hear certain types of cases, and using Congress's budget authority to punish offending judges. The pages that follow contain some of the most egregious examples. Judge Edwin Felter discusses South Dakota's 2006 "Jail for Judges" Initiative, which would have made the State's judges liable in criminal and civil actions for judicial acts deemed improper by dissatisfied litigants.[5] Former Colorado Supreme Court Justice Rebecca Love Kourlis and Jordan Singer cite House Majority Leader Tom DeLay's remarks that "the time will come" for federal judges who refused to restore Terri Schiavo's feeding tube "to answer for their behavior" and that the federal judiciary was "arrogant, out-of-control, [and] unaccountable."[6] This was after the federal courts affirmed the state courts in the Terri Schiavo case,[7] under the review required by Congress's one-time only statute.[8] Unfortunately there are many more examples.

In all the federal courts, including the Supreme Court, death threats have become increasingly common. Judge Greer, who handled the Schiavo case for over a decade, received many menacing e-mails and death threats. We've seen this before—Justice Hugo Black often wore a chest protector provided by the Secret Service when he visited Birmingham; my former colleague Harry Blackmun got death threats because of *Roe* v. *Wade*, and his living room window was once shattered by a gun shot. Recently, we saw a U.S. lawmaker go as far as to suggest that completed acts of violence against judges and their families were motivated by ideological disagreement with their judicial decisions.[9]

The exercise of independent judging in the face of such pressure requires great courage. Judges are called upon to stand firm against both the tide of public opinion and the power of the legislative and executive branches. A compelling example can be found in the 1954 decision of the Supreme Court in *Brown* v. *Board of Education*,[10] which declared that separate educational facilities for children of different races are inherently unequal. The case provoked a firestorm of criticism in much of the country. The unpopular decision was, however, the necessary first step in desegregating public institutions in the United States. It was an exercise of accountability to the Rule of Law over the popular will.

As you review the articles that follow, it is important to locate the notion of judicial accountability in this larger context. Keep in mind the

5. Edwin L. Felter, *Accountability in the Administrative Law Judiciary: The Right and the Wrong Kind*, 86 DENV. U. L. REV. 157, 159 (2008).

6. Kourlis & Singer, *supra* note 1, at 8 n.s.

7. Schiavo *ex rel.* Schindler v. Schiavo, 357 F. Supp. 2d 1378 (M.D. Fla. 2005), *aff'd*, 403 F.3d 1223 (11th Cir. 2005).

8. Act of Mar. 21, 2005, Pub. L. No. 109-3, 119 Stat. 15 (2005) ("An Act For the relief of the parents of Theresa Marie Schiavo.").

9. Editorial, *The Judges Made Them Do It*, N.Y. TIMES, Apr. 6, 2005, at A22, *available at* http://www.nytimes.com/2005/04/06/opinion/06wed1.html.

10. 347 U.S. 483 (1954).

cornerstone of judicial independence in our democratic governments, state and federal, and recognize that there are real, mounting threats to that independence. There are sound ways to achieve judicial accountability while safeguarding the role of our courts, accountability consistent with the larger role of the judiciary in our democratic society. True judicial accountability advances judicial independence and the paramount Rule of Law. "Accountability and independence are two sides of the same coin: accountability ensures that judges perform their constitutional role, and judicial independence protects judges from pressures that would pull them out of that role."[11] Indeed, as Kourlis and Singer suggest, the enterprise of accountability may greatly safeguard judicial independence; "[e]mbracing accountability for fair and efficient processes may help stave off irresponsible demands for accountability for decisional outcomes."[12]

True judicial accountability furthers another necessary characteristic of a functioning judiciary: judicial integrity. An independent *and* honorable judiciary is indispensable to the Rule of Law. Alexander Hamilton captured this necessity well when he wrote that a "steady, upright, and impartial administration of the laws" is essential because "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today."[13] If judges are to be the independent guardians of Rule of Law values, they must be incorruptible. Judges are entrusted with ultimate decisions over the life, freedoms, duties, rights, and property of citizens. But judges will never win the respect and trust of the citizens if they are subject to corrupt influences. Whenever a judge makes a decision for personal gain, or to curry favor, or to avoid censure, that act denigrates the Rule of Law. A third value may be advanced through judicial accountability properly construed: judicial competence. A fundamental value of the Rule of Law is that judicial decisions are not made arbitrarily, but through a process of reasoned decision making. The Rule of Law therefore requires that "official decisions be justified in law, and therefore be reasoned and nonarbitrary with respect to general legal standards."[14]

Independence, integrity, and competence, then, are the hallmarks of a judiciary committed to upholding the Rule of Law and they are the principles for which a judiciary should be held accountable. In the pages that follow, the contributors to this issue present and debate proposals to advance judicial accountability as experienced in our federal, State, and administrative courts.

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11. Sandra Day O'Connor & RonNell Anderson Jones, *Reflections on Arizona's Judicial Selection Process*, 50 ARIZ. L. REV. 15, 23 (2008).

12. Kourlis & Singer, *supra* note 1, at 9.

13. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 3, at 430.

14. Steven J. Burton, *Particularism, Discretion, and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 178, 187 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

Leading off, Kourlis and Singer propose a framework for a federal judicial performance evaluation program.[15] Because state judicial performance evaluation programs have been so successful, they argue, federal judges could equally benefit from them. Implementing a federal judicial performance evaluation program, they conclude, could preserve judicial independence, provide information for judges to improve their performance, and increase the public's confidence in the courts.

Next, using principles derived from international Rule of Law initiatives and international economic development, Norman L. Greene considers the relationship between fair and impartial courts and economic development in the United States.[16] Greene argues that state court judicial elections in the United States violate the Rule of Law and lead to adverse economic effects at home in much the same way they lead to adverse economic effects abroad. For the welfare of the economy, Greene concludes, Americans should eliminate judicial elections.

Washington State University Professor David C. Brody then analyzes the methods by which states assess the effectiveness of their judicial performance evaluation programs.[17] Brody surveys the conventions of judicial performance evaluations, and examines the impact that evaluations have on judicial accountability. He presents the results of a case study on the importance of methodology in judicial performance evaluations, and concludes that maintaining effective and trustworthy judicial performance evaluation programs will result in a desirable balance of judicial independence and judicial accountability.

Colorado administrative law judge Edwin L. Felter, Jr., then discusses and evaluates several forms of accountability in the administrative law judiciary, and compares them with prevalent forms of accountability in the judicial branch.[18] Felter argues that codes of judicial conduct, as well as formal enforcement mechanisms, work together to maintain a balance of independence and accountability in the administrative law judiciary.

Next up is James Bopp, Jr., who argued *Republican Party of Minnesota v. White*,[19] and Josiah Neeley. They probe commonly-cited criticisms of privately funded judicial election systems, and identify potential weaknesses of publicly funded judicial election systems.[20] Bopp and

15. Kourlis & Singer, *supra* note 1.

16. Norman L. Greene, *Perspectives from the Rule of Law and International Economic Development: Are there Lessons for the Reform of Judicial Selection in the United States?*, 86 DENV. U. L. REV. 53 (2008).

17. David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115 (2008).

18. Felter, *supra* note 5.

19. 536 U.S. 735 (2002).

20. James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 DENV. U. L. REV. 175 (2008).

Neeley argue that common criticisms of private funding are hyperbolic, and question the constitutionality of bans on personal solicitation of funds by judicial candidates, as well as the constitutionality of certain provisions of publicly-funded judicial elections. They conclude that restrictions on judicial candidates' speech will not effectively reform judicial elections.

Taking on Bopp and Neeley, Georgetown University Professor Roy A. Schotland argues that the personal solicitation of campaign funding by judges is problematic.[21] Schotland identifies "six fatal flaws" with Bopp and Neeley's argument, examining judges' personal solicitation of campaign funds in historical, constitutional, and pragmatic contexts.

Finally, former Tennessee Supreme Court Justice and current University of Tennessee Professor Penny J. White examines John Grisham's fictionalized account of a corporate defendant's scheme to oust a state supreme court justice and replace her with an appointee more friendly to the defendant's case.[22] White argues that situations similar to Grisham's fiction are not only plausible, but have repeatedly occurred. An "appeal to the masses" through the medium of fiction, she concludes, could spark greater public concern with the current state of the courts.

I am hopeful that some of these interesting proposals and ideas will help us stem the tide of threats to the independence of our judiciaries. The fair and effective functioning of our democracy demands as much.

21. Roy A. Schotland, *Six Fatal Flaws: A Comment on Bopp and Neeley*, 86 DENV. U. L. REV. 233 (2008).

22. Penny J. White, *"The Appeal" to the Masses*, 86 DENV. L. REV. 251 (2008).

# A PERFORMANCE EVALUATION PROGRAM FOR THE FEDERAL JUDICIARY

REBECCA LOVE KOURLIS[†] & JORDAN M. SINGER[††]

## INTRODUCTION

Federal judges enjoy a degree of freedom from structural political constraints unrivaled by nearly all of their counterparts on the state bench. Lifetime appointments shelter district and circuit judges from the fury of periodic elections or reappointment decisions, allowing them to focus on judging and other official duties rather than fundraising, electioneering, or testing the winds of prevailing electoral sentiment. Even federal magistrate and bankruptcy judges not subject to the guarantees of Article III are generally more insulated from politics than their state colleagues, as their appointments and reappointments remain largely internal matters.

Many commentators have praised Article III's guarantees of life tenure and freedom from salary cuts as essential tools to preserve judicial independence.[1] Far less frequently have the commentators explored the impact of these guarantees on judicial *accountability*. Rather, until relatively recently, the prevalent assumption (dating back to the original Federalist debates) has been that "the perceived need for judicial accountability to counterbalance life tenure, nonreducible salaries, and judicial review, began and ended with the impeachment mechanism."[2] A

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† Executive Director, Institute for the Advancement of the American Legal System, University of Denver. The Institute is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. The Institute provides principled leadership, conducts comprehensive and objective research, and develops innovative and practical solutions—all focused on serving the individuals and organizations who rely on the system to clarify rights and resolve disputes.

†† Director of Research, Institute for the Advancement of the American Legal System, University of Denver. The authors wish to thank the many judges, lawyers, and scholars whose comments helped us develop the proposal contained in this article, with special thanks to Steve Ehrlich and Russell Wheeler for their insightful comments on earlier drafts.

1. *E.g.*, Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 864 (2002) ("Life tenure may be the most important ingredient in assuring federal judicial independence."); *see also, e.g.*, Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 305 (2002); Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CAL. L. REV. 455, 455 (1999). *But see* Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2181 & n.35 (noting that life tenure and the guarantee of no reduction in salary is "only one such template" for establishing judicial independence).

2. Charles Gardner Geyh & Emily Field van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 51 (1998); *see also* James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1231 (2007) (noting that Hamilton himself "appears to have embraced impeachment-and-removal exclusivity as a feature of both the New York state constitution and the proposed federal Constitution . . . [and] did not identify any alternative judicial mode by which judges were to be removed from their offices."). *But see* Saikrishna Prakash

reexamination of that assumption, however, has been sparked in the early twenty-first century both by academic commentators and some in Congress. The last ten years alone have produced a host of creative—sometimes outrageous—alternatives to promote federal judicial accountability through (in most cases) a combination of executive and legislative power and populist sentiment. Some such proposals are effectively substance-neutral, most notably replacing life tenure with fixed, lengthy judicial terms.[3] Other proposals, however, are aimed at the substance of judicial decision-making, among them several schemes to strip federal courts of jurisdiction to hear certain types of cases.[4] Prominent politicians have even occasionally threatened impeachment—or worse—for federal judges as a punishment for decisions they did not find appropriate.[5] Contributing to the tenor of politically "accountable" judges is a federal judicial appointment process that has become increasingly partisan in the last two decades.[6]

Populist-based accountability for judges is precisely what the Founders feared, and should be avoided.[7] But this does not mean that judges should be exempt from any form of accountability to the citizens they serve. Rather, judges should remain accountable to the public for the

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& Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 72 (2006) (arguing that the Constitution permits Congress to "enact necessary and proper legislation permitting the removal of federal judges upon a finding of misbehavior in the ordinary courts of law.").

3. *See generally* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006); *see also* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006); James E. DiTullio & John B. Schochet, *Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004).

4. *See, e.g.*, Helen L. Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003 (2006); Caprice L. Roberts, *Jurisdiction Stripping in Three Acts—Three String Serenade*, 51 VILL. L. REV. 593 (2006).

5. *See, e.g.*, Mike Allen, *DeLay Apologizes for Comments on Judges*, WASH. POST, Apr. 14, 2005 (page unavailable) (quoting House Majority Leader Tom DeLay's remarks that "the time will come" for federal judges who refused to restore Terri Schiavo's feeding tube "to answer for their behavior" and that the federal judiciary was "arrogant, out-of-control, [and] unaccountable."); Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3 (noting that several Congressional leaders had called for the impeachment of Justice Anthony Kennedy after he authored an opinion forbidding capital punishment for juveniles); *see also* Editorial, *Unimpeachable Sources—Impeaching Federal Judge Thornton Henderson*, NAT. REV., Feb. 10, 1997 (suggesting that Judge Henderson should be impeached specifically for his decision enjoining California Proposition 209, which sought to prohibit racial preferences in certain programs).

6. *See* Steven B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 924-25 (2007) (arguing that "there is ample and persuasive evidence from both Supreme Court and lower federal court appointment experience that presidential pursuit of a policy agenda in making judicial nominations (and the reaction to it by Senators of the opposition party) is the chief cause of the politicization of judicial selection at the federal level."). *See also* NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE FEDERAL COURT APPOINTMENTS PROCESS 1-8 (2005).

7. *See* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The standard for good behavior for the continuance of office in the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body.").

*process* of adjudication. Judicial decisions, whatever their substantive impact, should be timely rendered, understandable, and supported by clear legal reasoning. Parties and their attorneys should be treated fairly and politely in the courtroom. And the judge should at all times earn the public trust and reputation that naturally comes with his or her position. These considerations locate accountability in actions that should be expected of any judge in any court, regardless of how the judge ascended to the bench or the length of his or her tenure. Embracing accountability for fair and efficient processes may help stave off irresponsible demands for accountability for decisional outcomes.

Accountability based on process measures is not new. Process-oriented criteria are employed regularly at the state court level to measure judicial performance, promote professional development among judges, and educate the public on the importance of accountability for the judicial process as opposed to the substance of specific decisions. At the federal level, however, judicial performance evaluation (JPE) programs remain an untried and (at least in a comprehensive form) unwelcome resource. This need not be the case. The time is ripe to separate the notions of judicial accountability for process and accountability for outcome, and for the federal judiciary carefully to consider process-oriented accountability through a regular performance evaluation program.

This Article begins with a discussion of the purpose and design of JPE programs, gleaned from more than thirty years of experience at the state level. Part II explores the sporadic history of federal JPE, and explains the historical objections to evaluation of federal judges. Part III proposes a series of pilot studies to test different methods of implementing JPE programs. Finally, Part IV discusses some of the more challenging issues presented by the establishment of a federal JPE program, and offers topics for further reflection and research.

## I. THE PURPOSE AND DESIGN OF JPE PROGRAMS

Judicial performance evaluation programs are currently in use in various forms in nineteen states, as well as the District of Columbia and Puerto Rico.[8] The details of these programs vary by jurisdiction, but all are designed to meet three fundamental objectives: (1) to provide constructive feedback to sitting judges to inform their professional development; (2) to educate the public on the work of its judges and foster appropriate expectations about the role of the judge; and (3) where applica-

8. See INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT app. A (2006) [hereinafter SHARED EXPECTATIONS].

ble, to provide relevant information to decision-makers concerning the retention or reappointment of judges.[9]

While there is no standard JPE program, most state programs share similar characteristics. Judges are evaluated periodically, either at the end of their terms or at another preset interval.[10] Evaluations are typically conducted by an independent, volunteer commission composed of attorneys, judges, and lay citizens.[11] In many states, each branch of government appoints a certain number of members to the commission, thereby reducing the risk of one appointing authority packing the commission with his or her selections.[12] Commission members usually serve staggered terms to further limit any potential mischief by any given appointing authority.[13]

The commission must evaluate judges on predetermined criteria related to the *process* of adjudication rather than to substantive outcomes. Most state JPE programs use the five criteria adopted by the American Bar Association in 1985: legal knowledge, integrity and impartiality, communication skills, judicial temperament, and administrative skills.[14] Guided by these criteria, a present-day commission typically collects a wide range of information on each judge, including surveys of those who interact with the judge in the courtroom (always lawyers, and frequently jurors, witnesses, litigants, or court staff as well), case management data, interview data, information gleaned from direct courtroom observation, and review of the clarity of the judge's written work product.[15] The commission reviews the collected information and composes a detailed

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9. Judicial performance evaluation originated in the 1970s and 1980s as a method of providing process-oriented information on a judge's performance to voters in judicial retention elections. It was subsequently adopted by a number of jurisdictions in which judges are subject to periodic reappointment by the governor or state legislature, and even in Massachusetts and New Hampshire, where state judges are appointed for life. *See* MASS. GEN. LAWS. ch. 211, § 26-26B (2005); MASS. SUP. JUD. CT. R. 1:16 (2008); N.H. SUP. CT. R. 56 (2008).

10. In New Hampshire, for example, trial judges are appointed until retirement or age seventy, and are nevertheless evaluated at least once every three years. *See* N.H. SUP. CT. R. 56(II)(A) (2008).

11. The size of the evaluation commission varies considerably across jurisdictions, from the seven-member Alaska Judicial Council to the thirty-member Arizona Commission on Judicial Performance Review. *See* Alaska Judicial Council, Membership, http://www.ajc.state.ak.us (last visited Oct. 17, 2008); Arizona Commission on Judicial Performance Review, http://www.azjudges.info /home/ (last visited Oct. 17, 2008).

12. *See, e.g.*, COLO. REV. STAT. § 13-5.5-102(1)(a)(I)(A) (2008) (dividing appointment authority over the ten-member Colorado state performance commission between the Governor, Chief Justice, President of the Senate and Speaker of the House).

13. *See, e.g.*, S.B. 105, 2008 Gen. Sess. (Utah 2008) (establishing for Utah's new evaluation commission that "At the time of appointment, the terms of commission members shall be staggered so that approximately half the commission members' terms expire every two years.").

14. *See generally* AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (1985) [hereinafter 1985 ABA GUIDELINES]. The ABA reaffirmed these criteria in 2005. AMERICAN BAR ASSOCIATION, BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (2005), *available at* http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf.

15. *See* SHARED EXPECTATIONS, *supra* note 8, at 20-37 (describing data collected in several states).

report that discusses the judge's perceived strengths and weaknesses on the bench. That report is given to the judge and, if appropriate, also provided to the judge's supervisor and those with the power to determine whether the judge remains on the bench.[16] Reports are also typically made available to the public, either in full or summary form.[17]

JPE programs have an established track record at the state level. They are sustainable over many years, even at high volume. In Colorado alone, more than one hundred evaluations of trial and appellate judges are typically conducted every two years,[18] and additional interim evaluations have recently been introduced and formally codified as part of the state's JPE statute.[19] JPE also has positive ripple effects: judges have found that JPE provides useful feedback for their professional growth—information that they could not have otherwise received.[20] Furthermore, at least one study has shown that the public has greater confidence in the quality of its judges as a result of JPE programs.[21] JPE also provides critical information for judicial retention or reappointment decisions, diluting the temptation of voters or reappointment authorities to make such decisions on the basis of specific case outcomes.[22]

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16. The retention/reappointment authority varies from jurisdiction to jurisdiction. In many states, retention of the judge is left directly to the voters, either in a special retention election in which the judge runs uncontested and must pass a straight up-or-down vote, or in a contested election. In other states, the legislature or governor bear the responsibility for reappointing judges. In Hawaii and the District of Columbia, reappointment and retention decisions are conducted by a commission. *See* D.C. Code § 1-204.33(c) (2008); HAWAI'I CONST. art. VI, § 3; Hawai'i State Judiciary, Judicial Selection Commission, http://www.courts.state.hi.us/page_server/Courts/2E049BDF320E2D71F0456B57B6.html (last visited Oct. 17, 2008).

17. In New Hampshire and Hawaii, collective reports have been made available to the public that review the judiciary as a whole. *See* JUDICIARY, STATE OF HAWAI'I, JUDICIAL PERFORMANCE PROGRAM 2007 REPORT (2007) (on file with authors), *available at* http://www.courts.state.hi.us/attachment/218D1292A4F6A54DE9973AA6FC/JPP2007.PDF; Letter from John T. Broderick, Jr., Chief Justice, to John Lynch, Governor, New Hampshire (Jul. 6, 2007) (on file with authors), *available at* http://www.nh.gov/judiciary/PerEval/2007-07-03%20final%20report.pdf. *But see* Pamela A. Maclean, *More States Evaluating Judicial Performance*, NAT'L L.J. Jun. 2, 2008 (explaining that the New Hampshire Supreme Court will move to individualized reports in 2008). In states with retention elections, full reports are frequently made available on the commission's website, and summary reports are provided in voter guides. *See* Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 204-05 (2007) (describing methods of public dissemination in each state).

18. Any Colorado judge who is eligible for retention is subject to a full evaluation during his or her retention year. Historically, some judges have chosen not to stand for retention after the evaluation has been completed, for reasons both related and unrelated to the evaluation results. Only the evaluation results of those judges who choose to stand for retention are released to the public. Accordingly, the number of judges who are evaluated is always somewhat higher than the number whose evaluations are made publicly available.

19. *See* COLO. REV. STAT. § 13-5.5-106.3 (2008).

20. *See infra* nn.142-144 and accompanying text.

21. A seminal 1998 study of JPE programs in four states found that significant majorities of voters who received evaluation information agreed that "the official . . . report adds to my confidence in the quality of judicial candidates [seeking retention]." KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 41 (1998) (omission in original).

22. *See id.* at 39-40.

The demonstrated benefits of JPE at the state level warrant serious consideration of a similar program for the federal courts. It is true that even the most successful state programs cannot be applied directly to the federal judiciary, and that any federal JPE program would need to be designed to address the unique circumstances of the federal courts. But JPE *does* hold considerable promise for the federal system. Indeed, each of the three major goals of state JPE translates meaningfully to the federal level. First, federal judges, no less than state judges, reasonably could benefit from periodic feedback on their performance based on information gleaned from those who interact with them in the courtroom. Although the Constitution intentionally shelters federal judges from public sentiment to a greater extent than do most state systems, legitimate expectations about a judge's ability to communicate clearly, treat parties fairly, and manage cases effectively apply with equal force to federal and state judges. Information derived from JPE programs might assist not only individual judges, but also Chief Judges, court administrators, and those who design and implement judicial education programs, to capitalize on individual and collective strengths, and address individual and collective weaknesses.

Moreover, if widely disseminated to the public, thoughtful evaluations at the federal level might help to educate the citizenry about its judges. The evaluation process holds the power to be a valuable tool for civic education; regardless of the outcome of any specific judicial evaluation, the routine of evaluating all judges for the same process-oriented skills reinforces to the lay citizen the proper expectations of a good judge. Finally, JPE may prove to be an important asset for those determining the reappointment of magistrate judges, bankruptcy judges, and others not subject to Article III's life tenure guarantees. Simply put, JPE provides decision-makers with information that they would otherwise not have at their disposal; given the choice between having or foregoing relevant, high-quality information, responsible decision-makers should choose to have the information every time.

## II. FEDERAL JPE IN CONTEXT

### *A. The Historical Framework for Process-Oriented Accountability*

Some of the principles underlying JPE have been present at the federal level for several decades, even though a sustained JPE program has not. As described in this Part, however, efforts to expand these principles to develop a more comprehensive review of judges' process-oriented performance have fallen short.

#### 1. Nibbling at Accountability: Case Management and Misconduct

Both the federal courts and Congress have emphasized process-oriented judicial accountability measures from time to time, usually in the area of case management. The courts themselves took the lead. As

Chief Justice, Earl Warren noted the negative impact of "[i]nterminable and unjustifiable delays in our courts" on substantive rights,[23] and pushed the Judicial Conference of the United States to study, and eventually recommend to Congress, the establishment of the Federal Judicial Center (FJC) as the research arm of the federal courts.[24] Warren Burger, too, bluntly acknowledged as Chief Justice that the federal judicial system needed to explore and adopt better management techniques, and that "[m]ore money and more judges alone is not the primary solution."[25] Certain judges at the district court level subsequently became active proponents of case management among their peers.[26] And in 1983, the Federal Rules of Civil Procedure were amended to give district judges greater management control over civil cases.[27] With those amendments came the increased expectation of judicial involvement in scheduling events, controlling discovery, and promoting settlement.[28]

Congress, however, was dissatisfied with the way it perceived some judges to be using (or not using) their case management authority. In 1990 it passed the Civil Justice Reform Act (CJRA), which mandated among other things that the Director of the Administrative Office of the Courts prepare a semiannual report, available to the public, disclosing for each judicial officer the number of motions pending more than six months, the number of submitted bench trials pending more than six months, and the number of cases pending more than three years.[29] The CJRA thus created a degree of transparency and accountability regarding the performance of federal judges. But the accountability it created was at once too much and too little. Merely publicizing case processing data about judges artificially elevates the importance of that data over other process criteria. Moreover, information on a judge under the CJRA is not available unless the judge fails to meet the statute's proscribed outer time limits, and what information is available reflects a mere sliver of the

23. Maurice Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, *in* THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 29, 31 (Harry W. Jones ed., 1965).

24. *See* Russell Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 LAW & CONTEMP. PROBS. 31, 38-39 (1988).

25. Chief Justice Warren E. Burger, Remarks on the State of the Federal Judiciary (Aug. 10, 1970), *in* HOWARD JAMES, CRISIS IN THE COURTS iv (1971). Burger continued this plea throughout his tenure as Chief Justice. *See* Warren E. Burger, *Introduction* to Symposium, *Reducing the Costs of Civil Litigation*, 37 RUTGERS L. REV. 217 (1985) (rejecting that additional judicial resources would alone resolve the challenges faced by the federal courts, and arguing that "[j]udicial administration needs tireless, articulate workers.").

26. *See, e.g.*, Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981).

27. The most prominent of the 1983 amendments were those to Rule 11 (mandating the imposition of sanctions for abuses related to the signing of pleadings and motions), Rule 16 (requiring case management conferences), and Rule 26 (giving the judge authority to keep discovery proportional to the magnitude of the case). *See* FED. R. CIV. P. 11, 16, 26 advisory committee's notes (1983 amend.).

28. *Id.*

29. 28 U.S.C. § 476 (2008). Given the notion of transparency and accountability inherent in the CJRA, it is ironic that the Director's semiannual reports are not available to the public on the official U.S. Courts website.

overall picture of a judge's performance with respect to case management.[30]

Congress's other foray into process accountability for judges occurred in 1980, with the passage of the Judicial Conduct and Disability Act.[31] That Act established a formal procedure for reviewing complaints "alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability."[32] The Act charged each chief circuit judge with determining if complaints fell within the Act's coverage, and dismissing those that did not.[33] The Act also charged the Judicial Councils with investigating complaints that the chief judge did not dismiss, and authorized the Councils to take a variety of actions, including imposing a range of statutorily specific sanctions.[34] The Act cautioned, however, that "[u]nder no circumstances may the judicial council order the removal from office" of an Article III judge.[35]

Like the CJRA, the Judicial Conduct and Disability Act addresses only very narrow issues of process-oriented accountability: those concerning formal allegations of misconduct by a federal judge or a judge's inability to discharge the duties of the office for health reasons. Most federal judges never seriously come within its purview.[36] The judge whose written order is simply not clear, or whose courtroom manner is abrasive, or whose dockets move at a snail's pace, will fly under the radar of the Act as long as no action rising to the level of formal misconduct is alleged. And the judge whose written orders are careful and thoughtful, and whose manner is unfailingly deserving of respect, will similarly avoid acknowledgment.

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30. Some statistical information on the performance of an entire court is available to the public outside the auspices of the CJRA. The Federal Court Management Statistics on the U.S. Courts website provide data on, among other things, each district court and circuit court's overall caseload for the previous five years, actions per judgeships, and median times from filing to disposition and filing to trial for district courts. *See generally* http://www.uscourts.gov/fcmstat/ (then follow the District Court hyperlink for the year for which data is sought). The Federal Court Management Statistics, however, do not publicly disclose figures for individual judges.

33. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, P.L. 96-458, 94 Stat. 2035 (1980) (current version at 28 U.S.C. §§ 351-364 (2006)).

32. 28 U.S.C. § 351(a).

33. *Id.* § 352.

34. *Id.* § 354(a)(1)-(2).

35. *Id.* § 354(3)(a).

36. A recent study found that roughly 650 to 800 complaints were filed annually between 2001 and 2005, with nearly half coming from prisoners. *See* JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 22 (2006). Almost all of the complaints were dismissed, 88% of the time because the allegations related directly to the merits of the case or were otherwise frivolous. *Id.* at 6, 28.

2. Limited Efforts at JPE Programs

Although process-oriented accountability has been addressed to some degree in the areas of case management and judicial misconduct, attempts to implement more comprehensive JPE at the federal level have been sporadic and largely unsuccessful. For thirty years, most of the discussion has centered on evaluating those federal administrative law judges (ALJs) who serve pursuant to the Administrative Procedure Act. In many ways, ALJs were a natural starting point for a federal judiciary hesitant to embrace any form of external evaluation. Although they perform certain judicial functions, ALJs are employees of the executive branch, and indeed are one of the few groups of career federal employees that remain statutorily exempt from performance appraisals.[37] Accordingly, proposals to develop a JPE program for administrative law judges have circumvented the thornier issue of Article III independence by couching evaluations as promoting consistency among all executive branch employees.[38]

Beginning in the late 1970s, several studies suggested that performance evaluations were necessary to assure consistency and efficiency in administrative adjudication. In 1978, the General Accounting Office (GAO) recommended that Congress amend the Administrative Procedure Act to assign responsibility for periodic evaluations of ALJ performance, to be conducted by the Civil Service Commission alone or in conjunction with an ad hoc committee of lawyers, Chief ALJs, agency officials, federal judges, and the Administrative Conference of the United States (ACUS).[39] In 1978 and again in 1986, ACUS issued its own recommendations for peer review.[40] These recommendations emphasized the importance of judicial independence, but also noted that "[m]aintaining the administrative law judges' decisional independence does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies underlying the [agency's] fulfillment of statutory duties."[41]

In 1992, ACUS issued Recommendation No. 92-7, which proposed among other things that the Chief ALJ be permitted to coordinate development of case processing guidelines for ALJs and conduct annual per-

37. *See* 5 U.S.C. § 4301(2)(D) (2006) (exempting ALJs from the definition of "employee" for the purpose of performance appraisals). *See also* Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluations for ALJs*, 7 ADMIN. L.J. AM. U. 589, 590 (1993); 5 C.F.R. § 930.211 (2008).

38. *See, e.g.*, Lubbers, *supra* note 37, at 590-93.

39. GENERAL ACCOUNTING OFFICE, ADMINISTRATIVE LAW PROCESS: BETTER MANAGEMENT IS NEEDED v-vi (1978).

40. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATION 78-2, PROCEDURES FOR DETERMINING SOCIAL SECURITY DISABILITY CLAIMS 36 (1978); ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATION 86-7, CASE MANAGEMENT AS A TOOL FOR IMPROVING AGENCY ADJUDICATION 53 (1986).

41. ACUS RECOMMENDATION 78-2, *supra* note 40.

formance reviews.[42] The recommendation also proposed a non-exclusive list of criteria for ALJ evaluation, including case processing guidelines (i.e., ALJ productivity and step-by-step goals), judicial comportment and demeanor, and "the existence of a clear disregard of, or pattern of nonadherence to, properly articulated and disseminated rules, procedures, precedents and other agency policy."[43] The recommendation spurred considerable consternation and intense debate.[44] The performance evaluation program was never implemented, and ACUS itself lost Congressional funding in 1995; one study suggests that ALJs angry with the ACUS proposal were a contributing factor to its demise.[45]

A similar effort to create a performance evaluation program for federal immigration judges—who are Department of Justice employees—was announced in August 2006.[46] The directive from then-Attorney General Alberto Gonzales described the need for a JPE program to detect unusual reversal rates or backlogs, and emphasized that, in the words of a Justice Department spokesman, "performance appraisals will not be used to tell judges whether to grant or deny relief."[47] The announcement nevertheless was met with considerable skepticism by some immigration judges, who voiced concern that the proposal would interfere with their duty to administer their duties neutrally and without political pressure.[48] Commentators, too, split on whether a performance evaluation program for immigration judges could be constructed in a meaningful way.[49] To date, the program has not been implemented.

There have also been periodic efforts to introduce JPE into the judicial branch. The Seventh Circuit Judicial Council, for example, has used evaluations to screen sitting bankruptcy judges who are applying for re-

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42. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: THE FEDERAL ADMINISTRATIVE JUDICIARY RECOMMENDATION NO. 92-7, 89 (1992).

43. *Id.*

44. *See, e.g.*, Lubbers, *supra* note 37, at 595-96; James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U. 629 (1993); *see also* Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 54-70 (1997) (proposing a different approach to ALJ evaluation).

45. Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19, 59-61, 96-97 (1998).

46. *See* Press Release, U.S. Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals, Aug. 9, 2006, *available at* 2006 WL 2282541.

47. Nina Bernstein, *Immigration Judges Facing Performance Reviews*, N.Y. TIMES, Aug. 10. 2006, *available at* http://www.nytimes.com/2006/08/10/washington/10immig.html.

48. *See id.*

49. *Compare* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 468, 469 (2007) (describing as an "especially bad idea[]" "[p]erformance reviews that take into account and serve as a criterion for retention and promotion") *with* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 499 (2007) (noting that the 1992 ACUS study "identified several criteria for a system of performance evaluation that appropriately protects decisional independence," including peer review and external oversight).

appointment.[50] Such evaluations have consisted of surveys sent to a random sample of one hundred attorneys who had at least two cases before a given judge during the two years prior to evaluation.[51] The Eighth Circuit has used a similar program to evaluate magistrate judges and bankruptcy judges in advance of reappointment decisions.[52] And in 2003, the Federal Judicial Center assisted the Judicial Conference's Bankruptcy Committee in developing guidelines and surveys for evaluation of bankruptcy judges, for the limited purpose of professional self-improvement.[53]

To date, however, there have been only two notable efforts to extend JPE to federal district judges. The first was a voluntary program developed in the Ninth Circuit in the early 1980s. The program emerged in response to informal polls conducted by newspapers and bar associations within the Circuit to evaluate federal judicial performance; in the words of the Executive Committee of the Judicial Conference of the Ninth Circuit, a more comprehensive approach under the leadership of the Judicial Conference would "contribute usefully to an effort to make the evaluation of judges as constructive as possible and to avoid the dangers of ill-conceived and sensational 'polls' which merely serve to influence passions."[54]

As this language suggests, the Ninth Circuit project appears to have been initiated and conducted from a strongly defensive posture. In authorizing an Ad Hoc Committee to Study the Evaluation of Federal Judges (the Ad Hoc Committee), the Ninth Circuit Judicial Council simultaneously authorized a parallel Committee to Study the Evaluation of Lawyers.[55] Furthermore, the Ad Hoc Committee was not authorized to actually evaluate judges, but merely "to evaluate the evaluation of judges."[56]

The Ad Hoc Committee modeled its program on two previous programs in California. The first program used a bar committee to collect attorney complaints about judges. The committee had no power to act on the complaints, but rather passed the complaints along to a committee of judges, who would forward them to the judge in question.[57] This pro-

50. *See* DARLENE R. DAVIS, JUDICIAL EVALUATION PILOT PROJECT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE JUDICIAL BRANCH 2 (1991).

51. *Id.*

52. *See id.*

53. FEDERAL JUDICIAL CENTER, 2003 ANNUAL REPORT 11; *see also* Surveys on Behalf of the United States Bankruptcy Court for the Northern District of Illinois (on file with authors), *available at* http://www.ilnb.uscourts.gov/Announcements/FJCSurvey.pdf.

54. Hon. James R. Browning, *Evaluating Judicial Performance and Other Matters*, 90 F.R.D. 197, 198 (1981) (quoting mandate of Ninth Circuit's Ad Hoc Committee to Study the Evaluation of Federal Judges).

55. *See id.*

56. *Id.*

57. *See id.* at 199.

gram was severely limited: it had no transparency, no serious mechanism for accountability other than the notion that "[p]eer pressure . . . would be a far more effective means of correcting judicial deficiencies,"[58] and no comprehensive scope. The second program considered by the Ad Hoc Committee featured a questionnaire sent to attorneys who had appeared before a district judge in the Northern District of California.[59] Here again the lack of transparency was trumpeted as a virtue: "The advantages are clear. . . . The judge alone receives the responses. There is no automatic public exposure to put the judge on the defensive and inhibit self-improvement."[60]

The Ninth Circuit Judicial Council ultimately adopted a voluntary, confidential self-evaluation program for district judges in 1981.[61] Few judges participated. In fact, a 1985 Judicial Council survey found that only nineteen of the 234 judges eligible for the program—less than 8%—had actually undertaken self-evaluation.[62]

The second effort to evaluate federal district judges came in the form of a pilot program completed in the Central District of Illinois in 1991, under the auspices of the Judicial Conference Committee of the Judicial Branch.[63] That district was selected in part because its district judges unanimously expressed interest in the pilot. Indeed, interest was so widespread throughout the district that the pilot program was expanded to include magistrate judges and bankruptcy judges as well.[64]

The pilot was limited in two key respects. First, the only source of evaluation information came from surveys sent to attorneys.[65] The clerk of the court reviewed a pool of attorneys who had appeared in civil and criminal cases during the eighteen months prior to the study, and sent surveys to a sample of 150 selected attorneys who had appeared before each subject judge.[66] Jurors, witnesses, and parties were specifically excluded from the study.[67] Second, the results were entirely confidential and each completed survey was returned directly to the subject judge.[68] The judges later estimated that the return rate on surveys was about fifty percent.[69]

Despite (or perhaps because of) these limitations, the judges who participated in the pilot project deemed it beneficial. One judge re-

58. *Id.*
59. *See id.* at 199-200.
60. *Id.* at 200.
61. *See* DAVIS, *supra* note 50, at 3.
62. *Id.* at 3-4.
63. *Id.* at 1.
64. *See id.* at 2.
65. *See id.* at 4.
66. *Id.* at 5.
67. *Id.* at 4.
68. *Id.*
69. *Id.* at 8.

marked, "The responses from the bar are an excellent barometer of how we are perceived to be performing our duties."[70] Another judge stated that the results of the survey are "helpful because they are about as objective an evaluation as we can hope to get."[71]

In the final analysis, however, the 1991 pilot study was at best a mixed success. It demonstrated that JPE programs may benefit judges' professional development by providing valuable information about each judge's performance—information that the judge is unable or unlikely to receive in any other format. At the same time, the pilot program clearly failed on two fronts. Most obviously, despite positive reviews from the participating judges,[72] the program was neither repeated in the Central District of Illinois nor attempted in other jurisdictions. Any momentum toward the design of a more widespread evaluation program was therefore lost. In addition, even if the program had been repeated or expanded in its original form, its extremely constricted scope rendered it of virtually no benefit to judicial training programs, court administrators, or the public. Short of a formal report issued by the Federal Judicial Center the following year,[73] no information was disseminated about the results of the program. Accordingly, the public neither learned about the performance of its individual judges nor was afforded the opportunity to see its judges collectively as dedicated public servants striving for continuous professional improvement. Even within the court, where collated survey results might have helped develop new judicial education initiatives or helped the Clerk's Office to anticipate case management issues, no such information was forthcoming.[74]

### *B. Conceptual Objections to Federal JPE*

There are likely many reasons why JPE has not yet succeeded at the federal level, but one key explanation may be anti-evaluation sentiment within the courts themselves. Both conceptual and practical objections have been offered by the courts. We discuss these objections below.

#### 1. Decisional Independence

The most vocal objections to JPE focus on perceived abuses and threats to the judiciary as an institutional actor. The most commonly voiced objection is that JPE, by its very nature, constitutes an assault on a judge's decisional independence.[75] James Timony, an administrative law judge writing to critique the 1992 ACUS proposal, argued that the

70. *Id.*
71. *Id.*
72. *Id.*
73. *See generally id.*
74. *See generally id.* at 4 ("[T]he subcommittee resolved that the results would remain strictly confidential.").
75. *See, e.g.*, Jacqueline R. Griffin, *Judging the Judges*, 21 LITIGATION 5 (1995).

JPE portion of the report "should be rejected, because it would diminish the decisional independence of federal ALJs and would decrease public acceptance of their decisions."[76] Similarly, Denise Noonan Slavin, then-President of the National Association of Immigration Judges, stated that performance review of federal immigration judges was "unwelcome" because it could lead to the public perception that rulings are based on quotas rather than dispassionate application of the law.[77] And Tennessee Administrative Law Judge Ann Marshall Young has argued that "unless sufficient attention is paid . . . to the need to protect judicial independence on a practical and human basis, the costs of such oversight and evaluation may outweigh any potential benefits."[78]

Two studies have attempted to measure the perceived impact of JPE on a judge's independence. A 2008 survey of Colorado judges conducted by the Institute for the Advancement of the American Legal System and Professor David Brody of Washington State University (the "Colorado judges survey") revealed an almost perfect bell curve of judicial opinion, with 28% of trial judges stating that the state's JPE program decreases their judicial independence, 44% indicating no effect, and 29% stating that JPE in fact *increases* their independence.[79] Another study of judges in several states with JPE programs posed the question somewhat differently, asking judges whether they agreed that "[t]he evaluation process undermines my independence as a judge."[80] In that study, only 14.5% of judges in Colorado, 22% of judges in Alaska, and 33% of judges in Arizona indicated their belief that their decisional independence was undermined by their state's JPE program.[81]

The survey findings provide reason for both optimism and concern. On the one hand, they demonstrate that a substantial majority of judges surveyed feel that JPE programs do not detract from (and indeed, may increase) their decisional independence. On the other hand, the minority of judges expressing concern about the impact of JPE on their independence cannot be disregarded.[82] These figures suggest, at least to us, that JPE programs should not be rejected for fear of conflict with decisional independence, but instead should be developed thoughtfully and with judicial input in order to minimize the risk of encroachment on the exercise of independent judgment.

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76. Timony, *supra* note 44, at 657.

77. Alfonso Chardy, *Immigration Law: Respect Sought for Busy Judges*, MIAMI HERALD, Sept. 25, 2006, at B1.

78. Young, *supra* note 44, at 7-8.

79. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, THE BENCH SPEAKS ON JUDICIAL PERFORMANCE EVALUATION: A SURVEY OF COLORADO JUDGES 31 (2008) [hereinafter THE BENCH SPEAKS]. Nearly two thirds of all judges in the state, at both the trial and appellate levels, responded to the anonymous survey. *Id.* at 2.

80. ESTERLING & SAMPSON, *supra* note 21, at 44.

81. *Id.*

82. *See id.*

Judicial independence is a matter not only of the judge's internal thought processes, but also of public perception. In this respect, JPE programs can put instances of independent, albeit unpopular, judicial decisions into context, thus strengthening judges' willingness to make such decisions. The 2008 state evaluations in Colorado provide a concrete example. In October 2007, Judge James Klein, a district court judge in the state's Twentieth Judicial District, issued a controversial ruling granting a claim for adverse possession.[83] Those who disagreed with the ruling immediately branded it as a "land grab"; a term picked up in the media.[84] Soon Judge Klein was known to most of the public as the "land grab" judge, to the extent he was known to the public at all.[85] His regularly scheduled performance evaluation, however, properly deemphasized the single case outcome. The district commission reviewing Judge Klein conducted a thorough evaluation of his overall performance, issuing a report that emphasized his strengths, weaknesses, and opportunities for continued development on the bench.[86] The commission also thoughtfully put the adverse possession case in the context of his overall caseload and performance:

> Judge Klein presided over a highly publicized adverse possession case. The Commission notes that this is only one of over one thousand cases handled by Judge Klein over the past three years. The Commission reviewed Judge Klein's rulings in the case. Judge Klein listened to the testimony presented, visited the site twice, and wrote clear and articulate rulings. Without offering any opinion on the merits of the decision, or whether the decision will be upheld by the appellate court, it is the opinion of the Commission that Judge Klein followed appropriate procedures. Disagreement with the result should not be expressed as unhappiness with Judge Klein's performance.[87]

Judge Klein was ultimately retained by the voters in the November 2008 election.[88] No matter what the final result at the polls might have been, however, the JPE program served its purpose of locating a single case outcome in the broader context of the judge's overall role.

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83. *See McLean v. DK Trust*, Case No. 06-CV-982, at 1 (Colo. 20th Jud. Dist. Oct. 17, 2007).

84. *See, e.g.*, Heath Urie, *Judge to Revisit 'Land-Grab' Case*, BOULDER DAILY CAMERA, Apr. 2, 2008, at A1; Editorial, *Legal Land Grab Should be Overturned on Appeal*, DENVER POST, Nov. 20, 2007.

85. *See, e.g.*, Ryan Morgan, *Judge in Land Case up for Retention*, BOULDER DAILY CAMERA, Apr. 3, 2008, at A1.

86. Judge Klein was appointed to the bench in 2005. *See* Commissions on Judicial Performance, Honorable James C. Klein (2008), http://www.cojudicialperformance.com/retention.cfm?ret=210 (last visited Oct. 20, 2008).

87. *Id.*

88. Colorado District Judge Election Results, Denver Post, http://data.denverpost.com/election/results/district-judge/ (last visited Nov. 21, 2008).

Decisional independence is of course central to the role of the judge. As one commentator has put it, independent decision-making should "be viewed less as a power than as an indispensable responsibility of all judges, at all levels . . . ."[89] Judicial performance evaluation may help judges discharge that responsibility fairly and accurately, and can educate the public on the full and proper role of the judiciary.

2. Life Tenure

Even leaving accountability issues aside, others object that JPE is a needless exercise at the federal level because district and circuit judges cannot be removed simply for underperforming. Judge Timony, for example, has dismissed the notion that state JPE programs are useful models for a federal program, arguing that "[t]he evaluations of state judges usually [are used] in retention elections, a process not relevant to federal ALJs who serve for an unlimited term."[90] But this is all the more reason to implement performance evaluations. Promises of continued employment are certainly no excuse for failing to perform to one's very best ability. Baseball players with guaranteed contracts still work on their swings. Best-selling authors have editors. Self-employed businesspeople send out customer satisfaction surveys. The position of federal judges should be no different. They are appointed to the bench based on a proven combination of skill, experience, and future promise; part of fulfilling that promise is a commitment to the public to grow in the job.

Moreover, for federal judges who do not have life tenure, such as magistrate judges and bankruptcy judges, JPE may assist not only with professional development, but also with reappointment decisions. Full-time federal magistrate judges serve eight-year terms; part-time magistrate judges four-year terms.[91] Terms are renewable with the concurrence of the majority of district judges in a district court, or by the chief judge if there is no such concurrence.[92] Bankruptcy judges similarly serve fixed terms of fourteen years, renewable by the Court of Appeals for the circuit in which they serve.[93] JPE is especially suited for these judges, because it could provide critical information about the judge's performance to the relevant decision makers in advance of a reappointment decision. We discuss one possible application of JPE to reappointment decisions in Part III.

3. Public Perception

A final conceptual objection to JPE relates to the potential release of evaluations into the public domain. The concern is that rather than fo-

89. Young, *supra* note 44, at 27.
90. Timony, *supra* note 44, at 641.
91. 28 U.S.C. § 631(e) (2008).
92. *See id.* § 631(a).
93. *Id.* § 152.

cusing on the judges who receive excellent reviews, or even the judges who demonstrate marked improvement in one or more areas, some in the public sphere will emphasize the judge who does badly or who receives particularly harsh comments.[94] Where informal polls of attitudes toward judges constitute the sole basis for judicial evaluation, there is indeed an increased risk that judges will be inappropriately ranked, or that specific evaluation results will be taken out of context.[95] However, when evaluations are based on a broad set of process-oriented criteria and are grounded in credible information from a wide variety of sources, and the process itself is transparent, the risk of media sensationalism or public overreach has the potential to be greatly reduced.

There is in fact some evidence that when the judiciary publicly supports a JPE program and makes the results broadly available, it gains the respect and confidence of the mass media—and perhaps by extension, the public. After a bar-sponsored program released evaluations of trial court judges in Pierce County, Washington, in June 2008, the county's largest newspaper ran five different stories on the evaluations. None of those articles focused exclusively on judges who did poorly (although they did mention those judges whose overall evaluations were particularly strong or weak),[96] and several explicitly praised the judiciary for its increased commitment to transparency and public service. As one editorial put it, "Naturally, sitting judges don't much like getting report cards, but Pierce County's judges cooperated admirably with the bar's rating process. The bench wins more respect when it acknowledges that its members should be held accountable for performance."[97]

Moreover, the Colorado judges' survey suggests that judges who have been through a comprehensive JPE process at least once strongly support providing evaluation results to the public. Nearly 69% of trial judges indicated that they have no difficulty with Colorado's current method of disseminating information to the public, which consists of

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94. *See, e.g.*, Griffin, *supra* note 75, at 61-62 ("[A]ny [state] judge who is given a 'do not retain' [recommendation] has no access to information on why or how the decision was made, and he is unlikely to have the resources to mount a response . . . ."). This statement is incorrect. In most comprehensive JPE states, each judge receives an extensive report compiling all the data on his or her performance before the evaluation is even released to the public. Colorado allows judges who disagree with a recommendation to seek a second interview with the evaluation commission, and, if necessary, to write a short rebuttal statement to go to the voters prior to the evaluation's release. *See* S.B. 08-54, 66th Gen. Assem., 2d Reg. Sess. (Colo. 2008) (codified as amended at COLO. REV. STAT. § 13-5.5-106(1)(a)(V) & -(2)(a)(V) (2008)). Arizona also enhances transparency by requiring that the ultimate vote on whether the judge had met performance standards be taken publicly. *See* ARIZ. COMM'N ON JUDICIAL PERFORMANCE REVIEW, RULES OF PROCEDURE FOR JUDICIAL PERFORMANCE REVIEW IN THE STATE OF ARIZONA, 6(e)(3) (2006), *available at* http://azjudges.info/about/procedure.cfm.

95. *See* Browning, *supra* note 54, at 199 (discussing a San Francisco Bar Association poll in the late 1970s that led to rankings of individual judges in the press).

96. *See, e.g.*, Editorial, *Bar's Judicial Ratings Will Aid the Voters*, NEWS-TRIBUNE (Tacoma, Wash.), June 3, 2008, *available at* http://www.thenewstribune.com/opinion/story/379136.html.

97. *Id.*

posting full evaluations on the state commission website, and providing short summaries of each evaluation in a voter guide.[98] The judges who provided comments in the survey uniformly indicated that public dissemination, and efforts to educate the public about the JPE process, could in fact be even more extensive.[99] If judges who face retention elections mere months after their evaluation favor such efforts to publicize the results, federal judges with life tenure should be comfortable with the release of their evaluations as well.

### *C. Practical Objections to Federal JPE*

#### 1. Cost

One frequently raised objection to JPE programs, even among those who support evaluations in principle, is the cost associated with a regular and ongoing JPE program.[100] Surveys must be sent out and responses tabulated. Where commissions are used, members may have to travel and results must be disseminated. Particularly when taxpayer money is at stake, the cost of a new program is never a matter to be taken lightly. However, the cost of a JPE program for a federal district need not be prohibitively expensive. The 1991 pilot program in the Central District of Illinois reported very few costs, and concluded that "the cost of a similar evaluation program in a large district would most likely be minimal."[101] While a full-scale, nationwide federal JPE program would certainly incur something more than "minimal" costs, evidence from existing programs suggests that it could be done in a cost-effective manner.

Detailed cost considerations usually begin with surveys. Some state programs use private polling companies to design and circulate surveys and tabulate responses, which ensures a high level of professional competence in survey methodology. High quality polling can also be achieved, however, through lower cost means. Some state programs complete their polling through local universities,[102] which promises high quality methodology with potentially less expense. Others have developed electronic surveys,[103] which eliminates mailing and copying costs, and allows for results to be tabulated on a rolling basis. Existing commercial survey software might well be suitable for use at least in federal

98. THE BENCH SPEAKS, *supra* note 79, at 26.

99. *Id.*

100. *See generally* Griffin, *supra* note 75, at 5-7.

101. DAVIS, *supra* note 50, at 7.

102. For example, Alaska conducts its JPE surveys through the University of Alaska Anchorage, Virginia uses Virginia Commonwealth University, and a recent pilot program in Pierce County, Washington relied on surveys conducted through Washington State University.

103. The Commonwealth of Massachusetts, for example, developed in-house an electronic system to survey attorneys. Respondents complete surveys for individual judges on a secure, encrypted website, and results are automatically aggregated by judge. Mona Hochberg, Judicial Performance Evaluation Coordinator, Mass. Supreme Judicial Court, Remarks at IAALS Symposium: Judicial Performance Evaluation: Strategies for Success (Aug. 6, 2008) (copy of presentation on file with authors).

pilot programs. Costs associated with more robust JPE programs, such as travel and public dissemination of results, can also be reduced or even eliminated with modern communications technology—teleconferencing and videoconferencing can reduce the number of required face-to-face meetings for the commission, evaluation results can be posted on the court's website at minimal cost,[104] and so on. Reasonable options for financing JPE programs can also be explored, perhaps through a modest raise on application fees for admission to practice in a federal district court.

Actually predicting costs is difficult, at least before thorough pilot studies are undertaken. Data on the cost of JPE programs at the state level are instructive but not dispositive. Massachusetts runs a relatively limited program based on electronic surveys, with no evaluation commission or publication of results, for the cost of one full-time employee and some minor overhead costs.[105] Alaska evaluates anywhere from ten to thirty judges each election cycle, spending $2000-4000 per judge for surveys, travel, materials, and dissemination inclusive;[106] if staff time were to be factored in, the per judge cost would roughly double.[107] Virginia's JPE program currently spends about $5000 per judge for surveys, but costs are expected to drop in the future to the range of $3500-4000 per judge.[108] These programs also benefit from economies of scale; the more judges evaluated during a particular cycle, generally the lower the per-judge cost.[109]

2. Risk of Politicization

Another common objection to JPE goes like this: "I support the idea of evaluating judges, certainly for purposes of self-improvement, but if we leave the evaluation to those outside the judiciary even the most carefully designed process is bound to inject politics into a system where none should exist."[110] Judges alone, the argument goes, can be trusted to understand the roles and responsibilities of the judiciary, and to reach

104. For excellent examples of state court websites describing their JPE programs and recent results, see Alaska Judicial Council, http://www.ajc.state.ak.us (last visited Oct. 17, 2008); Arizona Commission on Judicial Performance Review, http://www.azjudges.info (last visited Oct. 17, 2008); Colorado Commissions on Judicial Performance, http://www.cojudicialperformance.com (last visited Oct. 17, 2008); Kansas Commission on Judicial Performance, http://www.kansasjudicialperformance.org (last visited Oct. 17, 2008); Supreme Court of New Mexico Judicial Performance Evaluation Commission, http://www.nmjpec.org (last visited Oct. 17, 2008).

105. *See* Hochberg, *supra* note 103.

106. Larry Cohn, Executive Dir., Alaska Judicial Council, Remarks at IAALS Symposium: Judicial Performance Evaluation: Strategies for Success (Aug. 6, 2008) (notes from presentation on file with authors).

107. *Id.*

108. Edward Macon, Assistant Executive Sec'y and Counsel, Supreme Court of Virginia, Remarks at IAALS Symposium: Judicial Performance Evaluation: Strategies for Success (Aug. 6, 2008) (notes from presentation on file with authors).

109. Cohn, *supra* note 106.

110. *See, e.g.*, Griffin, *supra* note 75, at 7.

conclusions about strengths and weaknesses in an objective and apolitical manner. Underlying this objection is the fear that various governmental appointing authorities will choose commission members who will evaluate judges on the basis of case outcome rather than adjudicative process.[111]

Proponents of this view, however, are unable to cite to actual examples of politicized JPE programs. Instead, they argue by analogy. A recent article by Justice Charles Wells of the Florida Supreme Court, for example, argued that Florida was right to reject a comprehensive JPE program because the state legislature had changed the statutory composition of its judicial *nominating* commission in a way that "increased the potential for political influence in the selection of judges."[112] From this starting point, Justice Wells extrapolated the conclusion that "there can be no bulletproof guarantee that the judicial evaluation body will remain free of legislative or executive influence."[113]

It is certainly true that distrust between the courts and the legislative branch is broad and deep.[114] Recent concerns that proposed legislation for an Inspector General for the federal judicial branch might result in additional scrutiny of judges whose decisions are unpopular with Congress, notwithstanding statutory admonitions to the contrary, has not helped assuage this distrust.[115] However, independent JPE commissions should be seen as a possible solution to concerns over legislative or executive encroachment—not something to be discarded because of those concerns. In over thirty years of operation, there are no clear-cut examples in the popular or scholarly literature of state JPE commissions evaluating a judge on the basis of anything other than established, process-oriented criteria. We are certainly not aware of any examples in which a commission systematically targeted judges based on a particular ideology or approach. Rather, the outward politicization of judges and judicial decision-making occurs more frequently in jurisdictions that do *not* have judicial performance evaluation programs.[116]

The list of judges or entire judiciaries that have been targeted for political reasons in jurisdictions lacking JPE programs is lengthy and stretches out over more than two decades. At the state level, California Chief Justice Rose Bird and two of her peers did not retain their seats on

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111. *See id.*

112. Charles T. Wells, Editorial, *Viewpoint: The Inherent Danger of Judicial Evaluation Commissions*, JACKSONVILLE DAILY RECORD, Jan. 7, 2008, *available at* http://www.jaxdailyrecord.com /showstory.php?Story_id=49192.

113. *Id.*

114. For a discussion of a recent project to promote effective communication between Congress and the courts, see Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for Statutory Housekeeping: Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131 (2007).

115. Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. LJ. 1155, 1171 (2007).

116. *See* Kourlis & Singer, *supra* note 17, at 202.

the state supreme court in 1986 after an extensive and politicized public non-retention campaign. The three justices, who had no evaluations to document their broader judicial performance (the California judiciary had discussed but declined to adopt a JPE program in the early 1980s),[117] were left to defend themselves armed only with the esoteric notion of "judicial independence"—which public polling showed "was the one message that would not work."[118] In 1996, Justice David Lanphier of the Nebraska Supreme Court and Justice Penny White of the Tennessee Supreme Court were separately removed from the bench in highly politicized retention elections.[119] Once again, neither justice was able to point to objective evaluations from an independent commission to defuse the political rhetoric. Justice Lanphier limited his active campaigning to a bare minimum in order "to maintain the dignity of the office," a strategy that failed.[120] Justice White adopted Rose Bird's strategy of emphasizing the importance of judicial independence, which unfortunately produced the same result.[121] Justice White has since become an articulate supporter of JPE programs as a bulwark against politicization and for judicial independence, noting that "[u]ndoubtedly, much of the success of those who seek to destroy judicial independence results from the lack of available information upon which to base one's decision in judicial elections."[122]

To be clear, we are not asserting that JPE alone can inoculate the judiciary against politicization efforts. Local and national political culture would seem to have the most powerful impact on the existence and intensity of political attacks on the judiciary, and JPE by itself cannot change a poisoned cultural dynamic. But if JPE is not a vaccine, it is perhaps at least preventive medicine. Efforts to hold judges "accountable" for particular case outcomes appear more likely to find purchase in jurisdictions where process-oriented accountability measures are not publicly available. The "JAIL 4 Judges" initiative[123] emerged in South

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117. *See* REBECCA LOVE KOURLIS & JORDAN M. SINGER, A FRESH LOOK AT JUDICIAL PERFORMANCE EVALUATION IN CALIFORNIA 4-5 (2007), *available at* http://www.du.edu/legalinstitute/news/CA%20JPE.html.

118. John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, The Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 350 (1987); *see also* Bill Zimmerman, *The Campaign that Couldn't Win: When Rose Bird Ran Her Own Defeat*, L.A. TIMES, Nov. 9, 1986, at V1 (noting that "[t]o base a political campaign on the independence of the judiciary was to commit electoral suicide").

119. *See* Traceil V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 76-77 (1999).

120. *Id.* at 72.

121. *See id.*

122. Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1076 (2002).

123. The proposed initiative, styled as Constitutional Amendment E, would have allowed a thirteen-member "Special Grand Jury" to expose judges and prosecutors, as well as citizens serving on juries, school boards, county commissions, or in similar decision-making capacities to fines and jail—and strip them of public insurance coverage and up to half their retirement benefits—for making decisions that break rules defined by the special grand jurors. *See* CHRIS NELSON & KEA

Dakota, a state without a JPE program, in 2006. When that effort proved unsuccessful,[124] proponents proceeded with efforts to get the same measure on the ballot in Florida (a state that recently rejected any public dissemination of its JPE results)[125] in 2008.[126] Increased attacks on the state judiciary have also occurred recently in Missouri,[127] which similarly has lacked a formal JPE program.[128] Once again, we do not wish to suggest that the mere absence of a formal JPE program caused these attacks; rather, it is sufficient to observe that more existential threats to the independence of the judiciary tend to arise in states where public accountability through a JPE process is wanting.

By contrast, judges in JPE jurisdictions tend to be less subject to specialized attacks. When these attacks do occur, evaluation results—or simply the existence of a JPE program—have been used to emphasize the judges' adjudicative skills and depoliticize special interest messages. In 2006, for example, a ballot initiative was introduced in Colorado which sought to term-limit all of the state's appellate judges.[129] The initiative was retroactive and would have immediately removed nineteen of the state's twenty-six appellate judges from the bench, regardless of their experience and abilities. A spirited public education campaign, emphasizing among other things the fact that Colorado already had a system for evaluating (and, if necessary, removing) judges in a much more precise fashion, helped to defeat the initiative at the polls.[130] A follow-up study of Colorado voters found that only 18% of those who voted for judicial

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WARNE, SOUTH DAKOTA 2006 BALLOT QUESTIONS (on file with authors), *available at* http://www.sdsos.gov/electionsvoteregistration/electvoterpdfs/2006SouthDakotaBallotQuestion-Pamphlet.pdf. The proposed amendment was designed to apply retroactively. *Id.*

124. Due in large part to an extensive public campaign, the proposal was ultimately defeated by a 9-1 margin. *See* SOUTH DAKOTA SECRETARY OF STATE, GENERAL ELECTION OFFICIAL RETURNS FOR BALLOT QUESTIONS (on file with authors), http://www.sdsos.gov/elections voteregistration/pastelections_electioninfo06_GEballotquestions.shtm (last visited Oct. 17, 2008).

125. *See* Letter from Peter D. Webster, Chair, Comm. on Judicial Evaluations, to R. Fred Lewis, Chief Justice, Fla. Sup. Ct. (July 10, 2007) (on file with authors).

126. *See* Florida Department of State, Division of Elections, Initiative No. 02-06 (2002), *available at* http://election.dos.state.fl.us/initiatives/initdetail.asp?account=35025&seqnum=1.

127. As one example, Missouri Governor Matt Blunt used part of his 2008 State of the State Address to encourage the state legislature to "close the door" on courts who have "hijack[ed] the powers to tax and spend," even though no Missouri state court had raised such an issue in an opinion. Governor Matt Blunt, 2008 State of the State Address (Jan. 15, 2008) (on file with authors), *available at* http://governor.mo.gov/State_of_the_State_2008.pdf. Missouri is now the center of a firestorm concerning the best form of state judicial selection, and legislative threats to discontinue the Missouri Plan—the first state merit selection system implemented in the country—continue.

128. On February 29, 2008, the Supreme Court of Missouri created JPE committees at the trial and appellate levels by court rule, pursuant to its constitutional authority. The basis for the rule was a Report of the Missouri Judicial Evaluation Survey Committee. The program went into effect almost immediately, with the first set of reports and recommendations scheduled to be released in September 2008. *See* Letter from Dale C. Doerhoff, State Chair, Missouri Judicial Performance Evaluation Comms., to Participants at IAALS Symposium: Judicial Performance Evaluation: Strategies for Success (Aug. 5, 2008) (on file with authors).

129. *See* STATE OF COLORADO, ANALYSIS OF THE 2006 BALLOT PROPOSALS 7-8 (2006).

130. The proposed initiative gained only 43% support in the November 2006 election. *See* STATE OF COLORADO, OFFICIAL PUBLICATION OF THE ABSTRACT OF VOTES CAST FOR THE 2005 COORDINATED, 2006 PRIMARY, 2006 GENERAL 140 (2006).

term limits were aware that judges were evaluated by an independent commission; by contrast, 41% of those who voted against term limits knew specifically about the state's JPE commissions.[131] Far from injecting politics into the evaluation process, independent JPE programs—when they are publicly known and understood—have a tendency to serve as a bulwark against political attacks on the judiciary, making such proposals less likely to pass public muster.

## III. DEVELOPING A MODEL FOR FEDERAL JPE THROUGH PILOT PROGRAMS

In this Part, we propose a series of different pilot studies to test the benefits of JPE at the federal level. We suggest several alternatives: (1) a pilot program designed to elicit confidential feedback for federal district, magistrate, and bankruptcy judges strictly to promote professional self-improvement;[132] (2) a pilot designed to collect information on magistrate judges to provide feedback during their terms and provide information to the relevant decision-makers when the magistrate judge seeks reappointment; and (3) a program that employs an independent commission to review a wide range of data on the performance of district, magistrate, and bankruptcy judges, and to distill that information into a written report describing each judge's strengths and weaknesses on the bench. These proposed pilots are described in more detail below, although the opportunity for variation extends far beyond those three. Upon completion, we envision that each of the pilot studies would themselves be evaluated to determine their value in providing useful feedback to judges, increasing transparency and process accountability in an appropriate manner, and promoting greater public understanding of the courts.

Pilot programs should be designed to test the application of different elements of state JPE programs to the federal arena. These elements include the types of information collected, how the information is collected, whether the information is provided directly to the judge or reviewed first by a supervisor or commission, whether specific recommendations concerning the judge's professional strengths and weaknesses are made, to whom evaluation results will be provided, and the specific goals of the program. We recognize that the ideal pilot studies would be controlled experiments; however, given the reality of the federal courts'

131. *See* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM & LEAGUE OF WOMEN VOTERS OF COLORADO, 2007 COLORADO VOTER OPINIONS ON THE JUDICIARY 4 (2007), *available at* http://www.du.edu/legalinstitute/form-voter-input.html.

132. In restricting these pilot proposals to the district court level, we do not mean to suggest that other federal judges, such as appellate judges and ALJs, should themselves have no formal evaluation. Indeed, at the state level appellate judges have been evaluated for decades, and thoughtful programs have been developed to tailor appellate evaluations to the specific tasks and responsibilities of those on the appellate bench. New programs for appellate judges are being considered as well. Among them, the State of New Hampshire recently established an internal committee responsible for developing individualized performance evaluations of its Supreme Court. *See* Maclean, *supra* note 19.

dockets and the concern about installing an untried JPE program at the federal level, much less rigorous approaches will have to suffice.[133]

The three pilot studies described below build one on the other. The first proposed pilot is designed primarily to test the development of surveys, collection of meaningful case management data, and judicial response to receiving anonymous feedback. The second pilot includes each of these features, and additionally examines the value of interviews, independent review of judicial orders for clarity of communication, and distribution of evaluation results to those specifically charged with reappointing federal magistrate judges. The third proposed pilot would test the perceived advantages and disadvantages of an independent evaluation commission, and further would examine the efficacy of direct courtroom observation and judicial self-evaluations. While there is a logical progression to these proposals, they are not the only possibilities, and we welcome further discussion of the precise development of such pilots.

### *A. Pilot Proposal Number One: Confidential Evaluations*

As the 1991 study in the Central District of Illinois suggested, a basic JPE pilot could be organized and conducted solely within the judicial branch at relatively low cost. Like the Central District of Illinois pilot, our first proposed program would preferably be piloted in a district in which all judges support the endeavor. Also like the Illinois pilot, the program would be based primarily on survey responses from those who have directly interacted with the judge in the courtroom. We would go beyond just attorneys who have appeared before the judge, however, and also issue surveys to litigants, court staff, and jurors where appropriate. For purposes of the pilot program, it may make sense to have these surveys developed by the Federal Judicial Center.

Survey data traditionally have formed the backbone of judicial performance evaluations, and some background on their use is warranted. Attorney surveys in particular already comprise the core of JPE programs at the state level. In addition, the Chicago Council of Lawyers has conducted survey-based evaluations of federal judges who sit in Chicago for over thirty-five years, including evaluations of magistrate judges, district judges, senior district judges—and judges on the Seventh Circuit Court of Appeals.[134] The most recent survey—seeking input on Chicago-area federal magistrate judges—was sent to approximately 3,400 members of the Federal Trial Bar for the Northern District of Illinois, as well as all members of the United States Attorney's Office and Federal Defender's

133. For a discussion of the benefits of controlled experimentation in the context of procedural rules, see Maurice Rosenberg, *The Impact of Procedure-Impact Studies in the Administration of Justice*, 51 LAW & CONTEMP. PROBS. 13, 14-16 (1988).

134. *See* CHICAGO COUNCIL OF LAWYERS, AN EVALUATION OF UNITED STATES MAGISTRATE JUDGES 1 (2008).

Office in Chicago.[135] Survey recipients were asked about the magistrate judge's integrity (for example, by indicating their level of agreement with the statement "His/her rulings in civil cases are free from any predisposition to decide for either plaintiff or defendant"), judicial temperament (e.g., "He/she is courteous toward lawyers and litigants"), legal ability (e.g., "He/she understands the issues in complex cases"), decisiveness (e.g., "He/she rules promptly on pretrial civil motions"),[136] and diligence (e.g., "His/her hearings and pretrial conferences reflect adequate research and preparation").[137]

As the Chicago surveys suggest, attorney surveys must be carefully tailored both in their design and in their dissemination.[138] The survey should contain questions designed to elicit attorneys' perceptions of the judge's level of preparedness, clarity of expression, impartiality, and temperament on the bench, but should never allow them to comment on the substantive merits of a decision or order. With respect to dissemination, care must be taken to target only those attorneys who have actually appeared before the judge during the evaluation period, and to require those attorneys to respond to the survey based only on their personal experience with the judge.[139] In addition, an emerging practice at the state level is to survey attorneys shortly after the close of each case rather than to survey all attorneys at the same time.[140] Continuous dissemination of surveys has the virtue of targeting respondents while their experience with the judge is fresh in their minds.

Surveys should also invite attorneys to provide more extensive comments on the judge. In the pilot program in the Central District of Illinois, several of the judges who participated in the program reflected that the surveys and comments were beneficial to their professional development going forward. One district judge explained:

> I have benefited from knowing the feelings, ratings, and views of the attorneys. We all develop habits or ways of doing, or not doing, things in connection with our offices that we often are

135. *Id.* at 2.

136. *Id.*

137. *Id.* at Exhibit 2.

138. *See* Steven Flanders, *Evaluating Judges: How Should the Bar Do It?*, 61 JUDICATURE 304, 304-05 (1978) (praising the efforts of the Chicago Council of Lawyers but cautioning that bar polls alone may not produce a fully accurate picture of the judiciary).

139. The State of Alaska actually permits attorneys to complete surveys based on professional reputation or social contacts with the judge, but they must clearly indicate that this is the basis for their answers, and the basis for such responses is noted in the judge's final evaluation. *See* UNIVERSITY OF ALASKA ANCHORAGE BEHAVIORAL HEALTH RESEARCH AND SERVICES, ALASKA JUDICIAL COUNCIL RETENTION SURVEY 1 (2004). No other jurisdiction permits evaluations based on anything other than direct experience.

140. *See, e.g.*, COLO. RULES GOVERNING COMM'NS ON JUD. PERF. 10(a) (2007) (requiring that "surveys shall be conducted on a continuing basis").

> oblivious to that need continuing or changing. The responses I got will aid me in doing my job.[141]

Similarly, the Colorado judges survey indicated that most judges appreciated the greater feedback and were able to translate that feedback into immediate positive change.[142] As one judge put it:

> The most useful part of the process is the survey results. Although I think we're never as good as the most glowing compliments and never as bad as the worst, it is sometimes possible to find a common thread that alerts you to deficiencies. Even the most hateful comments may contain a kernel of truth.[143]

Attorney surveys are a necessary component of judicial evaluations, but other groups may also offer valuable information. Whereas attorney surveys in most jurisdictions ask for the attorney to rate a judge on a sliding scale for each question, juror surveys tend to ask a limited number of straightforward yes or no questions. This approach has the dual advantage of being easy to understand (yes or no questions make difficulties in the interpretation of questions less likely) and easy to complete (making it more likely that jurors will give it due attention after a long trial). As with attorney surveys, juror questionnaires tend to focus on the judge's behavior and control in the courtroom, rather than any substantive matter in the case. To this end, juror surveys might include questions such as: Did the judge treat people with courtesy? Did the judge act with patience and self-control? Did the judge act with humility and avoid arrogance? Did the judge pay attention to the proceedings throughout? Did the judge clearly explain the responsibility of the jury? Did the judge start court on time? And did the judge maintain control over the courtroom?[144]

In practice, juror surveys tend to be overwhelmingly positive for judges.[145] This is clearly a good thing from the perspective of juror service and public perception of the courts. Jurors who leave a courtroom believing that the judge acted thoughtfully, fairly, compassionately (where appropriate), and with a firm hand are more likely to think about the courts as a steady and valued institution, and are also more likely to share their positive experience with others. As one commentator has put it, "The [jury] system has served many purposes, but its enduring purpose has been to secure a greater measure of trust in judicial institu-

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141. DAVIS, *supra* note 50, at 9.

142. THE BENCH SPEAKS, *supra* note 79, at 13.

143. *Id.* at 14.

144. For related model juror questions, see SHARED EXPECTATIONS, *supra* note 8, at Appendix F.

145. *See, e.g.*, STATE OF UTAH, UTAH VOTER INFORMATION PAMPHLET—GENERAL ELECTION NOVEMBER 2, 2004 at 46-69 (2004) (showing that jurors gave favorable responses of 95% or higher to virtually all survey questions for virtually all district judges evaluated in 2004).

tions."[146] Because these virtues are so important, one should resist any temptation to discount high across-the-board ratings in juror surveys. Indeed, cause for concern should stem not from high ratings, but from abnormally low ones. The judge who does not connect with the jury, and who does not win jurors' confidence or respect, fails in at least that aspect of his or her role as a public servant.

Litigants might also be surveyed, preferably shortly after the close of the case. The existing literature suggests that litigants' satisfaction with the litigation process is far more relevant to their ultimate perception of the courts than the final outcome. Based on a review of court user studies in the 1980s, New York University Professor Tom Tyler concluded that "[t]he important role of procedural justice in mediating the political effects of experience means that fair procedures can act as a cushion of support when authorities are delivering unfavorable outcomes."[147] The existence of litigant surveys also serves as a gentle reminder to judges that the perception of procedural fairness is as essential to the courtroom experience as the reality. As one judge put it, courts must be known for "fairness and respect, attention to human equality, a focus on careful listening, and a demand that people leave our courts understanding our orders."[148]

Nevertheless, because individual litigants tend to have the highest emotional investment in a case, surveys should be crafted with particular care to focus only on general aspects of the litigation process. Appropriate questions for litigant surveys may include: was the judge well-prepared for your case? Was the judge respectful to you? Were the judge's rulings clear? Did the judge explain his or her ruling in a way that you could understand? And did the judge listen to your side of the case?[149]

Self-represented litigants present an additional challenge, because they lack the mediating force of an attorney to help explain procedures and decipher rulings. And while family law matters—almost exclusively the province of the state court system—tend to see unrepresented litigants in particularly high numbers,[150] the growing costs of legal services means that federal courts are not immune from increasing numbers of pro se litigants. Indeed, over twenty thousand cases were filed by non-

146. Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79, 93 (2003).

147. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 107 (1990).

148. Kevin S. Burke, *A Court and a Judiciary that Is as Good as Its Promise*, 40 CT. REV. 4, 6 (2003).

149. *See* SHARED EXPECTATIONS, *supra* note 8, app. G.

150. In Colorado, nearly 56% of litigants in domestic relations cases were self-represented in 1999, and the percentage was growing. GOVERNOR'S TASK FORCE ON CIVIL JUSTICE REFORM, FINAL REPORT 35 (2000) (on file with authors), *available at* http://www.state.co.us/cjrtf/report/report.htm (last viewed Aug. 3, 2008).

prisoner pro se litigants in the federal courts in 2007.[151] This does not mean, however, that pro se litigants require a different set of questions from those who do have legal representation. The survey instrument should include a question as to whether the respondent was self-represented, so that any trends concerning the judge's treatment of pro se litigants can be acknowledged.

Finally, surveys might be developed for court staff: law clerks, administrative staff, division clerks, court reporters, and others who interact with the judge on a regular basis in the courtroom. Such surveys should focus on the judge's interactions with support staff and clerks, level of preparedness in the courtroom, and responsiveness to administrative concerns, including case management issues.

For each of the respondent categories described above, care should be taken to ensure the anonymity of the respondents. Nothing on the survey should require or otherwise encourage the respondent to identify him or herself by name or specifics of the case. Where comments are provided, anonymity can be more thoroughly protected by asking someone unaffiliated with the judge being evaluated to review the comments and remove any identifying information before such comments are forwarded to the judge.

The number of responses to each survey is also important.[152] Juror response rates can be kept high by requesting (or even requiring) that each juror complete the short survey at the end of trial as the final component of jury service. Attorney response rates, which are traditionally low, can be raised to adequate levels in two ways. First, the surveys might be sent out on a rolling basis, shortly after the termination of each case,[153] so that the specifics of the case and the judge's performance are fresh in the attorney's mind. Second, wherever possible, surveys should be sent out electronically. Recent developments in electronic survey software provide respondents with the same guarantees of anonymity, allow for surveys that can be completed quickly with a few mouse clicks, and make it easy for the survey provider to track the number of surveys sent out and returned.[154] Furthermore, the federal district courts' move to electronic filing in recent years means that virtually every attorney of

151. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl. S-23 (2007).

152. *See* LAWRENCE F. LOCKE ET AL., READING AND UNDERSTANDING RESEARCH 48 (1998) (explaining the importance of an adequate sample size).

153. Here we define "termination" to mean the formal closing of the case, notwithstanding the possibility of appeal or reopening under other circumstances. Cases that close before an answer or other responsive pleading is filed would not be included.

154. *See* Gabriel M. Gelb & Betsy D. Gelb, *Internet Surveys for Trademark Litigation: Ready or Not, Here They Come*, 97 TRADEMARK REP. 1073, 1076-79 (2007) (describing the growth and development of online surveys); Dwight B. King, Jr., *User Surveys: Libraries Ask, "Hey, How Am I Doing?"*, 97 LAW LIBR. J. 103, 109-112 (2005) (same).

record has a valid e-mail account on file with the court, making accurate outreach to attorneys a relatively simple matter.[155]

Response rate and anonymity are more significant challenges for litigant surveys, although those challenges are not insurmountable. Most litigants (other than those proceeding pro se) do not automatically provide a physical or e-mail address to the court. Litigants may also feel less of an obligation to complete the survey than attorneys or jurors. Response rates can be increased, however, by making the opportunity to provide feedback easily available. The use of comment cards in restaurants provides an analogy. As one recent study concluded:

> If a customer has to seek out a comment card from a host or hostess, the cashier, or the front desk, suggestions for improvement of operations and general customer feedback on service are likely not to be received. Instead, relatively infrequent comments relating to extreme situations will likely be the only feedback provided. Although useful to know about these situations, it is of much greater importance to continually have the typical customer's assessment of normal operating conditions.[156]

One method of creating a larger and more representative response rate is to make it easy for each litigant to provide information by providing the litigant with information at the end of the case that identifies a court website and gives a specific (and time-limited) password to log into the system. The respondent could use any computer to complete the survey. Another possibility is to develop kiosks in the courthouse that would allow litigants to complete evaluation surveys electronically after leaving the courtroom. Of course, survey questions would have to be carefully formulated to protect against responses based on the emotion of an immediate courtroom appearance. But the technology for such kiosks already exists, and is being put to use in several state courthouses.[157]

Beyond survey data, we propose that the first pilot include collection of individual judges' case management data. Such data could be compiled by the Administrative Office of the U.S. Courts and sent to the judge to introduce an additional perspective on the judge's overall per-

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155. E-mail has become so essential to electronic case filing that one recent decision suggests that an attorney's failure to check the status of a case via e-mail or the PACER system may constitute professional malpractice. *See* Jessica Belskis, *Electronic Case Filing: Is Failure to Check Related to an Electronically Filed Case Malpractice?*, 2 SHIDLER J.L. COM. & TECH. 13, 13 (2005) (discussing Blackburn v. U.S. Dep't of Agric. & Forest Serv., No. C04-1404RSM (W.D. Wash. 2005)).

156. Joel D. Wisner & William J. Corney, *An Empirical Study of Customer Comment Card Quality and Design Characteristics*, 101 BRITISH FOOD J. 621, 629 (1999).

157. *See* Randall T. Shepard, *The New Role of State Supreme Courts as Engines of Court Reform*, 81 N.Y.U. L. REV. 1535, 1546 (2006) (discussing the emergence of "pro se kiosks" in Maricopa County, Arizona); Henri E. Cauvin, *New Internet Kiosks Make Courts More User-Friendly*, WASH. POST, Jan. 18, 2007, at DZ03 (noting installation of kiosks in the D.C. Superior Court to provide information and allow payment of fines).

formance. In addition to data concerning closed cases, average time to disposition, average caseload, and the like, at the pilot court's election, the data might also indicate to each judge where his or her statistics rank within the district, the circuit, and the nation. We float this idea not because we believe that judges should be ranked crudely against each other, but rather because relative performance, particularly within a district where judges have comparable dockets, is another important piece of information.

Judges in the 2008 Colorado survey expressed overwhelming support for the inclusion of case management data in performance evaluations. Overall, 73% of trial judges surveyed agreed or strongly agreed with the statement that case management data should be part of the evaluation process.[158] The judges in the survey expressed caution that such data be considered carefully and thoughtfully, and that judges be given the opportunity to explain to the committee any unusual issues with their dockets.[159] A federal JPE pilot might strike the same balance in the use of case management data; such data could be reviewed carefully for each judge and afforded appropriate, but not undue, weight in light of all the other factors comprising the judge's performance.

As envisioned in this pilot program, formal "evaluations" would not exist in a concrete sense. Rather, the survey and case management data, and relevant survey comments, would be sent to each judge for review and consideration toward his or her professional self-improvement. A slightly more robust version of this pilot would use the survey and case management results for individual mentoring or collective judicial training sessions.

At the completion of the pilot program, a separate study should be conducted to determine whether (and to what extent) the program met its stated goals, and which aspects of the program are worth maintaining, developing further, or discarding. This study could be conducted by the FJC or an organization unaffiliated with the federal judiciary that has similar capacity to conduct high-quality analysis.[160] Any such study should seek to measure all data reasonably related to the pilot program's goals. Here, the goals would include developing useful and appropriate survey instruments, soliciting an adequate number of survey responses, and providing meaningful information to judges in the form of survey and case management data. Much of the data that can be collected is

158. THE BENCH SPEAKS, *supra* note 79, at 14.

159. *See id.* at 15-19.

160. Assuming adequate resources are available, the benefits to using the FJC are rather obvious. The FJC's knowledge of the federal courts and the circumstances under which they operate makes it a natural first choice. At the same time, however, using a competent organization outside the judiciary to review the effectiveness of the pilot projects would remove any charge that the federal courts were simply reviewing themselves and might add to public confidence in the conclusions ultimately reached.

objective: how many judges were evaluated? Did all judges participate voluntarily? How frequently did evaluations take place? What criteria were set for evaluation? Other effectiveness data are subjective but highly important: did the judges find the feedback they received to be useful? Did judges express any concerns about the impact of the program on their decisional independence? Did the process generate any evidence of increased confidence among the bar or the public or both?

We recognize that the most important goal, improved judicial performance, would be difficult to measure meaningfully in the context of a pilot program. Careful selection of measurement variables, however, may help approximate at least the perceptions of improved performance. This approximation can be further strengthened by the inclusion of additional structural and data elements in the pilot program. We turn next to an example of this type of more robust pilot—one that adds interviews, review of written orders, and supervisory feedback.

### *B. Pilot Proposal Number Two: Magistrate Evaluations*

A second proposed pilot program would be limited to the evaluation of magistrate judges, but would be expanded with respect to the amount of information collected and the purposes for which such information was used. Specifically, the program would be designed to provide constructive feedback to magistrate judges well before the time they would need to announce intent to seek reappointment, and also to provide the historical evaluations of each magistrate judge to those vested with the responsibility of making reappointment decisions.

The value of comprehensive evaluations to the reappointment process is a primary goal of this proposed pilot. Currently, the information available for reappointment recommendations is relatively limited. Assuming the district court decides to consider an incumbent for reappointment, an independent panel is created to collect information and recommend whether the magistrate judge should be awarded an additional term.[161] The panel typically seeks input on the magistrate's performance through public comments, although an interview with the incumbent is also encouraged.[162] But as Professor Resnik has documented in the context of bankruptcy judge reappointments, giving heavy weight to public comments poses considerable risk. Comments come from self-

161. At least one year before the expiration of the magistrate judge's term, the district court must inform the magistrate judge whether it has determined not to reappoint the magistrate judge, or whether it has determined to consider reappointing the magistrate judge. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES 29 (2002). If the district court chooses the latter route, it must issue a public notice soliciting volunteers to serve on a "merit selection panel" for reappointment. *Id.* at 30. The panel must include at least two lawyers and at least two non-lawyers. *Id.* at 12.

162. *Id.* at 30.

selected respondents who may have particular agendas.[163] Furthermore, lawyers whose critical comments would otherwise be valuable may be reluctant to comment for fear that, should the judge be reappointed notwithstanding their feedback, they may have to appear before the judge with their identities—and criticisms—known.[164] The proposed pilot would test whether these concerns could be alleviated by broadly expanding the pool of information available to the reappointment panel, as well as employing anonymous surveys administered under the same rigorous methodology as proposed in the first pilot program.

As with the first pilot program described above, the magistrate pilot would begin with the collection of survey data and relevant case management data. In addition, the developers of the pilot program might consider including two additional sources of information: an interview with the magistrate judge, and a sample of the magistrate judge's recent written orders.[165]

Reappointment panels already have the option to interview an incumbent magistrate judge.[166] In the pilot program, we would suggest using an interview to flesh out any concerns about the collected information and allow the magistrate judge to provide any additional information that might not be evident from the data, such as an irregular docket or an unusually demanding or notorious case. The interview might also preview the panel's perceptions of the magistrate judge's strengths and weaknesses, and foster discussion (at least at a basic level) about future efforts for continuous professional improvement. Accordingly, the optimal time for an interview is some time after the panel has collected survey and case management data. All collected information should be forwarded to the magistrate judge in advance of the interview so he or she has an opportunity to review it ahead of time.

This pilot program might also consider collecting samples of the magistrate judge's orders for review. The purpose of this review is twofold. First, it allows those charged with reappointment to determine whether the magistrate judge's orders and opinions are sufficiently clear and understandable. It goes without saying that when any judge expresses him or herself in writing, the attorneys and litigants who review the opinion should understand without any hesitation the precise scope of the judge's ruling, and how the judge reached that result. Put another way, the parties should be clear about what happens next in their case.

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163. Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 676 (2002).

164. *Id.*

165. While discussed here solely in the context of magistrate judges, self-evaluations and review of written orders could obviously be piloted, and, if successful, employed in any JPE program for federal district judges, bankruptcy, judge, and the like.

166. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 161, at 30.

But this concern goes beyond the parties; even those with no interest in a particular case outcome should be able to read an opinion and understand the judge's reasoning.

The second purpose behind reviewing written orders is to ensure that the magistrate judge is relying on sound legal reasoning. By this we do not mean a "correct" decision in the substantive sense—that determination is the province of the district or appellate courts or both. Rather, the review for JPE purposes is somewhat more high-level: has the magistrate judge provided adequate citation to legal authority? Did the magistrate judge set out the relevant facts and evidence on which he or she relies for the decision? And is there a logical flow to the reasoning in the opinion?

While we have described this pilot with specific reference to magistrate judges, it could apply with limited modifications to the evaluation of bankruptcy judges as well. Reappointment decisions concerning bankruptcy judges, for example, do not require the use of advisory panels, but the practice of providing evaluation information to the ultimate reappointment authority would remain the same.

As with the first pilot, a pilot program using this model should be evaluated for its effectiveness. Because this proposed model builds on the first pilot, each of the effectiveness measurements used for the first pilot are equally appropriate here. In addition, one might examine the effectiveness of this pilot study by attempting to measure the value of a face-to-face interview to both the magistrate judge and the reappointment panel, the value to the reappointment panel of reviewing the magistrate judge's sample of written orders, and the overall value of the collected information on the magistrate judge to the reappointment panel.

### *C. Pilot Proposal Number Three: Commission-Based Evaluations*

A final proposed pilot program—again, one of dozens of possible variations—combines the emphasis on broader data collection in the proposed magistrate judge pilot with an additional element frequently used in state JPE programs: an independent commission to conduct the evaluation. The inclusion of an independent commission may serve three purposes. First, commission members may provide a perspective on the judge's professional strengths and weaknesses that might not be directly apparent to the judge, even if both the judge and the commission are reviewing the same performance-related information. Second, the commission can process the collected information and summarize it in a form that is more easily digestible than survey and case management data, and a potentially unwieldy number of comments. Finally, and perhaps most importantly, an independent commission may provide an imprimatur of balance and public oversight that simply cannot be achieved by even the most conscientious internal evaluation.

By "independent commission" we mean a volunteer commission at the district court level composed of a roughly equal number of attorneys and non-attorneys. This balance has proven to be successful at the state level,[167] and a similar format is used for magistrate judge reappointment panels.[168] Attorneys have the most consistent direct experience with the court and should have reasonable expectations about the nature of the judicial process. Attorneys may also provide legal expertise during the evaluation process and are in a position to explain the intricacies of a court's docket to laypersons. Non-attorneys provide a community perspective in the evaluation process, and help assure that the final evaluations are presented in a straightforward and non-technical manner. Both groups also add to the ultimate legitimacy of the evaluations. If only attorneys were involved, the process might be criticized as an "inside job" in which members of the legal community simply protect their own.[169] Citizen involvement strengthens both the perception of the program and the final product. As one early commentator on JPE put it:

> The key to any successful program of judicial evaluation is active lay participation—people working in concert or as a part of a co-ordinated effort with the legal profession in a broadly based citizens' effort to assist the voters in making those important decisions on critical judicial positions.[170]

If no attorneys were involved, however, evaluations might equally be criticized as the product of those who have little or no familiarity with the legal system or the role of judges. Finally, the inclusion of non-attorneys carries the additional benefit of fostering greater community understanding of the role of the judge. At least one study has shown that non-attorneys who are involved in the evaluation process walked away from it with a better sense of what judges do.[171]

For purposes of testing a JPE program in a pilot setting, it is sufficient to assemble a dedicated and balanced group of ten to twelve volunteers who are willing to review the relevant information provided by the

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167. As of 2008, all seven states with comprehensive JPE programs (Alaska, Arizona, Colorado, Kansas, New Mexico, Tennessee and Utah) utilize a commission with roughly equal representation of attorneys and laypersons.

168. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 161, at 12.

169. *See* A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 648-49 (1998); John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 878-79 (1990). The same criticisms have emerged where evaluations are conducted by Judicial Councils or otherwise controlled by the judiciary itself. The State of Utah, for example, instituted a JPE program in 1984 under the auspices of its Judicial Council, which consists of twelve judges and one attorney. That approach came under fire in the mid-2000's and was a major consideration undertaken by the state's Judicial Retention Task Force in 2007. In March 2008, Utah passed new JPE legislation that, among other things, entrusted evaluations to a commission composed of attorneys and non-attorneys. *See* UTAH CODE ANN. § 78A-12-201 (2008).

170. Henry T. Reath, *Judicial Evaluation—The Counterpart to Merit Selection*, 60 A.B.A. J. 1246, 1247 (1974).

171. *See, e.g.*, Anne Rankin Mahoney, *Citizen Evaluation of Judicial Performance: The Colorado Experience*, 72 JUDICATURE 210, 216 (1989).

Clerk of the Court (i.e., the survey data, self-evaluation, and sample of written orders) and the Administrative Office of the U.S. Courts (case management data), collectively discuss the judge's strengths and weaknesses that come out in the collected information, and draft a short report describing their conclusions as to the judge's performance. The independent commission may also wish to collect information itself from two additional sources: courtroom observation and a judicial self-evaluation.

Courtroom observation may be performed by members of the independent commission or by additional courtroom observers specially trained for that purpose.[172] There are advantages to either approach. Where commission members themselves conduct the observations, they can witness directly the judge's courtroom behavior and the behavior the judge expects (and tolerates) from attorneys, witnesses, and jurors. Commission members who do their own observations are also more likely to internalize the challenges a judge may face in the courtroom—crowded dockets, emotionally distraught litigants, unprepared counsel, and so on—that may not be apparent from paper reports on the judge. Independent observers, by contrast, are less likely to be recognized by the judge (assuring that the judge's behavior is not altered by the knowledge that a commission member is in the courtroom), and may have fewer preconceived notions about the judge before entering the courtroom.

In the Colorado judges survey, trial judges overwhelmingly supported regular courtroom observation. Forty-eight percent of the judges stated that courtroom observation was "very useful" in the JPE process, and another 40% stated that such observation was "somewhat useful."[173] Only 12% were neutral on the issue, and no judge indicated that observation was not useful.[174] Indeed, the judges practically pleaded for more observation as part of the process,[175] noting among other things that ob-

172. The State of Alaska, for example, has used a special corps of courtroom observers who are trained in advance and are required to couch their observations in specific categories of predetermined, process-oriented criteria. As many as fifteen observers are assigned to each judge. Each observer is given approximately forty hours of advance training, and the observers are directed to sit in courtroom proceedings at unscheduled intervals. They observe both criminal and civil cases and proceedings ranging from arraignments and motion hearings to full jury trials. The observers' notes are collected into a report for each judge, which specifies the number of observations, types of events and cases observed, the total number of hours the judge was observed, and the average rating the judge received in each category. The final reports are then forwarded to the Alaska Judicial Council for consideration as part of the judge's overall evaluation. *See* ALASKA JUDICIAL OBSERVERS 2006 BIENNIAL REPORT 1-8 (on file with authors), *available at* http://www.ajc.state.ak.us /Retention2006/JudicialObservers2006.pdf.

173. THE BENCH SPEAKS, *supra* note 79, at 20.

174. *Id.*

175. Colorado's JPE program requires that each commission member directly observe at least three judges up for evaluation in unannounced courtroom visits. *See* COLO. REV. STAT. § 13-5.5-103(1)(k) & -105(1)(c) (2008); Jane B. Howell, Executive Director, Colorado Office of Judicial Performance Evaluation, Presentation on Colorado Commissions on Judicial Performance (Aug. 2008), http://www.courts.state.co.us/Media/Law_School.cfm (select link for "Judicial Performance and Retention Presentation") (last visited Oct. 21, 2008).

servation would be enhanced further if the observer were to meet with the judge immediately afterward to ask any questions about what occurred. One judge summarized the feelings of a majority of respondents as follows:

> Observation is particularly useful if the judge does not know the individual or does not know that the observer is present in the courtroom. In our district, a courtroom can be observed by security officers over closed circuit TV. Another way is to appear during a busy docket day when the courtroom is full. I think the observer should arrange to sit down with the judge after observing him or her and ask questions about things observed to be sure there is no misunderstanding—particularly if the observer is a lay person.[176]

The developers of the pilot program may also consider introducing a judicial self-evaluation. It should be designed with two purposes in mind: to allow each judge to consider his or her strengths and weaknesses on the bench in private reflection, and to help the independent commission determine whether the judge's perception of those strengths and weaknesses comport with the strengths and weaknesses identified by others. The first purpose recognizes that even the most conscientious judge committed to continuous professional improvement is more likely to succeed when he or she takes time to assess his or her skill set on a regular basis. The second purpose ensures that there is no disparity between the judge's perception of his or her skills (positive or negative) and the perception of those who interact with the judge in the courtroom.

A common complaint among judges is that self-evaluation lacks real meaning, because all judges feel pressure to rate themselves as highly as possible.[177] Indeed, an average or below average self-evaluation in any category may invite questions from the commission, even if all other data indicate that the judge is above average in that category. There is, of course, little that can be done to assure that all judges approach the self-evaluation openly and honestly. But those who do should derive a benefit much greater than those who are inclined to inflate their self-assessments.

The pilot program can help promote sincere self-evaluations by considering making available mentorship programs that foster self-improvement. Here, the State of Arizona provides a model. Each judge who is evaluated is assigned to a "conference team" composed of another judge, a member of the state bar, and a member of the public.[178] The judge meets with the conference team to discuss his or her strengths,

176. THE BENCH SPEAKS, *supra* note 79, at 21.
177. *Id.* at 21-22.
178. *See* Pelander, *supra* note 169, at 690.

weaknesses, and areas for improvement based on the self-evaluation, survey results, and public comments. Together, the judge and his or her conference team prepare and sign a written self-improvement plan.[179] By rule, no member of the conference team may participate in formal evaluation of the judge.[180]

Similar to Arizona, a federal JPE pilot program might choose to use judicial self-evaluations as a teaching and self-improvement tool rather than as a formal component of the magistrate judge's evaluation. The conference team model, which uses the information gleaned from the evaluation process but is more hands-on and more private than a formal evaluation, should encourage magistrate judges to be thoughtful and honest in their self-assessments.

Regardless of whether the judge being evaluated is a district judge, magistrate judge, or bankruptcy judge, the independent commission should endeavor to collect as much of the specified information as possible during the data collection phase. If all information is not available for a certain judge, however, the commission may still proceed with the evaluation and note in its report what information was missing.

Once again, an effectiveness study should follow a pilot program of this type. In addition to the measurements described for the first and second proposed pilots, an effectiveness study here should consider measuring the time and money expended by the independent commission, the commission members' perception of the process, the value each judge placed on completing the self-evaluation, the number of times each judge was observed in the courtroom, the value to both the judge and the commission of the courtroom observation, and the overall value to the judge of receiving an independent analysis of his or her performance data.

## IV. BEYOND PILOT PROGRAMS: CHALLENGES AND OPPORTUNITIES

It is our hope that suitable testing of JPE through a variety of pilot programs in one or more districts will more rigorously define the contours of successful judicial performance evaluation at the federal level. A successful pilot program in one district, however, may not translate cleanly to another district, or to a national program encompassing all ninety-four districts. A pilot program may also be able to sidestep certain structural and administrative issues that become more pressing—and more complex—when extrapolated to a national program. The development of a more permanent and expansive federal JPE program, then, ultimately will require consideration of several additional factors. Here we discuss five such factors: the administration of a national JPE pro-

179. *Id.* at 692; *see also* ARIZ. JUD. PERF. REV. R. 4(f).
180. *See* Pelander, *supra* note 169, at 693.

gram; the development of national rules governing such a program; the structure and use of independent commissions; the frequency of evaluations; and the degree to which evaluation results should be publicly disseminated.

*A. Authorization and Administration*

A nationwide program of JPE in the federal courts would plainly benefit from some degree of centralized administration. A single authority can exercise greater control over both inputs (e.g., uniform survey questions, case management data, and operating procedures) and outputs (e.g., format of evaluation reports, methods of disseminating evaluation results if applicable). A centralized authority also may find it easier to run comparative analyses across districts, to confirm (for example) that the level of survey responses is reasonably consistent.

Judges would presumably be more comfortable if any national administration of a federal JPE program rested within the judiciary itself. Excellent resources within the judicial branch for developing and operating a national program are already in place. In one formulation, the Judicial Conference of the United States might be tasked with overseeing the program and developing national rules and procedures; the FJC with developing appropriate surveys and conducting research into the effectiveness of JPE across districts; the Administrative Office of the U.S. Courts with providing case management data; and the Circuit Clerks with collecting all the relevant data for each evaluated judge in the circuit and providing that information to the judge, appointing authority, and independent commission as appropriate.

A coordinated effort within the federal courts to develop and implement a robust JPE program would require both commitment and leadership from the judiciary. But it would also assure greater judicial control over the process and would demonstrate to the American public that federal judges are sincere about improving their performance on the bench and committed to their role as public servants. By contrast, the potential consequence of a tepid judicial response is a strong—and perhaps unwelcome—legislative response. Titles 18 and 28 of the U.S. Code are littered with statutory responses to perceived failures of the federal judiciary to address issues invoking accountability. The Speedy Trial Act[181] reflects legislative impatience with the judicial use of Federal Rule of Criminal Procedure 50(b).[182] The Judicial Conduct and Disability Act arose in part as a response to the failure of Judicial Councils to use their (admittedly vague) authority to deal with issues of judicial mis-

181. *See, e.g.*, 18 U.S.C. § 3161 (2008).

182. *See* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 430 (1992).

conduct under the pre-1980 version of 28 U.S.C. § 332.[183] The Civil Justice Reform Act was in part a Congressional response to the perception that district courts were not sufficiently achieving cost and delay reduction through case management.[184] And the Alternative Dispute Resolution Act of 1998 suggests legislative frustration with the pace of alternative dispute resolution implementation in the federal courts.[185]

When the judicial branch demonstrates strong leadership in areas of transparency and accountability, however, Congress is less likely to pass reactionary legislation. The Judicial Conference's mandated use of conflict disclosure software, for example, probably prevented a legislative push for a statutory mandate.[186] A similar mandate concerning seminar disclosure requirements may be sufficient to defeat a proposed legislative amendment to the pending federal judicial salary legislation to ban attendance at non-judicial seminars altogether.[187] And broad legislative demand for cameras in the courtroom in at least the lower federal courts may be dampened by the experimental posting of audio files of trial court proceedings on the federal court's PACER website.[188]

Judicial leadership and judicial administration of a federal JPE program, then, may well make sense. A statutory structure, however, does not entirely lack merit. We note that in most states in which JPE is successful, it rests upon a legislative foundation. Moreover, thoughtful legislation may carry certain advantages. First, a JPE program may engender greater public confidence when it is not administered by the judiciary itself. No matter how well-meaning or thoughtfully constructed a judicially operated JPE program might be, from the citizen perspective the evaluations are to some degree less credible when judges are the only parties involved in their own evaluations.[189] Second, a statute provides backbone to a program; it may be somewhat more difficult to change than a set of rules or guidelines, and accordingly may provide a more

183. *See* Stephen B. Burbank, *Procedural Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 291-94 (1982) (describing the legislative history of the Act and the concerns of some that the Judicial Councils were unwilling to exercise existing power).

184. *See, e.g.*, Mary Brigid McManamon, *Is the Recent Frenzy of Civil Justice Reform a Cure-All or a Placebo? An Examination of the Plans of Two Pilot Districts*, 11 REV. LITIG. 329, 332 (1992).

185. 28 U.S.C. § 651 (2008).

186. The Third Branch, Administrative Office of the U.S. Courts, Washington, D.C. *Transparency Takes Shape* (Dec. 2006), *available at* http://www.uscourts.gov/ttb/12-06/transparency/index.html; *see also* Linda Greenhouse, *Federal Judges Take Steps to Improve Accountability*, N.Y. TIMES, Sep. 20, 2006, at A20.

187. *See* Greenhouse, *supra* note 186; *see also* Charles Lane, *Judges Alter Rules for Sponsored Trips*, WASH. POST, Sep. 20, 2006, at A23.

188. *See* News Release, U.S. Courts, Pilot Project Begins: Two Courts Offer Digital Audio Recordings Online (Aug. 6, 2007) (on file with authors).

189. *See* Jean E. Dubofsky, *Judicial Performance Review: A Balance Between Judicial Independence and Public Accountability*, 34 FORDHAM URB. L.J. 315, 334 (2007) ("[J]udges' own evaluations often are too self-serving; no one can possibly be as good as some judges think they are.").

consistent model for judicial performance than might otherwise be available. Individual rules and guidelines can of course be authorized by the legislative framework, and such guidelines can be adjusted with greater frequency while leaving the framework in place.[190] Third, a statute represents, at its best, a triumph of communication between two branches of government, and between the citizens and their courts. It should be a product of discussion between elected representatives, the courts, and the public, based on careful thought and discussion about what it means to evaluate judges as public servants.[191] Finally, legislation would promote a certain degree of transparency about the purpose of the JPE program; debates concerning the legislation become part of the public record, and the statute itself is widely available. If the goals of the program and the criteria for evaluation are clearly delineated, the statute itself can be a self-contained civics lesson on what the public can expect from its federal judiciary.

We are cognizant of the concerns—voiced most recently by Justice Wells—that legislative authorization opens the door to legislative mischief.[192] And in discussing the perceived advantages and disadvantages to legislative versus judicial authorization of a federal JPE program, we do not take a position that one approach is preferable. A robust program created and designed under the auspices of the judiciary, with active leadership and buy-in from the entire federal bench, would be expected to gain considerable public support and plaudits for the courts' commitment to transparency and accountability.

### *B. Rules and Procedures*

Depending on the frequency and complexity of pilot JPE programs, rules and guidelines governing those programs may reasonably be set at the district or circuit level. Indeed, this sort of experimentation may be encouraged as a means of developing JPE rules and practices that best meet with the performance improvement needs of the judges and the

190. We discuss the ability to change or amend rules and guidelines in greater detail in Part IV(B) *infra*.

191. We fully recognize that the process of crafting legislation is inherently political and that even the most careful strategies and thoughtful suggestions are not immune from criticism and compromise. But that sober conclusion warrants greater involvement in the process, not less. Two recent legislative amendments to state JPE programs illustrate the point. In Utah, the Task Force on Judicial Retention considered changes to the state's program through the fall of 2007 before a bill was introduced in the state senate in early 2008. The Task Force was composed of members of both houses of the state legislature and three state court representatives, including the Chief Justice. *See* Minutes of the Judicial Retention Election Task Force (Aug. 14, 2007) (on file with authors). While it is not fair to say that every member of the Task Force walked away from the experience with everything he or she wanted, the discussion only benefitted the final legislative outcome. Similarly, the respective chairs of Colorado's Senate and House Judiciary Committees held open meetings throughout the summer and fall of 2007 to receive input on the reenactment of that state's JPE statute. The interests of the courts, attorneys' groups, legal organizations, think tanks and private individuals were considered during these initial meetings and throughout the legislative process. The bill that ultimately became law, while perfect to no one, was nevertheless largely acceptable to all.

192. *See generally* Wells, *supra* note 112 and accompanying text.

information-seeking needs of appointment authorities, chief judges, or the public. In a national program, however, a uniform set of national rules and guidelines should be considered, perhaps to be developed by the Judicial Conference. Such rules might set out the purposes of the JPE program, criteria for evaluation, process of collecting data, person(s) eligible to view the collected data on each judge, and procedures for preparing a report if an independent commission is used.

A provision for future amendment might also be included in the rules. Amendments should not go into effect immediately, for the obvious reasons that independent commissions would require time to prepare for changes to the data collection or the evaluation procedure, and judges subject to evaluation would require adequate notice of a procedural change. Judicial performance evaluations only have professional development impact if each judge is presented with clear and comprehensible criteria for the evaluation ahead of time. Put another way, judges cannot be expected to hit a constantly moving target.

### *C. Use and Composition of Independent Commissions*

If pilot studies suggest that a national program should use independent commissions, the rules should set out the composition and reach of those commissions. As discussed above, for pilot purposes it may be sufficient to seek out volunteers in rough balance of attorneys and non-attorneys. In a more fixed program, however, consideration should be given also to balancing a commission by appointing authority, and perhaps to achieving partisan balance as well. The judiciary may wish to appoint all commissioners itself. Or the rules could institute a model in use in some states, in which appointments are shared among all three branches of government. Some appointment authority may also be invested in groups outside the federal government that have an investment in the success of the courts, such as the Faculty of Federal Advocates or a local bar association. No matter how appointments are broken down, additional balance can be achieved by staggering the terms of each commission member so that no appointing authority has the power to pack the commission with new appointees at any given time.[193]

### *D. Frequency of Evaluations*

A judge is likely only to be evaluated once or twice during the course of a pilot program. In a more permanent program, however, regular intervals should be set for the evaluation of each judge. Evaluations should be conducted with sufficient frequency that improvements and continuing strengths are well-documented, and weaknesses or difficulties are identified and diagnosed quickly. Depending on the stated goals of a

193. For a more extensive discussion of best practices for the composition of independent commissions at the state level, see SHARED EXPECTATIONS, *supra* note 8, at 81-82.

final JPE program, evaluations for magistrate and bankruptcy judges might be timed to provide reasonably current data to assist with reappointment decisions. For example, districts that employ part-time magistrate judges with four-year terms might evaluate those magistrate judges three years after their initial appointments and three years after each reappointment.[194]

Full-time magistrate judges and bankruptcy judges might be evaluated more often. More frequent evaluation would serve two purposes. First, it would identify the judge's strengths and weaknesses on an early and continuing basis, providing more time and opportunity for professional development than might be the case if the judge was only evaluated once each term. Second, multiple evaluations are more likely to show improvement or lack of improvement in certain areas over time, making aberrations in data or dockets less likely than might be the case if only one evaluation is conducted.

The timing of evaluations for district judges with life tenure is less obvious, because there are no reappointment decisions or other temporal cues. However, there are strong arguments for maintaining a pattern of regular evaluations similar to those proposed for magistrate judges. One format might be to evaluate district judges two years after initially taking the bench, and every three years thereafter. District judges with senior status could also be evaluated every three years. This scheme has been used at the state level where judges are similarly appointed with no fixed terms. In New Hampshire, for example, Superior Court and District Court judges face evaluation at least once every three years.[195] Similarly, in Massachusetts, trial judges are evaluated at least once every three years.[196]

Evaluation every three years makes sense from a professional development perspective. As is the case with magistrate judges, regular evaluation of district judges helps to identify and address weaknesses more quickly. Regular evaluation also can be used to demonstrate a pattern of individual improvement. It can pinpoint areas for more widespread judicial education if a number of evaluations suggest collective strengths and weaknesses across the court. Finally, when evaluations are conducted on a frequent and consistent basis, the natural level of stress associated with such evaluations (for the judge being evaluated, but also

194. This timing scheme would allow sufficient time for a thorough evaluation (and, if requested, a recommendation on reappointment) based on three years of the magistrate judge's performance. It would also afford the magistrate judge a full year before reappointment to address any weaknesses identified in the evaluation.

195. *See* News Advisory, New Hampshire Judiciary, 2002 Judicial Performance Evaluations Released (Jul. 11, 2003) (on file with authors) *available at* http://www.courts.state.nh.us/press/pr030611.htm.

196. MASS. GEN. LAWS. ch. 211, § 26A (2008) (setting evaluation intervals of twelve to eighteen months for judges with four years of experience or less, and evaluation intervals of eighteen to thirty-six months for judges with more than four years of experience).

for members of the bar and court staff who must interact with the judge on a regular basis) may be diluted.

*E. Dissemination of Evaluation Results*

Public dissemination of evaluation results historically has been a difficult aspect of JPE for judges to stomach. And there are certainly circumstances in which the release of a judge's evaluation may be unwise.[197] But the importance of circulating evaluation results to the general public should not be underestimated, and should be considered carefully for inclusion in any final program of judicial performance evaluation. Indeed, there are at least five advantages to broad sharing of results. First, regular dissemination of judicial evaluations reinforces appropriate criteria by which the public should measure its judges. Rather than considering a judge to be "good" or "bad" based on his or her handling of a particularly difficult or controversial case (the types of cases most likely to be covered by the media)—or worse, the outcome of a particularly politicized case—the lay public may begin to base its assessment of judicial quality on the judge's clarity of expression, ability to manage his or her docket efficiently, and demonstrated command of procedural rules and substantive law.

Second, to the extent the public is aware that evaluations are being conducted, knowledge of the program may increase transparency and foster public confidence in the court system. Transparency would in fact be increased along two dimensions: the courts demonstrate that they are willing to be subject to evaluation as a means of fostering continuous improvement in their role as public servants, and the evaluation commission demonstrates that its evaluation process was open, thorough, and in line with its role as a representative of the people.[198]

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197. If, for example, the judge retires or resigns after the evaluation is conducted but before the date scheduled for its release, there is little value in making the evaluation public. This approach has precedent at the state level. Colorado has a longstanding requirement that judges be shown their final evaluation and "narrative profile" (a short form of the evaluation for inclusion in voter guides) at least 45 days before they must declare their intent to seek retention. COLO. REV. STAT. §§ 13-5.5-106(1)(a)(V) & (2)(A)(3) (2008). Judges who resign from the bench or do not declare their intent to seek retention do not have their evaluations circulated or placed in the voter guide. In 2008, the state's JPE legislation was amended to require the state's Office of Judicial Performance Evaluation to issue a statewide statistical report thirty days before the election, setting forth the total number of justices and judges who were eligible to stand for retention, the total number of evaluations performed by the state and district commissions, the total number of justices or judges who were evaluated but did not stand for retention, and the total number of justices and judges recommended for retention. *See id.* §§ 13-5.5-103(1)(q)(I)-(IV).

198. One commentator recently observed in a discussion of judicial nominating commissions:

> A lack of transparency is highly damaging to the public's perception of the commission system. In the absence of information regarding proceedings, the public tends to think that the system is 'closed,' and that judges are selected through 'the old-boy system' or some other process that has little to do with the qualifications of the candidate. Such perceptions undermine the confidence in the quality of judges and ultimately in the quality of the legal system.

Third, public confidence is also promoted by the simple fact that most judges historically do well on evaluations, and the federal bench—given the increased salaries, prestige, and difficulty of appointment—should shine in this area. Certainly at the state level, judges selected through a competitive appointive process tend to do well on evaluations.[199] Federal district judges in particular, whose initial qualifications were sufficient to elicit a Presidential appointment and Senate confirmation, are presumed to be well-qualified to take the bench. Dissemination of evaluation results serves both to confirm this presumption, and to demonstrate that each judge is motivated to grow and improve on the bench.

Fourth, for those judges who do not receive a strong evaluation, public dissemination may serve as motivation to improve performance. Indeed, it may be the single strongest source of motivation. Federal district judges do not face the danger of being removed in an election; only personal standards of excellence and the risk of public embarrassment align a judge toward continued improvement on the bench. For most judges (state and federal), personal drive is enough. For those few judges who have lost their enthusiasm for the job, however, publication of poor evaluation results might provide the appropriate kick-start to either dedicate oneself to rapid professional improvement, or resign from the bench if that dedication is lacking.

Finally, widespread dissemination assures that the information the public actually receives on its judges is comprehensive and accurate. Public awareness of the federal judiciary has been influenced by the proliferation of media coverage for judicial nominations, confirmation hearings, and infamous cases.[200] Furthermore, in recent years an increasing number of websites have emerged that either target specific judges[201] or ask for anonymous and unedited comments on a wide range of judges.[202]

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Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based System*, 34 FORDHAM URB. L.J. 125, 157 (2007). The identical point applies to judicial evaluation commissions—full disclosure of the evaluation process and the identities of the commission members promotes public understanding of the system and confidence therein.

199. Alaska, for example, has utilized merit selection since statehood and has used a JPE program since 1975. During that time, only three judges have not been recommended for retention, in part because of the careful efforts of the nomination commission to recommend highly qualified candidates. Bill Gordon, Member, Alaska Judicial Council, Remarks at IAALS Symposium: Judicial Performance Evaluation: Strategies for Success (Aug. 5, 2008) (notes of remarks on file with authors).

200. This list of federal cases generating high media interest in the last several years alone is extensive and springs easily to mind, particularly in the areas of accused corporate malfeasance, criminal activity by celebrities, or terrorism. The judges presiding over these cases have found themselves under an unexpected (and uninvited) microscope, with greatly increased public scrutiny.

201. *E.g.*, Impeach Judge Turk!, http://www.anusha.com/turk.htm (last visited Oct. 17, 2008); Ten Federal Judges Who Must Be Impeached for Abuse of Power, http://home.earthlink.net/~dlaw70/top10.htm (last visited Oct. 17, 2008).

202. *See, e.g.*, The Robing Room, http://www.therobingroom.com (last visited Oct. 17, 2008). The website describes itself as "a site by lawyers for lawyers." *Id.* Their mission is "to provide a forum for evaluating federal district court judges and magistrate-judges." *Id.* Lawyers are encour-

The evaluations on these sites are at best unscientific and anecdotal, reflecting only the comments of a self-selected group; at worst, they are factually incorrect and motivated by personal bias rather than any dispassionate evaluation. JPE, by contrast, holds both the judges and the evaluation process *itself* to rigorous standards, creating a system in which both the public and the judiciary can be confident.

## CONCLUSION

If thoughtfully implemented, a JPE program holds great promise both for the federal judiciary and for those who use and rely on the federal courts to preserve their rights and resolve their disputes. Pilot programs, drawn from elements of successful programs at the state level, may be useful in developing a program tailored to the unique needs of the federal system. A well-constructed JPE program would help locate judicial accountability where it belongs—in the process of adjudication—rather than in public or Congressional reaction to case outcomes.

Ultimately, for any JPE program to be accepted and functional, it must be embraced both by federal judges and the public they serve. Individual judges will need to step forward as leaders in this enterprise. The benefits of doing so—reframing judicial accountability, preserving judicial independence, and building public confidence in the courts—suggest that such an effort would be well worthwhile.

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aged to provide numerical ratings or comment on individual judges. *See id.* Commenters' e-mail addresses are collected, but no names are displayed in connection with the comments. *See id.* For a similar example, see Robe Probe, http://www.robeprobe.com (last visited Oct. 17, 2008).

# PERSPECTIVES FROM THE RULE OF LAW AND INTERNATIONAL ECONOMIC DEVELOPMENT: ARE THERE LESSONS FOR THE REFORM OF JUDICIAL SELECTION IN THE UNITED STATES?

NORMAN L. GREENE†

*The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*[1]

* * *

*Most U.S. judges and court reform organizations regard elections as a poor method for selecting judges. They believe judges can be influenced by the fear of electoral retaliation against decisions that conform to the law but not popular preferences. They also fear that judges may compromise their independence by incurring obligations to those who provide financial support to their election campaigns.*[2]

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In writing this article, the author took an open and collaborative approach and reached out to experienced international and domestic law practitioners and scholars in a variety of disciplines. A partial list in alphabetical order includes distinguished members of the American Bar Association, Rule of Law Initiative; the American Society of International Law; Development Alternatives, Inc. (DAI); the Millennium Challenge Corporation (MCC); the National Center for State Courts; the United States Agency for International Development (USAID); the United States Department of State; the World Bank; academia; and the judiciary: *e.g.*, Elizabeth Andersen, Daniel Berkowitz, Ronald Brand, Anthony Champagne, Wade Channell, Donald Chisholm, Melanne Civic, Simon Conte, Kenneth Dam, Kevin Davis, Martha Dye, Robinson Everett, Kevin Fandl, Rob Fleck, Tom Ginsburg, Richard Gold, F. Andrew Hanssen, Ann Hudock, Erik Jensen, William Kaschak, Linda Camp Keith, Stuart Kerr, Rachel Kleinfeld, Aart Kraay, Evelyn Lance, Robert Leventhal, Richard Messick, John K.M. Ohnesorge, Luis Ore, H. Kathleen Patchel, Amanda Perry-Kessaris, Hon. Richard Posner, Kristi Ragan, Anita Ramasastry, Joe Siegle, Robert Stein, Matthew Stephenson, Brian Tamanaha, Frank Upham, Mark Walter and Franck Wiebe, and the author thanks them for their collegiality, generosity and in certain cases, inspiration. The author also acknowledges the support of Altria Client Services Inc. in connection with the preparation of this article. Responsibility for any statement contained in this article is solely that of the author rather than that of any person or entity acknowledged here.

1. Central European and Eurasian Law Initiative, U.N. Basic Principles on the Independence of the Judiciary 2 (2004), http://www.abanet.org/rol/programs/resource_judicial_reform.html (follow "UN Basic Principles on the Independence of the Judiciary" hyperlink).

2. Mira Gur-Arie & Russell Wheeler, *Judicial Independence in the United States: Current Issues and Relevant Background Information, in* GUIDANCE FOR PROMOTING JUDICIAL

## INTRODUCTION

I have learned through multiple conversations and extensive study that American writers on domestic judiciaries and American writers on foreign judiciaries seem to be on separate paths. They often publish in different places, and if they read each other's work, it is not obvious from some or perhaps much of what I have read. Not too long ago, I was on one of those separate paths myself (the domestic one) until I was told, in substance, by a friend who was on the other one (the international and rule of law one) that "the issues on both paths are really the same, don't you know?" This simple but perceptive thought gave me an entirely new perspective. The objectives of this article include joining the two paths, applying to the domestic sphere perspectives from the field of rule of law and international economic development, inspiring further scholarship, and starting on the road toward positive change.

This article will consider whether a relationship exists between good business and a fair and impartial judiciary; if so, whether a compelling domestic economic rationale for American judicial reform may be identified; and if so, how it may be achieved. It will begin by focusing on the international principles of rule of law originating in work sponsored by international financial institutions and other governmental and non-governmental organizations, which have disbursed billions of dollars to improve judicial systems in developing countries. These principles include key components of the rule of law, such as judicial impartiality, independence,[3] competence, and accountability;[4] and they are applicable

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INDEPENDENCE AND IMPARTIALITY 133, 140 (rev. ed., USAID Office of Democracy and Governance 2002), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf.

3. *See* MICHAEL J. TREBILCOCK & RONALD J. DANIELS, RULE OF LAW REFORM AND DEVELOPMENT 61-63 (2008); Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1042-43 (2007); *see also* Suleimanu Kumo, *The Rule of Law and Independence of the Judiciary Under the Sharia*, 8 J. ISLAMIC & COMP. L. 100, 103 (1978) ("The principle of the rule of law is inextricably mixed with the principle of independence of the judiciary. The latter principle means, in effect, that judges shall enjoy immunity from interference by the government and [be free] to decide issues before them only in accordance with the law without fear of adverse repercussions. This is secured in modern constitutions, by provisions laying down well defined procedures for appointments to the higher judicial offices, charging judicial salaries on the consolidated fund thus giving them fixed salaries and excluding these from parliamentary debates and by the procedure for their removal from office."); Sam Rugege, *Judicial Independence in Rwanda*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 411, 411, 415 (2007) (noting the relationship between the rule of law and judicial independence as well as economic progress: "Judicial independence is a universally recognized principle in democratic societies. It is a prerequisite for a society to operate on the basis of the rule of law," and citing the Asian Development Bank for the following proposition:

> The cornerstone of successful reform is the effective independence of the judiciary. That is a prerequisite for an impartial, efficient and reliable judicial system. Without judicial independence, there can be no rule of law, and without the rule of law the conditions are not in place for the efficient operation of an open economy, so as to ensure conditions of legal security and foreseeability.)

*See also* Evelyn Lance, Commentary, *Emerging Democracies Get Help from Isles*, HONOLULU ADVERTISER, May 2, 2005 at 1, *available at* http://www.courts.state.hi.us/attachment/7337E1F0797A8F54EB5741B062/edghfi050205.pdf (noting that "many [emerging democra-

to the United States as well as to other countries.[5] This article will also consider the basis for linking the rule of law and economic development, various causation controversies affecting the linkage, and the likely economic consequences of rule of law violations. It will then assess state court judicial elections in the United States in light of the rule of law, whether the American practice of judicial elections is consistent with the rule of law, and the potential economic implications.

The article concludes that a sufficient connection between the rule of law and sustainable economic progress (whether called development or growth) has been demonstrated to warrant the concern of governmental and nongovernmental policymakers, both at home and abroad; that the principles of the rule of law and economic development apply domestically as well as internationally; that state court judicial elections create or appear to create rule of law violations in the United States; and that Americans most concerned about the welfare of our economy should work for the elimination of state court elections in the United States.

## I. THE RULE OF LAW AND INTERNATIONAL ECONOMIC DEVELOPMENT

### *A. The Enormous International Commitment to Promoting Rule of Law*

The notion that the rule of law promotes economic development is built on various factors, including common sense, practical assumptions, logic, and to some extent, empirical studies.[6] Based on this level of knowledge, policymakers have made decisions and taken action, includ-

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cies] . . . recognize that a strong, independent and professional judiciary . . . is an essential element of a free, orderly and economically vital society").

4. *See* TREBILCOCK & DANIELS, *supra* note 3, at 63-65; *see also* Stefan Voigt, *The Economic Effects of Judicial Accountability: Some Preliminary Insights*, 27 (Int'l Ctr. for Econ. Research, Working Paper No. 19, 2005) (considering the relationship between the rule of law and judicial accountability as well as economic progress):

> In this paper, the hypothesis that judicial independence and judicial accountability are not necessarily competing ends but can be complementary means toward achieving impartiality and, in turn, the rule of law is presented. It is argued that judicial accountability can increase economic growth through various channels[,] one of which is the reduction of corruption. *Id.*
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> . . . Independent judges who are not accountable and do not incur any cost for such behavior, will prevent the judiciary from unfolding its potentially beneficial consequences. A low degree of [judicial accountability] can thus increase uncertainty with regard to the status of the promises made by the legislature [*i.e.*, the laws passed by the legislature, with reference to private property]. Higher levels of uncertainty are expected to induce lower aggregate investment and thus lower levels of economic growth.

*Id.* at 10-11. *See also id.* at 27 (Voigt recommends further research to test his article's theories).

5. The general applicability of the principles of judicial impartiality, independence, competence, and accountability to the United States judiciary is self-evident. In support of the general applicability of the rule of law to the United States, see, for example, World Justice Project, Domestic Mainstreaming of the Rule of Law, http://www.worldjusticeproject.org/domestic-mainstreaming (last visited Nov. 4, 2008). *See also* Symposium, *Is the Rule of Law Waning in America?*, 56 DEPAUL L. REV. 223 (2007).

6. *See generally* John K.M. Ohnesorge, *The Rule of Law*, 3 ANN. REV. OF L. & SOC. SCI. 99, 100 (2007).

ing disbursing extraordinary sums of money to promote the rule of law as a key component of international assistance to developing countries.[7] Policymakers are on a timetable: they need to make decisions now on the basis of the knowledge that they have to try to improve or not improve foreign legal systems. If they decide to take action, they must decide what kind of action to take and where.

At the same time, an academic debate proceeds over what we know about the subject, including: what is the rule of law; what is economic development; do improvements to the rule of law promote economic development; what is the measure of each; does economic development in turn bring about a demand for the rule of law; does it do so everywhere; are there exceptions; what caused the exceptions; do they matter; and how do we know and prove the connection between the rule of law and economic development. Is the connection just an association, perhaps a correlation, or is there demonstrated causation? Is there empirical evidence of this; if so, how much; and how much is necessary? If not, what evidence should we obtain and how should we obtain it? The academic discourse is divided, sometimes tentative, other times assertive, and often calls for further research, but it forms a vast literature.

The effort in the "field of law and economic development . . . has been lead [sic] by the international financial institutions (IFIs)—the World Bank, the International Monetary Fund (IMF), the Asian Development Bank, etc.—by the aid and development arms of the U.S. government and the European Union, and to a lesser extent by NGOs. . . . In this context, the Rule of Law is understood as being related to economic development and the workings of a market economy, rather than as a set of normative political commitments."[8] These and other organizations, such as and including the Inter-American Development Bank, the United States Agency for International Development (USAID), and the American Bar Association (ABA) through its Rule of Law Initiative (ABA ROLI) [9] and its diverse activities, have disbursed or overseen the disbursement of billions of dollars.[10] The many activities of ABA ROLI

7. *See, e.g.*, TREBILCOCK & DANIELS, *supra* note 3, at 2.

8. Ohnesorge, *supra* note 6, at 100.

9. *See* American Bar Association, *About the ABA Rule of Law Initiative*, http://www.abanet.org/rol/about.shtml (last visited Oct. 17, 2008) ("The Rule of Law Initiative (ABA ROLI) is a mission driven, non-profit organization with an annual budget of over $30 million. The Rule of Law Initiative's primary funders are the United Agency for International Development (USAID), the Department of State, and the Department of Justice. It also receives funding from foundations, private individuals, law firms and corporations.").

10. Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117, 117 (1999); Richard E. Messick, *Judicial Reform: The Why, the What, and the How* 1 (Mar. 15-17, 2002), http://www.pogar.org/publications/judiciary/messick/reform.pdf. The work of some of the involved organizations includes: for ABA ROLI's judicial reform program, *see* American Bar Association, *Judicial Reform Programs*, http://www.abanet.org/rol/programs/judicial-reform.html (last visited Oct. 17, 2008); for the World Bank, *see* The World Bank, *Judicial Reform*, http://tinyurl.com/59njp9 (last visited Oct. 17, 2008); for the Inter-American Development Bank, *see* Inter-American Development Bank, *A Decade of*

appear on its website and are too extensive to catalog, but cover numerous countries and projects in the area of legal reform, including gender equality projects.[11]

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*Judicial Reform*, http://www.iadb.org/news/articledetail.cfm?language_EN&artid=2127 (last visited Oct. 17, 2008) ("The reform of Latin America's judicial systems, once considered a specialized concern of judges and lawyers, is now at the center of the region's development agenda, IDB President Enrique V. Iglesias said at a recent conference."); for USAID, *see* USAID, *Strengthening the Rule of Law & Respect for Human Rights*, http://www.usaid.gov/our_work/democracy_and_governance/rol.html, (last visited Oct. 17, 2008) ("[C]ivil and commercial codes that respect private property and contracts are key ingredients for the development of market-based economies. USAID's efforts to strengthen legal systems fall under three inter-connected priority areas: supporting legal reform, improving the administration of justice, and increasing citizens' access to justice."); for the Asian Development Bank, *see* Eveline N. Fischer, Deputy Gen. Counsel, Asian Dev. Bank, *Lessons Learned from Judicial Reform: The ADB Experience* (Oct. 20, 2006) ("Since 1995, international donors have invested more than US$1.0 billion in legal and judicial reform work—for good reason. Strong rules-based institutions promote economic growth. A fair, independent and efficient judiciary supports equitable development."), http://www.adb.org/Media/Articles/2006/10829-speech-Eveline-Fischer/; and for the IMF, *see, e.g.*, Press Release, International Monetary Fund, *IMF Executive Board Approves Three-Year US $75.8 Million Stand-By Arrangement for Macedonia* (Sept. 15, 2005) ("Comprehensive judicial reform, to be implemented over several years, will create a fairer and more predictable framework for business activity by increasing the independence and professionalism of judges, eliminating court delays, and removing misdemeanors and administrative cases from the regular courts."), http://www.imf.org/external/np/sec/pr/2005/pr05196.htm.

Although not an aid-dispensing organization, Transparency International "raises awareness and diminishes apathy and tolerance of corruption, and devises and implements practical actions to address it." Transparency International, *About Transparency International*, http://www.transparency.org/about_us (last visited Oct.17, 2008). It has likewise recognized a connection between judicial reform—specifically, eradication of corruption, economic progress and other societal needs. *See* Transparency International, *Other Thematic Issues*, http://www.transparency.org/global_priorities /other_thematic_issues/judiciary (last visited Oct. 17, 2008) ("It is difficult to overstate the negative impact of a corrupt judiciary: it erodes the ability of the international community to tackle transnational crime and terrorism; it diminishes trade, economic growth and human development; and most importantly, it denies citizens impartial settlement of disputes with neighbors or the authorities."); Mary Noel Pepys, *Corruption within the judiciary: causes and remedies*, *in* TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007 3 (Cambridge Univ. Press 2007), *available at* http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2007#download; *see also* Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 39 (Thomas Carothers ed., Carnegie Endowment for Int'l Peace 2006) [hereinafter PROMOTING]("Real equality before the law requires courts that are strong and independent enough to enforce it. It also depends particularly on a lack of corruption within the judiciary, because the rich can use bribes to escape equal justice.").

See also the United States Institute for Peace (USIP) Rule of Law program, which seeks to advance "peace through the development of democratic legal and governmental systems." United States Institute of Peace, http://www.usip.org/specialists/bios/current/kritz.html (last visited Oct. 28, 2008). Also, the "USIP's Rule of Law Program works to assist institutions and processes that will best bring about law-based management of international conflict and a sense of justice. The program is based on the premise that adherence to the rule of law entails far more than the mechanical application of static legal technicalities; it requires an evolutionary search for those institutions and processes that will best bring about authentic stability through justice." http://www.usip.org/ruleoflaw/about.html (last visited October 28, 2008). For general information about USIP, see http://www.usip.org/aboutus/index.html (last visited Oct. 28, 2008).

11. Specifically, the ABA's Rule of Law Initiative is involved in the following substantive areas: anti-corruption, criminal law reform and human trafficking, gender issues, human rights and conflict mitigation, judicial reform, legal education reform and legal profession reform. *See* American Bar Association, *supra* note 10. Also, it is involved in over forty countries in Africa (including North Africa), Asia, Europe and Eurasia, Latin America, the Caribbean, and the Middle East. *Id.* Among the many efforts of the Rule of Law Initiative has been the Arab Women's Legal Network

For example, according to a 2002 report:

> The World Bank, the Interamerican [sic] Development Bank, and the Asian Development Bank have extended over $800 million in loans for judicial reform. . . . [T]he United Nations Development Program, the European Union and its member states, and the American, Australian, Canadian, and Japanese governments have provided significant grant aid to help developing nations improve the operation of the judicial branch of government.[12]

The World Bank reports having lent $273.2 million in 2002, $530.9 million in 2003, $503.4 million in 2004, $303.8 million in 2005, $757.6 million in 2006, and $424.5 million in 2007 on rule of law initiatives.[13] As one commentator noted, there has been a "massive surge in development assistance for law reform projects in developing and transition economies involving investments of many billions of dollars. The World Bank alone reports that it has supported 330 'rule of law' projects and spent $2.9 billion on this sector since 1990."[14]

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(AWLN), for which the ABA has provided "technical assistance and capacity-building support." *See Arab Women's Legal Network Holds General Meeting in Amman*, ABA RULE OF LAW INITIATIVE, July 9, 2007, http://www.abanet.org/rol/news/news_jordan_awln_general_meeting.shtml. The idea of the AWLN was conceived in February 2004 at a conference in Amman, Jordan, and the network was formally launched in 2005. *See* ABA Rule of Law Initiative, *The Arab Women's Legal Network*, http://www.abanet.org/rol/mena/awln.shtml (last visited Sept. 19, 2008). The purpose of the AWLN included considering and advancing issues facing women in the legal profession and women's rights generally. *Id.*; *see also* U.S. Dep't of State, *Women and the Law—A Regional Dialogue: Conference Summary, Observations, and Conclusions* (2004 Amman conference), http://www.state.gov/p/nea/rls/31797.htm (last visited Oct. 10, 2008).

Two of the persons acknowledged in this article were involved with the AWLN, one Evelyn Lance, in the AWLN's formative phase at the 2004 Amman conference, see, for example, Lance, *supra* note 3, and the other, Martha Dye, in managing the North African segment of the program supporting the AWLN. *See, e.g.*, A Bulletin for CEELI Staff, Volunteers and Friends Around the World, *Women Legal Professionals Come Together for ABA Training in Morocco*, May 20, 2005, *available at* http://mail.abanet.org/scripts/wa.exe?A3=ind0505&L=ROL_ENEWS&E=quoted-printable&P=75739&B=_%3D_NextPart_001_01C55D4D.13469F2C&T=text%2Fhtml;%20charset=iso-8859-1.

12. Messick, *Judicial Reform: The Why, the What, and the How*, *supra* note 10, at 1; *see also* U.S. GEN. ACCOUNTING OFFICE, FOREIGN ASSISTANCE RULE OF LAW FUNDING WORLDWIDE FOR FISCAL YEARS 1993-98 2-3 (1999), *available at* http://www.gao.gov/archive/1999/ns99158.pdf:

> Based on the funding data that cognizant departments and agencies made available, the United States provided at least $970 million in rule of law assistance to countries throughout the world during fiscal years 1993-98 . . . . At least 35 entities from various U.S. departments and agencies have a role in U.S. rule of law assistance programs. The Departments of State and Justice and USAID are the principal organizations providing rule of law training, technical advice, and related assistance. The Department of Defense, the U.S. Information Agency (USIA), numerous law enforcement agencies and bureaus, and other U.S. departments and agencies also have a direct role.

*Id.* Research has not disclosed an updated study by the General Accounting Office.

13. THE WORLD BANK, SUMMARY OF FISCAL YEAR ACTIVITIES 55 (2007), http://siteresources.worldbank.org/EXTANNREP2K7/Resources/AR07Section3.pdf.

14. TREBILCOCK & DANIELS, *supra* note 3, at 2; *see also Economics and the Rule of Law: Order in the Jungle*, THE ECONOMIST, Mar. 13, 2008, *available at* http://www.economist.com/displaystory.cfm?story_id=10849115 ("Western donors have poured billions into rule-of-law projects over the past 20 years.").

The Millennium Challenge Corporation (MCC) is a United States government corporation that provides aid to countries meeting certain levels of satisfactory standards of good governance.[15] Founded in 2004, the "MCC is based on the principle that aid is most effective when it reinforces good governance, economic freedom and investments in people."[16] Eligibility for grants depends, among other things, on whether the country meets certain thresholds in particular categories. These categories include: "Ruling Justly" indicators, consisting of "Political Rights" and "Civil Liberties" (measured by Freedom House indexes); "Control of Corruption;" "Government Effectiveness;" "Rule of Law;" and "Voice and Accountability" (measured by World Bank Institute indexes).[17] Using these indicators, the MCC evaluates countries on, among other things, "public confidence in the . . . judicial system; . . . strength and impartiality of the legal system; . . . independence, effectiveness, predictability, and integrity of the judiciary; . . . [and the training of judges] in order to carry out justice in a fair and unbiased manner."[18] Eligibility does not require minimum scores in all indicators.[19] The purpose of the indicators is "to identify countries with policy environments that will allow Millennium Challenge Account funding to be effective in reducing poverty and promoting economic growth."[20]

Rule of law reform includes both judicial reform and overall legal reform.[21] What falls into the category of judicial reform or legal reform

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15. Carnegie Endowment for International Peace, *Fact-Sheet: The Millennium Challenge Corporation and Political Reform in the Arab World*, http://www.carnegieendowment.org/files/mccfactsheet1.pdf.

16. Millennium Challenge Corporation, *About MCC*, http://www.mcc.gov/about/index.php (last visited Oct. 17, 2008).

17. Carnegie Endowment for International Peace, *supra* note 15.

18. Millennium Challenge Corporation, *Guide to the MCC Indicators and the Selection Process: Fiscal Year 2008* 16-17 (2008) http://www.mca.gov/documents/mcc-fy08-guidetoindicatorsandtheselectionprocess.pdf.

19. Morocco received in August 2007 a $698 million five-year compact, despite passing only two of the six "Ruling Justly" indicators, in light of its qualification in other categories of eligibility. Carnegie Endowment for International Peace, *supra* note 15. Some countries which might not otherwise qualify for funding from the Millennium Challenge Corporation may meet the test for threshold funding. See Press Release, U.S. Dept. of State, Millennium Challenge Corporation Board of Directors Announces 2007 Threshold Countries: Niger; Peru; and Rwanda (Nov. 8, 2008), *available at* http://www.state.gov/p/af/rls/76110.htm ("MCC's Threshold Program is designed to assist countries on the 'threshold' of Millennium Challenge Account (MCA) eligibility for Compact assistance. Threshold countries must demonstrate a commitment to reforms that will address the specific policy weaknesses identified by the MCA eligibility criteria.").

Improving conditions in developing nations, of course, requires attention to sectors in addition to rule of law reform in an integrated approach. *See* Office of the Coordinator for Reconstruction and Stabilization, Western Hemisphere Planning and Development Section, *Active Response Corps Regional Deployment, Port-au-Prince, Haiti*, http://www.crs.state.gov/index.cfm?fuseaction=public.display&shortcut=4RPT (last visited Dec. 7, 2008) (mentioning security and police, judicial improvement, good governance and community building, and economic and infrastructure development).

20. Millennium Challenge Corporation, *supra* note 18, at 2.

21. *Cf.* Kleinfeld, *supra* note 10, at 47 ("Although most legal scholars define the rule of law by its ends, most programs to build the rule of law implicitly define the rule of law by its institutional attributes. . . . Internally, most practitioner organizations rarely use the words *rule-of-law*

"blurs at the margin," but the "core of a judicial reform program typically consists of measures to improve the operation of the judicial branch of government and related [or supporting] entities such as bar associations and law schools."[22] This includes "changes in the ways in which judges are selected, evaluated, and disciplined to ensure that decisions are insulated from improper influences."[23] Overall legal reform may include drafting and revising legislation as well.[24] Increasing compensation and respect for the judiciary are also concerns.[25]

Reforms need not involve transplanting "complicated legal systems that work well in rich countries" to poorer countries "without significant modification."[26] The subject of legal transplantation—what is successful or unsuccessful and why—is one of some complexity; however, merely transplanting an institution from one place to another does not insure that the institution will be functional or effective when it arrives at its destination.[27] The "'hasty transplant syndrome' is a critical problem in legal

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*reform* and instead discuss legal reform, judicial reform, and police (or law enforcement) reform."); Carothers, *The Problem of Knowledge*, *in* PROMOTING, *supra* note 10, at 20 ("[T]he terms *judicial reform* and *rule-of-law reform* [are] often used interchangeably," but "[t]he question of which institutions are most germane to the establishment of the rule of law in a country is actually quite complex and difficult.").

22. Messick, *Judicial Reform: The Why, the What, and the How*, *supra* note 10, at 4. *See* Kleinfeld, *supra* note 10, at 48 ("As practitioners have tried to reform these primary institutions [such as the judiciary], however, they have found that they rely on the proper functioning of a large and ever-growing array of essential supporting institutions. . . . The judiciary is reliant on magistrates' schools, law schools, bar associations, clerks and administrative workers, and other supporting groups. . . . As new supporting institutions are discovered and deemed to be essential, they are added to the list of areas in need of reform.").

23. Messick, *Judicial Reform: The Why, the What, and the How*, *supra* note 10, at 5.

24. *Id.* at 4.

25. Kleinfeld, *supra* note 10, at 59 ("When judges are underpaid and underrespected, corruption can take hold, forcing difficult choices between increasing judicial independence and achieving predictable, equitable justice.").

26. Juan Carlos Botero et al., *Judicial Reform*, 18 WORLD BANK RES. OBSERVER 61, 83 (2003). *See also id.* at 77 ("Poor countries, or countries without a developed judicial tradition, should probably concentrate on instituting simple rules and procedures that are easy to enforce. A legal system that will do perfect justice in infinite time and at infinite cost is probably a luxury that the poor can ill afford."); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 5 (1998) (recommending simple rules "for the kind of weak judiciary that one is apt to find in a poor country" because, among other reasons, they put "fewer demands on the time and the competence of the judges" and therefore are less costly and make decision-making "more likely to be accurate.").

27. *See* Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163, 167 (2003) (classifying countries into those that developed their formal legal order internally ("origins") and those that received their formal legal order from other countries ("transplants")). Considering receptive and unreceptive transplants, the authors note that "[t]he most common complaint is that while the transplanted law is now on the books, the enforcement of these new laws is quite ineffective." *Id.* at 165; *see id.* at 179. *See also* Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 ANNU. REV. POLIT. SCI. 205, 221 (2008) ("[I]nstitutions do not necessarily have the same effects when transplanted from one context to another. To redeploy the memorable line of former Brazilian minister Luis Carlos Bresser Pereira, 'institutions can at most be imported, never exported.'") (citation omitted); MASAHIKO AOKI, TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS 2 (MIT Press 2001) (noting that "a borrowed institution may be neither enforceable nor functional" under certain circumstances); KATHARINA PISTOR, THE STANDARDIZATION OF LAW AND ITS EFFECT ON DEVELOPING ECONOMIES 15 (United Nations Publ'n 2000), *available at* http://www.unctad.org/en/docs/pogdsmdpbg24d4.en.pdf (distinguishing between merely having "the

reform assistance, which 'involves using foreign laws as a model for a new country, without sufficient translation and adaptation of the laws into the local legal culture.'"[28]

### B. *The Linkage Between the Rule of Law and Economic Development at Home and Abroad*

#### 1. Definition of the Rule of Law

The concept of the rule of law has been traced to "political theorists like Aristotle, Montesquieu and Locke, who were concerned with devising limits to the power of the government."[29] In the case of Aristotle, the concept appears in the sense of "judging the case rather than the parties" and showing impartiality.[30] The phrase "rule of law" itself has been attributed to British jurist Albert Venn Dicey in 1885.[31] The phrase is susceptible to varying definitions from the limited to the substantial.

For example, definitions of the rule of law have been described as broad and variable; it has been called a "notoriously plastic phrase."[32] The phrase "rule of law" is not a "legal term of art."[33] Commentators have varying views of its utility. One extreme view is that the phrase has

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best laws on the books" and "establishment of effective legal institutions," which are not necessarily the same thing). Pistor "warns against viewing legal standards as a panacea for building effective legal systems around the world." *Id.* at 17.

28. Wade Channell, *Lessons Not Learned About Legal Reform*, *in* PROMOTING, *supra* note 10, at 139. "In some egregious cases, reformers simply translate a law from one language to another, change references to the country through search-and-replace commands, and then have the law passed by a compliant local legislature. The result is generally an ill-fitting law that does not 'take' in its new environment as evidenced by inadequate implementation." *Id.* at 139-40. The mistaken assumption is that if one would

> simply help countries adopt the laws that have been proven to support economic development, such development would follow . . . . In some sense, this approach could be compared to a hypothetical orchard development program in which analysts recognize that healthy orchards all have a certain quality of apples. The analysts then fly in apples, tie them to the local trees, and momentarily assume success because the result looks like an orchard.

*Id.* at 145. *See also* Kleinfeld, *supra* note 10, at 52 ("reformers tend to waste time and scarce legal resources within developing countries in efforts to make laws and institutions look like those in their own system.").

29. Alvaro Santos, *The World Bank's Uses of the 'Rule of Law' Promise in Economic Development*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 257 (David M. Trubek & Alvaro Santos eds., 2006) (citation omitted). A history of the rule of law commencing with the ancient Greeks appears in BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (Cambridge Univ. Press 2004); however, Tamanaha's book does not cover the subject of the rule of law and economic development.

30. Richard Posner, *The Role of the Judge in the 21st Century*, 86 BOSTON U. L. REV. 1049, 1057 (2006) (internal citation omitted). *See id.* at 1057:

> [A] defining . . . element of the judicial protocol is what Aristotle called corrective justice. That means judging the case rather than the parties, an aspiration given symbolic expression in statues of justice as a blindfolded goddess and in the judicial oath requiring judges to make decisions without respect to persons. It is also the essential meaning of the "rule of law."

31. TREBILCOCK & DANIELS, *supra* note 3, at 15.

32. Matthew C. Stephenson, *A Trojan Horse in China?*, *in* PROMOTING, *supra* note 10, at 196.

33. Ohnesorge, *supra* note 6, at 101.

no meaning: "The 'rule of law' means whatever one wants it to mean. It's an empty vessel that everyone can fill up with their own vision."[34] If rule of law just means the "rule of good law," the term is useless, since "'we have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.'"[35] "Everyone uses the phrase because everyone can get behind it and it might make it easier to get funding."[36] "The rule of law . . . stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means."[37]

One commentator observed that "[w]hen an American writes or speaks on [the rule of law] he usually begins with a confident assumption that everybody knows what the rule of law is and then devotes the rest of his time to a bold and eloquent statement in favor of it."[38] Another commentator noted the following:

> Our tradition has produced no agreed definition of the Rule of Law, and there is no important tradition of academic analysis and explication of the term . . . . Few American law students study jurisprudence (legal philosophy), and it is safe to say that the overwhelming majority of American law students never address the Rule of Law concept in any systematic way.[39]

The rule of law should not be the rule of any law, regardless of its content, however. Although that may enhance predictability, such a rule of law would be "compatible with a regime of laws with inequitable or evil content"; and it "may actually strengthen the grip of an authoritarian regime by enhancing its efficiency and by according it a patina of legitimacy."[40]

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34. Stephenson, *supra* note 32, at 196.

35. *Id.* (citing Joseph Raz, *The Rule of Law and its Virtue,* 93 L. Q. REV. at 195-96 (1977)). *See also* TAMANAHA, *supra* note 29, at 113 ("The rule of law cannot be about everything good that people desire from government. The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it should not be indulged.").

36. Stephenson, *supra* note 32, at 196.

37. TAMANAHA, *supra* note 29, at 4. *See also id.* at 1 ("[T]here appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the 'rule of law' is good for everyone.").

38. Harry W. Jones, *The Rule of Law and the Welfare State,* 58 COL. L. REV. 143, 145 (1958).

39. Ohnesorge, *supra* note 6, at 102. Minimalist or thin theories of the Rule of Law emphasize "form and procedure" rather than a set of "substantive rights or norms," and "maximalist, or thick theories" include "references to democracy and core human rights." *Id.*

40. TAMANAHA, *supra* note 29, at 120; *id.* at 95-96 ("The rule of law in the service of an immoral legal regime would be immoral. Clarity and consistency of application with respect to pernicious laws—like legalized slavery—makes the system more evil, enhancing its draconian efficiency and malicious effect . . . . To see formal legality as moral in itself can have hazardous consequences for a populace."). *See also* Norman L. Greene, *A Perspective on Nazis in the Courtroom, Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France,* 61 BROOK. L. REV. 1121, 1124-25 (1995); *Economics and the Rule of Law: Order in the Jungle, supra* note 14, at 84 ("America's southern states in the Jim Crow era were governed by the rule of law on thin definitions, but not on thick.").

The World Justice Project has identified four "universal" principles comprising its "working definition" of the rule of law, embodying, among other things, fairness, accountability, independence, and competence:

> 1. The government and its officials and agents are accountable under the law;
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> 2. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property;
>
> 3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient;
>
> 4. The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges, who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[41]

Another view likewise ascribes to the rule of law three elements, which generally require that the courts should be accessible, independent, impartial and accountable:

> The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements: *first*, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful "day in court"; *second*, that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and *third*, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of general principle and the demands of the particular situation.[42]

In turn, judicial impartiality and independence are captured by the notions that decisions "are reached on the factual and legal merits of the

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41. World Justice Project, http://www.worldjusticeproject.org/about/ (last visited Nov. 4, 2008).

42. Jones, *supra* note 38, at 145, *cited with approval in* Ohnesorge, *supra* note 6, at 101-02. See also Carothers, *The Rule of Law Revival*, *in* PROMOTING *supra* note 10, at 4, noting that

> [t]he rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.

issues before the court, uninfluenced by considerations that are extraneous to those merits, such as personal relations between the judge and one of the parties, corruption, cronyism, political interference or coercion in particular decisions, especially those affecting the government of the day or its officials."[43] Judicial accountability, among other things, includes such matters as the quality of the decision-making process, compliance with judicial codes of conduct, and the efficiency of judicial administration.[44]

Different concepts of the rule of law are peculiarly referred to as "thick" or "thin," depending on the number and kinds of requirements they contain, and have been shown in a sliding scale.[45] The thickest versions contain individual rights, including some social welfare concepts.[46] For example, the World Justice Project's concept of the rule of law is not merely one of formalistic legality, but expressly includes concepts of fairness, competence, and the protection of "fundamental rights." Its definition appears to fall within the "thicker" part of the scale.

The notion of the "rule of law, not of men" has sometimes been considered an alternative view of the rule of law.[47] This is subject to the caveat that human participation cannot be divorced from the operation of law since laws do not apply or interpret themselves.[48] It is a valuable reminder that judges should "apply a relevant body of rules to a situation," rather than "do as they please . . . without regard to rules."[49]

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43. TREBILCOCK & DANIELS, *supra* note 3, at 31.

44. *Id.* at 63-65. The authors elaborated on the concept of accountability as follows:

> For example, decisions of judges in lower courts are typically subject to a judicial appeal process to higher courts. Gross dereliction of duty, abuse of office, and other flagrant forms of judicial misconduct are typically subject to some form of judicial disciplinary process, which may be administered by the courts themselves or by a semi-independent body representing a diverse range of relevant stakeholders. Operational accountability in the efficient and appropriate expenditure of public monies is often ensured through various budgetary allocation processes and public audit mechanisms . . . .

*Id.* at 32. *See also* Stefan Voigt, *The Economic Effects of Judicial Accountability—Some Preliminary Insights* 3 (Int'l Centre for Econ. Research, Working Paper No. 19, 2005):

> Of course, we do not want judges to be able to decide no matter what with regard to cases brought before them. We want them to treat the parties appearing in front of them with respect, to separate relevant from irrelevant arguments, and to decide the case within a reasonable period of time according to the letter of the law. We do not want them to let their personal preferences or their sympathy or antipathy with the parties to taint their decision. In that sense, we want judges to be accountable to the law and, at the end of the day, to the people who use the law as a means to structure their interactions.

45. TAMANAHA, *supra* note 29, at 91.

46. *Id.* at 112; Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 336, 338 (Erik G. Jensen & Thomas C. Heller eds., Stanford Univ. Press 2003) ("In Western liberal democratic discourse, *rule of law* connotes a commitment to democracy, an emphasis on law and order, limitations on the power of state action (particularly police and prosecutors), respect for legal authority, individual rights, and an effort to hold state actors up to the same rules and standards as everyone else.") (footnote omitted).

47. *See, e.g.*, TAMANAHA, *supra* note 29, at 122.

48. *Id.* at 123.

49. *Id.* at 126.

Without specifying what the rules should be, the concept calls for government to "sublimate their views to the applicable laws."[50]

Finally, the World Justice Project recently developed a Rule of Law index that has been and will be applied to a number of countries, including the United States, to measure the extent to which a country acts in conformity with the rule of law.[51] A pilot study performed for the Project by the Vera Institute measured the rule of law to a limited extent in three cities outside the United States and in New York City to "gauge the extent to which all people, particularly those who are poor or otherwise marginalized, experience and benefit from the rule of law."[52]

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50. *Id.* at 140.

51. World Justice Project, Rule of Law Index, http://www.worldjusticeproject.org/rule-of-law-index (last visited Nov. 4, 2008):

> The Rule of Law Index is the first index that examines the rule of law comprehensively. . . . Because the Index looks at the rule of law in practice and not solely as it exists on the books, the Index will be able to guide governments, civil society, NGOs and business leaders in targeting efforts to strengthen the rule of law.
>
> . . . .
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> The WJP has developed a robust and cost-effective methodology to measure more than 100 variables. It utilizes two main sources of new data: a general population poll, and a qualified respondent's questionnaire. In addition, existing data and data drawn from other indices are being incorporated into the analysis.
>
> . . . .
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> The WJP has completed field testing Version 1.0 of the Rule of Law Index in Argentina, Australia, Colombia, Spain, Sweden and the USA. The next round of testing will be conducted in Liberia and Tanzania. The WJP anticipates administering the Index in 100 countries in three years. In each country where the Index is administered, the WJP will prepare a Rule of Law Index report that describes its findings. The Index will be administered periodically to show changes in countries over time.

*See also* MARK DAVID AGRAST ET AL., THE WORLD JUSTICE PROJECT RULE OF LAW INDEX: MEASURING ADHERENCE TO THE RULE OF LAW AROUND THE WORLD 5, 8, 22, 23 (2008); *id.* at 5:

> The Index methodology employs a combination of data collection methods and sources of information, including a standardized general population poll, four standardized expert surveys, and analysis and triangulation of data from existing indices and local sources. The methodology developed by the WJP [World Justice Project] team was tested in Argentina, Australia, Colombia, Spain, Sweden and the United States.

52. JIM PARSONS ET AL., VERA INSTITUTE OF JUSTICE, DEVELOPING INDICATORS TO MEASURE THE RULE OF LAW: A GLOBAL APPROACH, A REPORT TO THE WORLD JUSTICE PROJECT 1 (2008). *See also* AGRAST, *supra* note 51, at 5 ("In addition, the Vera Institute of Justice developed for the WJP a set of new performance indicators to measure the Index, and tested indicators for the last two bands of the Index in [particular cities in] Chile, India, Nigeria and the United States."). The Vera project commenced in January 2008, and its findings were presented to the World Justice Forum in Vienna, Austria, in July 2008. PARSONS, *supra* at 1. In addition to New York City, the particular cities studied were Chandigarh, India, Lagos, Nigeria, and Santiago, Chile. *Id.* As a pilot project, the Vera report also noted lessons learned, next steps, and future challenges. *Id.* at 23-26.

As its "baseline" definition of the rule of law, the Vera Report accepted a 2004 definition of the United Nations Secretary-General, as follows:

> [The "rule of law"] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

2. What is Economic Development?

Although the rule of law obviously applies to the United States as well as other countries, the phrase is still most commonly used these days in the field of international development work.[53] For example, starting in the early 1990s, the World Bank and IMF "began conditioning the provision of financial assistance on the implementation of the rule of law in recipient countries," justified in order to "provide a secure environment for investments, property, contracts, and market transactions."[54] Over the past couple of decades, this has grown to be a professional field, whose practitioners use funding from international development institutions, such as USAID, to promote the rule of law in developing countries and post-conflict environments.[55]

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*Id.* at 3 (citing the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 4, *delivered to the* Security Council, U.N. Doc. S/2004.616) (August 23, 2004) *cited with approval in* U.S. AGENCY FOR INT'L DEV., THE GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 5 (2008)). This definition in part appears to invoke the rule of good law by bringing in a human rights component to the rule of law and therefore would fall within the "thicker" part of the scale for rule of law definitions. AGRAST, *supra* note 51, at 6.

53. For application of the concept of the rule of law domestically, see TAMANAHA, *supra* note 29, at 130 (providing examples of how the United States has disregarded the rule of law in the international arena). *See also* Symposium, *supra* note 5, at 223-26; Marci Hamilton, *The Rule of Law Even As We Try to Export the Ideal of Justice By Law, Not Whim, Some in America Resist That Very Ideal*, (Oct. 23, 2003), *available at* http://writ.news.findlaw.com/hamilton/20031023.html ("Public servants . . . have invested enormous amounts of time into the project of exporting the rule of law to countries trying to establish democracy . . . . Even as we export this precious principle, however, there is evidence that it has lost ground here at home."); World Justice Project, Domestic Mainstreaming of the Rule of Law, *supra* note 5 ("The rule of law needs to be strengthened in the United States as it does around the world. To promote that effort, a kickoff 'mainstreaming' meeting was held in Washington, DC in February 2007. Now, state and local bar associations around the country are designing state-level multidisciplinary outreach meetings that can identify multidisciplinary partnerships for strengthening the rule of law at the state and local levels.").

54. TAMANAHA, *supra* note 29, at 2.

55. The antecedents of the current "law and development" movement may be traced back to unsuccessful efforts in the 1960s to reform international judicial systems and substantive laws. This effort, sponsored by USAID, the Ford Foundation, and private American donors, ended unsuccessfully but was subsequently resumed in a different form in the 1990s. *See* Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 125 (1999); *id.* at 128-132 (describing rule of law aid programs); *see also* Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. OF COMP. L. 895, 900 (2008) (describing, among other things, the "first wave of law and development theorists that emerged in the 1960's"); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1065. The "most significant reason" for the early failure was reportedly the belief that United States legal institutions could be "easily transplanted to developing countries." Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 126. Before the 1990s resumption, U.S. aid providers "took an interest in law-oriented aid, starting in Central America in the mid-1980's," concentrating on criminal justice. THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 163 (Carnegie Endowment for Int'l Peace 1999).

Many resources are available on international development efforts and practices, including http://www.bizclir.com/ ("This site is a dynamic knowledge development and knowledge sharing tool to improve the impact of USAID's efforts on Business Climate Legal and Institutional Reform. The site will host information for development practitioners including: country assessments, best practices, publications, and expert opinions.").

Many articles refer to the rule of law and economic development; however, little is said in those articles about the definition of economic development, as if all readers knew what this term meant. Sometimes the word "economic growth" is used instead of "economic development," as if both words were the same; and sometimes the words "development" and "growth" both appear in the same definition, as follows:

> Outside the U.S., the concept of local economic development (LED) refers to a broad set of financial and technical assistance provided to less developed countries (LDCs) to reduce global poverty. In this sense, policies and programs focus on a comprehensive approach to economic growth that includes capacity building for citizen, public and private sector participation and collaboration. These efforts may focus on improvements to political, legal, financial, transportation, communications, education, environmental, or healthcare systems. Business or employment specific aspects of LED may focus on entrepreneurial development, foreign direct investment, and the development and maintenance of efficient production and distribution systems for goods and services.[56]

Although the subject is not free from doubt, development is sometimes perceived to be the broader term and more representative of permanent economic progress.[57] Nonetheless, nothing precludes the rule of law from supporting less extensive forms of economic progress.

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56. Int'l Econ. Dev. Council, Economic Development White Paper, 1-2 (2006).

57. My wide-ranging inquiry in July and August 2008 about the meaning of "economic development" to experienced thinkers in the field of rule of law and economic development surprisingly led to responses to the effect that this was a "good question," with limited suggestions. This led me to consider the subject carefully and reach my own conclusion regarding what economic development meant, as stated in this article.

My similar inquiry about the differences between "economic development" and "economic growth" in August 2008 led to numerous comments to the effect that this too was a "good question" and suggested distinctions and theories on the similarities and differences. For example, there were some responses to the effect that they are not the same; that they should not be applied interchangeably; that development was a broader and more sustainable form of economic progress; and that, among other things, growth may indeed occur (as measured by an increase in GDP) without overall improvement in other indicators of economic progress, such as reductions in unemployment, poverty and wealth disparity. *See, e.g.*, e-mail from Moira Brennan to author and American Society of International Law Interest Group Members for International Economic Law and Transitional Justice and Rule of Law (Aug. 28, 2008, 22:05 EST) (on file with author and *Denver University Law Review*). Among other things, the Brennan e-mail noted "thank you for raising an important question . . . of whether the words 'economic growth' and 'economic development' should be used interchangeably." *Id.*

Others commented to the effect that the phrases are often used interchangeably and are essentially the same. *See, e.g.*, e-mail from Frank Upham, Wilf Family Professor of Property Law, New York University School of Law to author (Aug. 28, 2008, 09:13 EST) (on file with author and *Denver University Law Review*) ("I generally think economic growth and economic development denote the same phenomenon, i.e., an increase in the gross national product. The fundamental unit of measurement is economic and does not include the political, social, or psychological measures of well being that Sen was paramount in putting into the term 'development.' Of course we are using these terms advisedly. Most people lump them all together."). *See also* e-mail from Kenneth Dam, Max Pam Professor Emeritus of American & Foreign Law, Senior Lecturer, University of Chicago Law School to author (Aug. 27, 2008, 17:32 EST) (on file with author and *Denver University Law Review*) ("I believe that for most purposes they [i.e., economic growth and economic development]

The definition of economic development may differ from country to country and context to context, especially to the extent that it depends on priorities. For example, for a country with insufficient housing, power plants, highways, and jobs, it might mean more houses, power plants, road construction, and new jobs. For a country with lots of housing, power plants and roads, it might mean, among other things, more hospitals and manufacturing, if those were deficient. If the country lacked certain goods and services, development might mean the production of those goods and services. The definition depends on what is needed in each case.[58] Furthermore, whether development in particular areas should be left to market forces in laissez-faire economies or otherwise directed or encouraged is a fair ground for discussion in a country-by-country context.

As an alternative or supplemental tool for assessing economic development, one might consider large measures of wealth, such as gross domestic product or per capita income. To the extent that they do not take into account disparities in wealth within a country, however, those measures may be insufficiently meaningful. Therefore, to counterbalance this, one might need to reflect on the "Gini coefficient of inequality." According to the World Bank, the Gini coefficient "is the most commonly used measure of inequality. The coefficient varies between 0 [zero], which reflects complete equality, and 1 [one], which indicates complete inequality (one person has all the income or consumption, all others have none)."[59] "To begin to understand what life is like in a country—to know, for example, how many of its inhabitants are poor—it is not enough to know that country's per capita income. The number of poor people in a country and the average quality of life also depend on how equally—or unequally—income is distributed."[60]

Thus one might not regard something which exacerbates wealth disparities (*e.g.*, by leaving virtually all the wealth in the hands of a few, such as a dictator or an aristocracy, while the rest of the population remains impoverished) to be positive economic development, even if it

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are interchangeable today. But economic development does seem slightly broader in the sense best seen if one looks at an oil rich country which may show rapid growth in GDP but by failing to build the physical and other infrastructure for broader based growth in the future is not enjoying as much economic development as another country which does prepare for continued growth after oil production growth levels out or begins to fall.").

58. This definition of economic development does not define "needs." Nor does it specify if a country needs many things how the priorities for filling those needs should be established. For example, it does not answer the question of how many hospitals should be built if the country lacks hospitals. This level of precision may be determined by the policymakers in each particular country.

59. The World Bank, *Measuring Inequality*, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20238991~menuPK:492138~pagePK:148956~piPK:216618~theSitePK:430367,00.html (last visited October 29, 2008).

60. The World Bank Group, *Beyond Economic Growth Student Book*, Chapter 5, *Income Inequality*, http://www.worldbank.org/depweb/english/beyond/global/chapter5.html (last visited October 29, 2008).

raises the country's overall wealth dramatically. Countries with extraordinary disparities of wealth and poverty may also be unstable and thus be poor investment climates for business. "High inequality threatens a country's political stability because more people are dissatisfied with their economic status, which makes it harder to reach political consensus among population groups with higher and lower incomes. Political instability increases the risks of investing in a country and so significantly undermines its development potential . . . ."[61]

Regardless of the measure of economic development, certain principles arguably support economic progress—namely, enforcement rather than violation of legitimate bargains,[62] encouragement rather than discouragement of investment in useful enterprises, creation rather than dissipation of legitimate and useful employment opportunities, and increase rather than shrinkage in the production of valuable goods and services. The words "legitimate" and "useful" in this sentence are intended to reflect the notion that there is no societal interest in enforcing corrupt contracts or contracts otherwise against public policy,[63] creating unlawful employment opportunities or ones which are not socially useful, or in providing poor quality or undesirable goods and services. For example, undesirable employment opportunities might be the following: jobs building x when the country already makes too much x, and there is no export market for x; or jobs in industries which do not benefit society, such as building arms for aggressive war, serving in a dictator's secret police, and engaging in narcotics production and human trafficking. The armaments and narcotics themselves might also be examples of undesirable production.

The use of the phrase "public policy" brings up the question of "whose public policy," since public policy may vary from country to

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61. *Id.* *See also id.* at Chapter VI, *Poverty and Hunger*, http://www.worldbank.org/depweb/english/beyond/global/chapter6.html ("A favorable *investment climate* includes many factors that make investing in one country more profitable and less risky than in another country. Political stability is one of the most important of these factors. Both domestic and foreign investors are discouraged by the threat of political upheaval and by the prospect of a new regime that might impose punitive taxes or expropriate capital assets.").

62. *See* KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 93 (The Brookings Institution 2006).

63. *See* Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 153 (1958) ("It is not that the right of property or the right to contract were ever absolute; . . . the rule that courts will not enforce contracts against public policy are sufficient reminders that every legal system has put outside limits on the autonomy of property owners and contracting parties."). Nor is the rule of law voided by certain contractual limitations. *See also id.* at 154:

> [S]tatute barring forfeiture of premiums paid on a lapsed life-insurance policy diminishes freedom of contract only in the doctrinaire sense that insurers no longer can impose forfeiture clauses on a "take it or leave it" basis. Because of the inequality of bargaining power, such clauses were never the subject of genuine negotiation between insurer and insurance applicant. Similarly, it would be wildly unrealistic to see in a minimum wage law only an interference with the individual employee's right to contract for less than subsistence wages.

country.[64] Western institutions attempting to bring rule of law reforms to foreign countries would undoubtedly find it difficult to encourage enforcement which substantially offended their own public policy standards; and ignoring foreign standards of public policy would presumably lead to resistance from the foreign nations concerned.

### 3. The Linkage Between the Rule of Law and Economic Development

Many have linked the rule of law to economic development in developing countries, and statements to that effect are common and long-standing.[65] "The argument that the rule of law fosters economic development has been made many times."[66] Although the principal focus of

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64. *See* Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 129 (noting research on contracting in Africa and finding to the effect that "rigid compliance with the terms of a written contract was difficult if not impossible, in developing countries. Their economies are simply subject to too many exogenous shocks for contracts to be strictly enforced . . . .").

65. *See* Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 121. The article goes on to trace that argument to, among others, John Fortescue, Henry VI's chancellor, in the 15th century, Adam Smith in the 18th century, and Max Weber in the 19th century. *Id.* at 121-22. It also links the notion to Thomas Hobbes in the 17th century. *See id.* at 3 ("Without a reliable judicial system, he [Hobbes] argued, traders will be reluctant to enter into wealth-enhancing exchanges for fear that their bargains will not be honored."). The full quote from Hobbes's LEVIATHAN is as follows:

> For he that performeth first has no assurance the other will perform after, because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power; which in the condition of mere nature, where all men are equal, and judges of the justness of their own fears, cannot possibly be supposed. And therefore he which performeth first does but betray himself to his enemy, contrary to the right he can never abandon of defending his life and means of living.

THOMAS HOBBES, LEVIATHAN ch. XIV (Richard Tuck ed., Cambridge Univ. Press 1991), *available at* http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html. The proof of Hobbes's theory of transactions is difficult since it would require showing how many bargains were not made because of a poor judicial system. Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 120. A similar task would be to show how many dogs do not bark at night because of a particular set of circumstances.

66. Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 121; *see* Posner, *supra* note 26, at 3 ("If it is not possible to demonstrate as a matter of theory that a reasonably well-functioning legal system is a necessary condition of a nation's prosperity, there is empirical evidence showing that the rule of law does contribute to a nation's wealth and its rate of economic growth [citation omitted].").

However, there is some controversy, among other things, concerning the strength of the connection between rule of law and economic development in certain countries. *See* John K.M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT'L ECON. L. 219, 256 (2008); *see also* Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT'L L. 141, 143 (2004) ("Optimistic claims about the role of legal institutions in achieving development have a long lineage. In fact, most contemporary versions of this theory can be traced back to the turn-of-the-century writings of Max Weber. But theoretical analyses that are skeptical about whether legal institutions play an independent role in achieving development, or any other form of social change, are equally easy to find.") (footnote omitted); David A. Skeel, Jr., *Governance in the Ruins*, 122 HARV. L. REV. 696, 696 (2008) (book review of CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD (2008)) (reviewer notes that authors of reviewed book describe themselves as caricaturing, "[i]n [their] more cynical moments," what they call the "endowment perspective," to the effect that "good economic outcomes" result from "good law + good enforcement.").

the rule of law and economic development discussion is in the context of international development, some American business organizations have noted the relationship between law and American economic prosperity as well.[67] For example, one multinational company has recognized that "the business community [has] a particular opportunity to help spread the word that if countries want to grow economically, if they want to create better futures for their people, if they want to build new jobs, the independence of the judiciary in fact plays a critical role in economic development."[68] In addition, the United States Chamber of Commerce has concluded as part of its "tort" or "civil justice" reform agenda that the American tort system costs businesses billions and harms both employment and productivity.[69] Similar statements have been made by others, including the American Tort Reform Association:

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67. Construed broadly, the civil justice reform agenda, to the extent that it seeks greater fairness and even-handedness, is consistent with the rule of law. To the extent that the goal is not an impartial system but one in which victory is assured or nearly assured in each case, it would not be. *See, e.g.*, JOHN GRISHAM, THE APPEAL (Doubleday 2008). Much of the reform language, however, asserts the benefits of an unbiased and even-handed system, the proverbial "level playing field."

68. Text of prepared remarks by Brad Smith, Senior Vice President, Legal & Corporate Affairs, General Counsel and Corporate Secretary, Microsoft Corporation, American Society of International Law Second Century Dinner, Washington, D.C., November 3, 2006, *available at* http://www.microsoft.com/presspass/exec/bradsmith/11-03-06InternationalLaw.mspx (last visited October 28, 2008). *See also id.* (emphasis added):

> One of the things I first discovered when I was working in Central and Eastern Europe in 1990 and 1991, when the Iron Curtain had just fallen, was how enthusiastic people were to welcome foreign investment, especially investment that they perceived as having real potential to generate economic growth. That remains the case today. People want corporations to be subject to their laws and regulations, and quite rightly so, and they also want them to be present and investing in the local economy. I think that one of the important messages we have the opportunity and indeed do convey is that we're able to make those kinds of investments only if we have *confidence that there is a legal system with principled rules applied in an objective manner by an independent judiciary.*

The remarks likewise commented on the importance of respect for a fair and independent judiciary on a national level for respect for law at an international level:

> The second challenge that I think we need to confront . . . is the critical need for the broadening and deepening recognition of the importance at the national level of a fair and independent judiciary. You might ask "what does that have to do with international law"? In answering, I would say this: one of the greatest threats to international law is and has always been the prospect that executive power will simply ignore it. I don't know how one can create a world in which executive power respects law at the international level if executive power doesn't respect the independence of the law and the judiciary at the national level.

*Id.*

69. *See* U.S. Chamber of Commerce, Institute for Law Reform, *Lawsuit Abuse Impact*, http://www.instituteforlegalreform.org/index.php?option=com_ilr_issues&issue_code=LAI&view=ilr_issue&expand=1 (last visited Jan. 5, 2009):

> America's runaway legal system imposes burdensome costs on workers, consumers, small businesses, and healthcare. The cost of America's lawsuit-happy culture totals $261 billion a year, or $880 per person, according to seminal research by Tillinghast-Towers Perrin (2006). According to a 2007 study commissioned by the Institute for Legal Reform, small businesses alone pay $98 billion a year to cover the cost of America's tort system—money that could be used to hire additional workers, expand productivity, and improve employee benefits.

*See also* U.S. Chamber Institute for Legal Reform, *Lawsuit Climate 2008: Ranking the States*, http://www.legalreforminthenews.com/2008PDFS/HarrisPoll08.pdf (last visited Oct. 31, 2008).

> While most judges honor their commitment to be unbiased arbiters in the pursuit of truth and justice, judges in Judicial Hellholes do not. These few judges may simply favor local plaintiffs' lawyers and their clients over defendant corporations. Some, in remarkable moments of candor, have admitted their biases. More often, judges may, with the best of intentions, make rulings for the sake of expediency or efficiency that have the effect of depriving a party of its right to a proper defense. What Judicial Hellholes have in common is that they systematically fail to adhere to core judicial tenets or principles of the law. They have strayed from the mission of being places where legitimate victims can seek compensation from those whose wrongful acts caused their injuries. . . . *Rulings in these Judicial Hellholes often have national implications because they involve parties from across the country, can result in excessive awards that bankrupt businesses and destroy jobs, and can leave a local judge to regulate an entire industry.*[70]

The linkage between the rule of law and economic development (including foreign investment) has been described as the "dominant theory."[71]

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70. AM. TORT REFORM ASS'N, JUDICIAL HELLHOLES—2007 1, http://www.atra.org/reports/hellholes/report.pdf (emphasis added). Thus both the U.S. Chamber of Commerce and the American Tort Reform Association have identified the relationship between legal reform and the economy. Nonetheless, to the extent that either group is identified with reforming judicial selection methods as a cure, they appear to be divided on how to proceed. Both do support legislative methods of civil justice reform, however.

71. *See* Amanda Perry-Kessaris, *Finding and Facing Facts About Legal Systems and Foreign Direct Investment in South Asia,* 23:4 LEGAL STUDIES 649, 651-52 (2003):

> The dominant theory therefore proposes that foreign investors are attracted to states with "effective" legal systems—that is, those which are efficient and predictable, imposing relatively low transaction costs on investors; and that they avoid states with "ineffective" legal systems—that is, those which are inefficient and unpredictable, imposing relatively high transaction costs on investors.... The central focus of this paper is how this dominant theory can be tested—that is, what methods can we use to test the extent to which the effectiveness of legal systems affects success in attracting FDI [foreign development investment]?

*See also* Dani Rodrik et al., *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development,* 9 JOURNAL OF ECONOMIC GROWTH 131-65, 157 (2004) (noting the types of things that investors care about, including "the likelihood that investors will retain the fruits of their investments, the chances that the state will expropriate them, or that the legal system will protect their property rights . . . . Obviously, the presence of clear property rights for investors is a key, if not the key, element in the institutional environment that shapes economic performance. Our findings indicate that when investors believe their property rights are protected, the economy ends up richer."). Foreign direct investment is not synonymous with economic development; nonetheless, "[r]ecognizing that FDI can contribute to economic development, all governments want to attract it." Padma Mallampally & Karl P. Sauvant, *Foreign Direct Investment in Developing Countries,* FINANCE & DEVELOPMENT, March 1999, http://www.imf.org/external/pubs/ft/fandd/1999/03/mallampa.htm. *See also id.* at 3 ("Given the potential role FDI can play in accelerating growth and economic transformation, developing countries are strongly interested in attracting it."). Some foreign direct investment can meet resistance from the country which might otherwise receive it. *See* Daniel Bases, *Global FDI to hit record $1.47 trln in 2007—survey,* Sept. 5, 2007, http://www.reuters.com/article/mergersNews/idUSN05183212200709O5?pageNumber=1 (citing "protectionist behavior including U.S. lawmakers resistance, cited for security reasons, to Dubai Ports World owning six U.S. ports . . .").

A set of common sense assumptions appears to underlie the connection between rule of law and economic development, with some limited or questioned empirical study covering various possibilities,[72] including a country's historical origins.[73] These assumptions relate to the key components of the rule of law. For example, "[m]ore independent judges are often more efficient judges. . . . [T]he combination of judicial independence and efficiency seems to be essential for judicial reforms to have a positive effect on economic development."[74] "Judicial independence is a key determinant of growth as it promotes a stable investment environment."[75] Reforms which strengthen judicial accountability—and thus efficiency—improve judicial performance.[76] A sound judicial system promotes economic development "[b]y enforcing property rights, check-

72. *See* Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 122 ("Rigorous econometric methods for verifying the rule-of-law hypothesis and the role played by the judicial system are still in their infancy."); *id.* ("These studies also do not rule out competing explanations such as increases in trade and investment or even the effects of other institutional reforms such as the introduction of an independent central bank."); *id.* at 123 ("In sum, while history and comparative analysis support the view that a better judicial system fosters economic growth, there is . . . no clear, empirical evidence showing the economic impact of a weak judicial system. The most that can be said at the moment is that the weight of opinion and evidence suggests the existence of some type of relationship."). In addition to judicial reforms, other contributors may exist, including a free press or other free media, civic education, and an independent business community. *See, e.g.*, Davis & Trebilcock, *supra* note 55, at 910 (referencing body of literature connecting a free press "independent of government influence" as well as a "competitive press" with rule of law and development).

73. Some have proposed "the legal origins approach, as applied to economic development . . . [which attempts] to show that the origin—say, English common law or French civil law—of a particular country's law is associated with that country's rate of economic growth." DAM, *supra* note 62, at 31. Using this legal origins approach, "[t]he central inquiry is to determine which legal families have the best substantive law for financial development, using substantive legal criteria determined by the authors." DAM, *supra* note 62, at 38 (for a detailed discussion of the "legal origins" approach, see *id.* at 26-55). Dam finds the approach "interesting from a scholarly point of view," but of "dubious relevance" for "public policy formation for the poorer developing countries." *Id.* at 54. *See* Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT'L L. 141, 160 (2004) ("Even if one accepts the notion that these studies succeed in demonstrating a connection between legal heritage and development, the studies are of little direct use to prospective legal reformers, simply because a society's legal heritage cannot be changed.") (footnotes omitted). *Cf.* Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 THE AM. ECON. REV. 1369, 1395 (2001) (the nature of a country's "colonial experience" is "one of the many factors affecting [its] institutions."; the colonial experience varied, among other things, depending on whether the colonizers "settled in the colonies and set up institutions that enforced the rule of law and encouraged investment[]" or "set up extractive states with the intention of transferring resources rapidly to the metropole[]"; however, according to the authors, these "findings do not imply that institutions today are predetermined by colonial policies and cannot be changed.").

74. Botero et al., *supra* note 26, at 80; *see also* Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using A New Set of Indicators*, EUR. J. POL. ECON. 497 (2003) (correlating de facto judicial independence with economic growth); USAID, *The Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework* 6 (Aug. 2008), *available at* http://pdf.usaid.gov/pdf_docs/PNADM700.pdf:

> Rule of law provides a stable basis for democracy to develop. It ensures the protection of those rights critical to maintaining an orderly and productive society, creating the conditions that enable a democratic society to develop and thrive. . . . Such rights are also essential to ensuring economic development and addressing poverty.

75. Millennium Challenge Corporation: *Guide to the MCC Indicators and the Selection Process: Fiscal Year 2008*, http://www.mca.gov/documents/mcc-fy08-guidetoindicatorsandtheselection process.pdf.

76. Botero et al., *supra* note 26, at 81.

ing abuses of government power, and otherwise upholding the rule of law and in enabling exchanges between private parties."[77] "[T]he claim that judicial independence is a necessary condition for the protection of property rights or economic growth should give any American political scientist pause."[78]

"No one, whether local or foreign, wants to invest in a country that is politically unstable or where there is no confidence in the justice system, as investors would not be assured of a fair return on their investment."[79] "An independent judiciary could thus also be interpreted as a device to turn promises—*e.g.*, to respect property rights and abstain from expropriation—into credible commitments. If it functions like this, citizens will develop a longer time horizon, which will lead to more investment in physical capital. . . . All these arguments imply that [judicial independence] is expected to be conducive to economic growth."[80]

"The link between property rights, the integrity of contract, and economic growth comes through several channels, but incentives play a central role: The more well-developed and secure are property rights, the greater incentives individuals have to invest."[81]

Thus "the [World Bank] sees law as facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts, and maintaining law and order."[82] As a former president of the World Bank noted:

> Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A

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77. Messick, *Judicial Reform: The Why, the What, and the How*, *supra* note 10, at 2 (citing THOMAS HOBBES, LEVIATHAN); *see also* Perry-Kessaris, *supra* note 71, at 650 (footnote omitted) noting:

> [C]ommentators and development agencies argue ever more regularly that FDI [foreign direct investment] flows are to some extent determined by the effectiveness of host state legal systems—that is, the institutions and officials involved in the creation and implementation of law, including courts and judges; bureaucrats; and politicians, in their capacity as makers and implementers of law.

Her article proposes the type of data which she contends is necessary to prove this argument and the extent of its availability.

78. Haggard et al., *supra* note 27, at 217. The article also notes that "[m]ost legal scholars believe that appointment of judges is more likely to guarantee independence than election, which requires a campaign for votes, organized interest group support, and campaign contributions." *Id.* at 216 (footnote omitted). This subject is discussed in more detail below.

79. Rugege, *supra* note 3, at 4; *see also* Kleinfeld, *supra* note 10, at 61 ("An investor does not read the constitution of an emerging market economy but asks other businesspeople whether contracts are enforced fairly and predictably.").

80. Lars &Voigt, *supra* note 74, at 499. Judicial independence may act as a counterweight to avoid "takings of property by the state" where the "government itself is a litigant" and "in purely private disputes when one of the litigants is politically connected and the executive wants the court to favor its ally." La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECONOMY 445, 446-7 (2004); *see also* DAM, *supra* note 62, at 93 ("One conclusion widely agreed upon, not just in the economic literature but also among lawyers and legal scholars, is therefore that the judiciary is a vital factor in the rule of law and more broadly in economic development.").

81. Haggard et al., *supra* note 27, at 207.

82. Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 127.

> government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.[83]

Another World Bank commentator stated that "the payoffs from a successful [judicial] reform, in terms of economic growth and development, more than justify the work involved."[84] "One conclusion widely agreed upon, not just in the economic literature but also among lawyers and legal scholars, is therefore that the judiciary is a vital factor in the rule of law and more broadly in economic development."[85]

### *C. The Challenges to Promoting Economic Development through Rule of Law*

#### 1. What to Do and Where to Start

Addressing rule of law reform and economic development in any specific country presents particular challenges. "Specifying the optimal set of judicial and legal institutions for any given country is a . . . difficult and context-specific task."[86] "The question . . . becomes one of sequencing: Where does one start?"[87]

As in the case of economic development, the answers may depend on what the country needs. Obviously, if the country has undertrained

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83. Ohnesorge, *supra* note 66, at 256 (quoting James D. Wolfensohn, *A Proposal for a Comprehensive Development Framework* (January 21, 1999)); *see also* Botero et al., *supra* note 26, at 79 (citing Wolfensohn to the same effect). Ohnesorge's article argues for a modified approach to law and development theory which takes account of the Northeast Asian economic successes in Japan, South Korea and Taiwan despite their "failure to conform to law and development theories." Ohnesorge, *supra* note 66, at 230-31. The article notes that "studying only a country that has a weak legal system *and* a weak economy, such as Russia in the early to mid-1990's, encourages the confusion of correlation with causation." *Id.* at 226. Others have questioned in specific contexts how much formal legal institutions have contributed to economic success, particularly in China. *See* Donald C. Clarke et al., *The Role of Law in China's Economic Development*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878672 (last visited Oct. 17, 2008).

84. Messick, *Judicial Reform: The Why, the What, and the How*, *supra* note 10, at 9; *see also* Alan Greenspan, Chairman, of the Fed. Reserve, Remarks at the 2003 Financial Markets Conference of the Fed. Reserve Bank of Atlanta: Market Economies and Rule of Law (April 4, 2003), http://www.federalreserve.gov/BoardDocs/speeches/2003/20030404/default.htm ("Uncertainties that stem from the arbitrary enforcement of the body of prevailing rules are reflected in higher risk and cost of capital which, in turn, inhibit economic growth.").

85. DAM, *supra* note 62, at 93; *see also* Christopher Clague et al., *Contract-Intensive Money: Contract Enforcement, Property Rights, and Economic Performance*, 4 J. OF ECON. GROWTH 185, 207 (1999) (contending that "economic growth and investment significantly accelerate when governments impartially protect and precisely define the rights of all participants in the economy.").

86. Matthew C. Stephenson, *Judicial Reform in Developing Countries: Constraints and Opportunities*, *in* ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 2007, REGIONAL: BEYOND TRANSITION 311, 314 (François Bourguignon & Boris Pleskovic eds., 2007).

87. Kleinfeld, *supra* note 10, at 50.

judges, insufficient computer systems,[88] and lack of courthouses, one would have to look at those items. Other considerations in deciding on reform include resource constraints, which make it important to prioritize among reform projects: "[E]very dollar spent on judicial reform is a dollar that cannot be spent on other public goods or put toward economically productive private investment,"[89] including public health.[90] Researchers and policymakers may assess the effectiveness of past reforms, and if inadequate, they may wish to revise their future approach.[91] Other activities beyond legal and judicial reform might be needed to improve the rule of law. "Rule of law is an end-state, not a set of activities."[92] For instance, one may need to inquire whether "developing the judiciary is sufficient to advance the rule of law or whether it is also important to invest in improving political processes."[93] Establishing and reviewing the effectiveness of rule of law programs is an ongoing process.

2. Assessing the Level of Causation

a. Recognizing Causation Controversies

Determining, as a social scientific or empirical matter, whether economic development is caused or at least facilitated by rule of law reform

88. *But see id.* at 52 ("Reform programs that focus on providing computers to improve court efficiency in the midst of a political autocracy, for example, seem rather like treating heartburn in a patient suffering from cancer.").

89. Stephenson, *supra* note 86, at 314. *See also id.* at 315:

> A similar resource constraint problem, and a similar set of hard choices, appears when we think about how to allocate resources among different types of judicial reform projects . . . . [H]ow should priorities be set? Is it more important to train judges or to computerize the case filing and tracking system? Is it more important to invest in fighting corruption or in educating the poor about their legal rights? Does it make more sense to concentrate resources on creating a few highly capable specialized tribunals—say, to deal with disputes involving foreign investors or major business transactions—or to spread resources more widely to improve the average local court?

*See also* Stephen Golub, *A House Without a Foundation*, *in* PROMOTING, *supra* note 10 at 105, 119 (questioning the value of the argument that judicial reform is a valuable "development priority" in itself (even if not "a direct path to poverty reduction") in light of the need to set priorities, noting that resources are limited and there are other options "for serving the poor" besides improving judiciaries).

90. *See* Kevin E. Davis & Michael B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 LAW & SOC. INQUIRY 1095, 1116 (2007):

> Given the limited empirical support for the claim that reforms recommended by the DB project [*i.e.*, the World Bank's Doing Business Project] will have positive effects on development outcomes, it is far from clear to us that widespread implementation of those reforms is an accomplishment worth boasting about. We believe that it is an open question whether the energy and resources invested in legal reforms would have been better put to other uses, including medical research, vaccines, distribution of mosquito nets, and sanitation projects.

91. *See* Channell, *supra* note 28, at 145.

92. USAID, *supra* note 74, at 19; *see also* Kleinfeld, *supra* note 10, at 34 ("Current definitions of the rule of law used by organizations working to create it abroad tend toward ad hoc laundry lists of institutions to reform . . . ."); *id.* at 57 (objecting to "defining the rule of law by institutional reform rather than by end goals."); *id.* at 56-57 ("Rule of law reformers believe, by definition, that they are trying to create the rule of law. . . . Any work to reform laws, any change to police policy, is considered rule of law reform.").

93. USAID, *supra* note 74, at 19.

or any of its aspects, including sound judicial institutions, is beyond the scope of this article. Such an approach requires an adequately designed research study, perhaps on a country by country basis, controlling for the effect of perhaps many other circumstances that might affect development.[94] One commentator, for instance, has identified the questions she would like answered in order to determine the extent to which foreign investment is influenced by legal reform, but noted that the data was so far unavailable.[95] The questions are as follows:

> • Did or will you investigate Country X's legal system before you deciding [sic] to invest there? (Are legal systems a factor?)
>
> • If yes, did or do you consider it to be an attractive legal system? (What is an attractive legal system?)
>
> • Would you refuse to invest in, or remove investment from, Country X if you did not consider its legal system to be effective? (How much of a factor are legal systems?)
>
> • How much importance do you place on the legal system as a factor in determining where you should invest? (How much of a factor are legal systems?)
>
> • Have you had or do you expect to have much interaction with the legal system in Country X? (How much of a factor are legal systems?)[96]

The results may be inconsistent from country to country; and researchers or commentators may not achieve consensus because of disputes over the variables selected, the presence or absence of data,[97] the

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94. The World Bank's Governance project gathers subjective measures of institutional quality and groups them into six clusters—of which the rule of law is only one—in order to measure the quality of governance in many countries. In addition to "rule of law," the clusters are "voice and accountability," "political stability," "government effectiveness," "regulatory quality," and "control of corruption." The Governance project concludes that there is a relationship between institutional quality and its measure of development, "hence their conclusion that 'Governance Matters.'" Davis & Trebilcock, *supra* note 55, at 938. The Governance project is also described on the World Bank's website. *See* World Bank, *Governance Matters 2008: World Wide Governance Indicators, 1996-2007*, http://info.worldbank.org/governance/wgi/index.asp; *see also* DAM, *supra* note 62, at 52-55; Daniel Kaufmann, Aart Kraay, & Massimo Mastruzzi, *Governance Matters VII: Aggregate and Individual Governance Indicators, 1996-2007* 7-8, 11 (World Bank Policy Research, Working Paper No. 4654, 2008) *available at* http://ssrn.com/abstract=1148386. The governance data is updated annually, and a website is dedicated to the cross-country data on institutional quality. *See* www.govindicators.org.

95. Perry-Kessaris, *supra* note 71, at 688.

96. *Id.* (describing the questions that she would like to have answered).

97. Davis & Kruse, *supra* note 90, at 1114 ("Given the often sweeping conclusions drawn by the . . . authors, it is clear that they want to draw inferences about the relationship of regulation to development that go well beyond the limited set of regulations and social and economic outcomes they have studied."). *Compare* Marcus J. Kurtz and Andrew Schrank, *Growth and Governance: Models, Measures, and Mechanisms*, 69 J. POL. 538, 547, 552 (2007) (pointing out that "[r]ecent scholarship has emphasized the importance of good governance for economic performance," yet contending that "the oft-asserted connection between growth and governance lies on exceedingly

definition of terms (including what is "rule of law" and what is "economic development"),[98] other methodological controversies, such as countries that arguably do not fit within the overall theory, and the contention that correlation between rule of law reform and economic development is being confused with cause.[99] Some even suggest that causation flows in reverse, with economic development leading to rule of law reform, rather than rule of law reform leading to economic development.[100] Causation may also flow in both directions.[101]

Moreover, certain northeast Asian countries have weak rule of law and had substantial economic progress.[102] Some may question, if this is established, what this means for the general rule: for example, are they outliers or anomalies which leave the rule intact; is it too early to tell whether the progress is sustainable;[103] might past progress have been

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shaky empirical pilings"), *id.* at 541 ("Clean, effective government is desirable, but what is not so clear is whether it is an essential or even important antecedent of rapid economic growth . . ."), and Marcus J. Kurtz and Andrew Schrank, *Growth and Governance: A Defense*, 69 J. POL. 563 (2007), with Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Growth and Governance: A Reply*, J. POL. 555, 555 (2007) (responding to Kurtz and Shrank articles, among other things, by noting that there is a "rich body of recent work in the economics literature that has documented a sizeable long-run effect of governance on growth."), and Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Growth and Governance: A Rejoinder*, 69 J. POL. 570 (2007) (further rebuttal to Kurtz and Shrank articles).

98. Davis & Kruse, *supra* note 90, at 1097 (referring to the "complexity and uncertainty of law, the contested nature of the concept of development, the opacity of the causal connection between these phenomena . . . .").

99. *Id.* at 1112-13.

100. *See* Daniel M. Klerman, *Legal Infrastructure, Judicial Independence, and Economic Development,* 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 427, 430 (2007) ("Although independent courts are usually viewed as a cause of economic growth, the reverse may be true. . . . As wealth increases, private parties have more to offer the government and become more politically powerful. As a result, as economic growth occurs, demand for independent courts may increase and such demands are more likely to be heeded."). Nonetheless, despite acknowledging the reverse causation argument, Klerman also acknowledges that independent courts promote growth, noting that "economic theory suggests that effective, independent courts promote investment and economic growth. . . . The empirical literature provides some support for the idea that independent courts encourage economic growth, but causation remains unclear and much work remains to be done." *Id.* at 434.

101. DAM, *supra* note 62, at 276 ("The econometric evidence examined in earlier chapters showing that causation runs from institutions to growth rather than vice versa may be interpreted to say that *on balance* the causation runs from institutions to growth but that to some extent increasing wealth helps to build institutions.").

102. *See* Ohnesorge, *supra* note 66, at 258-60 (2007). Others point out that in some situations the rule of law may be weak and foreign investment may be strong or that foreign investment may not even be required for economic development. *See, e.g.*, Carothers, *Steps Toward Knowledge*, *in* PROMOTING, *supra* note 10, at 17. For policymakers, unquestioned social scientific proof of the connection between the rule of law and economic development may be unnecessary or at least only be a long-term objective; and common sense may sometimes be enough for reasoned decision-making.

Even in a country with "weak" rule of law, the rule of law need not be weak in every aspect. For example, the rule of law may be weak in cases involving the government or the rich, but not involving two ordinary citizens having a breach of contract case. Or it may be weak in criminal law cases but not in family law cases.

103. *See* DAM, *supra* note 62, at 277 (China's experience is consistent with the view "that considerable development is possible without strong legal institutions but sustainable growth to higher per capita levels requires considerable development of legal institutions."). Dam noted that "[i]t is certainly too early to accept the notion that recent Chinese experience is a counterexample to

greater still in those countries if rule of law were stronger; or is substantial future progress possible only with stronger rule of law?

Even some skeptical commentary, however, would not entirely deny the connection between rule of law reform and economic development, much less suggest that law reform efforts cease; rather, these commentators suggest law reform efforts go forward.[104] For example, questions about a World Bank study relating to the connection of law to economic development nonetheless concluded with appreciation for the work and suggestions for improvement, not cessation.[105] Another commentator noted:

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the need for a focus on institutions in the developing world and, indeed, for a rule of law in China itself," and that "little thus far in the Chinese experience leads to the conclusion that rule-of-law issues are not important in economic development." *Id.*

104. *See, e.g.*, Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, *in* PROMOTING, *supra* note 10, at 101 (objecting to certain aspects of rule of law rhetoric, but noting that "I do not intend to discourage legal reform or the borrowing of legal rules or institutions from other countries.").

Thomas Carothers singled out as one of the objects of his concern "an unusually strong initial sense of certainty, often verging on hubris, about such [rule of law] work . . . ." Carothers, *Steps Toward Knowledge*, *in* PROMOTING, *supra* note 10, at 329. He likewise has referred to the "enthusiasm of many rule-of-law assistance providers who believe fervently in the centrality and naturalness of the rule-of-law agenda" and "unrealistic expectations." Thomas Carothers, Rule of Law Temptations 18 (Oct. 2008) (unpublished manuscript, on file with author and *Denver University Law Review*) (earlier Preliminary Draft, Prepared for World Justice Forum *available at* http://www.lexisnexis.com/documents/pdf/20080806033651_large.pdf). *See also id.* at 2:

> The rule-of-law field continues to radiate an almost constant sense of discovery. Policy actors and aid practitioners continue discovering it and becoming seized with enthusiasm for the rule of law. They are often surprised to learn that what seems to them a vital discovery is in fact a relatively late arrival to a revival that has been going on for quite some time.

*See also* Carothers, *Steps Toward Knowledge*, *in* PROMOTING, *supra* note 10, at 337 ("The subject [of rule-of-law] commands strong interest in many quarters and continues to be invested with high expectations.").

But Carothers nonetheless applauds the rule of law effort, stating "that something vital and dynamic lies at the root of rule-of-law promotion, something that will continue to sustain commitment and hope in such work despite the daunting complexities and conundrums that exist all along the way." *Id.* at 337. *See also* Carothers, Rule of Law Temptations, *supra* at 7. In addition, when it comes to the connection between the rule of law and economic development, Carothers notes that it is "real" and "plausible":

> This continued attention to rule-of-law development reflects the fact that the connections of the rule of law to economic and political development, although perhaps not as straightforward as some early enthusiasts presumed, are real. In the economic domain, the simplistic idea that the rule of law automatically helps foster economic growth has come under useful critical scrutiny. Yet at least some positive link appears plausible and is enough to animate many aid practitioners.

*Id.* at 2. *See also id.* at 7 ("The rule-of-law agenda on the international policy stage is of tremendous potential importance and value.").

105. *See* Davis & Kruse, *supra* note 90, at 1117 ("Assessed solely as a research project, the [World Bank's 2004 Doing Business] project is extremely impressive in terms of the creativity of its design, scale, and rigor. The criticisms set out above are not meant in any way to detract from our overall appreciation of the data-collection exercise that the participants in the project have undertaken and its contribution to the enterprise of understanding the relationship between law and development. Our sense is that the limitations of the project reflect challenges inherent in achieving its ambitious objectives.").

> It is hard to argue that an effective, efficient, and fair judicial system is not a good thing or that a country will be better off without "an effective system of property, contracts, labor, bankruptcy, commercial codes, personal rights and other elements of a comprehensive legal system that are effectively, impartially, and cleanly administered by a well-functioning, impartial and honest judicial and legal system," and I will not attempt to do so.[106]

> . . . I do not intend to discourage legal reform or the borrowing of legal rules or institutions from other countries. . . . It would be foolish and futile to argue against it, and it would mean arguing against transnational legal learning.[107]

Still others contend that "[w]hile there appears to be an increasingly firm empirically grounded consensus that institutions are an important determinant of economic development . . . there is much less consensus on which *legal* institutions are important . . . ."[108] In any event, although doing a study as an academic or future policy matter is undoubtedly worthwhile and may fall under the heading of "next steps" or "future challenges," it is unnecessary for the purposes of this article. Nor, as shown below, need it delay policymakers from making the decisions that they need to make in light of what they already know.

b. Informal Legal Systems and Incentives

Some contend that formal legal systems are not the only systems causally linked to economic development or are not essential for development. Instead, they identify informal legal systems consisting of various incentives which also help ensure that persons keep their promises: for instance, the negative consequences of failing to maintain a good reputation.[109] This, of course, does not prove that formal legal systems are not linked to economic development, but rather suggests only that other informal incentives may be at work too.

For example, "[a] vendor who is a member of a community is unlikely to risk his reputation by failing to perform his obligations under a contract. The result would be a loss of respect and a subsequent lack of

106. Upham, *supra* note 104, at 78.

107. *Id.*; *see also* Carothers, *The Rule-of-Law Revival, in* PROMOTING, *supra* note 10, at 7 ("Although its wonderworking abilities have been exaggerated, the desirability of the rule of law is clear. The question is where to start.").

108. Davis & Trebilcock, *supra* note 55, at 945. The authors noted that the reduced consensus on the role of legal institutions in economic development is affected by "the existence of informal substitutes, [questions concerning] what an optimal set of legal institutions might look like for any given developing country, or for those developing countries lacking optimal legal institutions (however defined) what form a feasible and effective reform process might take and the respective roles of 'insiders' and 'outsiders' in that process." *Id.*

109. *See, e.g.*, Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 129.

business."[110] In other words, a company which does not carry out the first bargain may lose the opportunity to have a second bargain, because the company's reputation was harmed. Alternatively, the company may not lose the opportunity to do another deal, but it may lose the opportunity to do so at a reasonable price. Thus the cost of credit or sales price or any other cost indicators may escalate because of the perceived danger of a breach or noncompliance. "A country that cannot establish to the satisfaction of the contracting private party that the rule of law will ensure fair treatment can expect to pay more, perhaps much more, just to cover the risk."[111]

In developed legal systems, reputation likewise plays a role in ensuring compliance, especially given the uncertainties involved in contract enforcement even in those systems. The availability of an action for breach of contract may be of limited benefit even in developed countries. Even if one has a valid claim, recovery is not assured. For example, the party in breach may assert defenses or counterclaims or be insolvent; a lawsuit may be time-consuming, slow and expensive; and the judge or jury may simply "get it wrong." In many ways, it is important to deal with someone with a good reputation under any circumstances. Although reputation is not referred to as law (a phrase generally restricted to formal law), this does not make reputation any less effective as a persuasive (if not coercive) force to ensure compliance.

Sometimes it will be uncertain which mechanisms (formal or informal) cause some to keep their bargains. Some may keep their bargains because of reputational or informal legal systems, some may do so because of the formal legal system or threat of lawsuit, and others may do so because of the mixture of the two.[112] It might be difficult to guess which is the most efficacious as opposed to supporting both.[113] Furthermore, both systems may provide greater safety than one, resources permitting.[114]

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110. Kevin J. Fandl, *The Role of Informal Legal Institutions in Economic Development*, 32 FORDHAM INT'L L. J. 1, 14 (2008).

111. DAM, *supra* note 62, at 126.

112. *See* e-mail from Richard E. Messick, Senior Public Sector Specialist, World Bank to author (July 18, 2008, 10:01 a.m. EST) (on file with author and *Denver University Law Review*):

> Consider the following two scenarios—1) Firms observe the terms of their contracts because they fear that if they don't the bad reputation they get will prevent them from doing future business. 2) Firms observe the terms of their contracts because of the threat of lawsuits. Would you say the rule of law exists only in #2? What if some firms comply with contracts because of #1, some because of #2, and some because of concerns about both #1 & #2?

113. *Id.*

114. *See* Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 129 (referring to the "incentive to maintain a good reputation."). *See also* Erik G. Jensen, *Justice and the Rule of Law*, *in* BUILDING STATES TO BUILD PEACE 119, 121 (Charles Call & Vanessa Wyeth eds., 2008), noting that informal institutions are less costly:

> I am pragmatic. Formal institutions are expensive to build. Enforcement through formal institutions is complex. Formal enforcement is also expensive. These realities . . . lead to

### D. *The Policymakers' Decisions*

A tension exists in the field of law and development between policymakers and researchers. They have different timetables and different knowledge requirements. Policymakers (including international financial institutions) and companies and their CEOs may (and will) act on the basis of sound policy, logic and common sense. None of these factors requires a demonstration of causation to a reasonable degree of social scientific certainty. Nor will they insist on such a high level of proof given their time constraints: if necessary decisions awaited the completion of time-consuming research, the time to act might have passed. Decisions may have to be made on the basis of scientifically imperfect, although otherwise sound, information:

> Policy decisions on economic development issues are being made every day in every developing country and in bilateral and multilateral agencies in the developed world as well. Economy policymaking is necessarily carried out under conditions of uncertainty—uncertainty about the facts and about underlying principles and causes. So decisions about whether to change legal institutions and substantive law will be taken—if only by inaction—in substantive fields, such as land, equity markets, and credit markets as well as in enforcement, including the role and nature of the judiciary. Since policymakers know that institutions matter to economic development, it would be foolish for them to assume that legal institutions—both the rules of the game and law's organizations, especially the judiciary—do not matter.[115]

That does not mean that research should not proceed and hypotheses and dominant theories should not be tested. Common-sense principles include the concept that economic transactions may be unsafe where there is no reliable legal system to enforce them, and foreign investment is less likely where the chances of investment protection are uncertain.[116] The lack of reliable enforcement may make doing business risky and complicate business planning; among other things, it may impede the

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a very practical approach. Figure out what informal institutions are doing; which types of disputes are handled reasonably well by informal institutions and which are not; and tailor formal institution building to handle matters that are not being handled well by informal institutions yet are crucial to the strategic dependent variables or outcomes identified.

115. DAM, *supra* note 62, at 231; *see also id.*, at 230 (describing the position that the law matters for economic development, or, otherwise stated, that "institutions matter" for development and "that, in particular, legal institutions matter."). According to Dam, "[p]roof of the correctness" of the premise that law matters for development "would be an . . . exercise . . . more appropriate for economists and perhaps other social scientists than for lawyers and policymakers."). *Id. See also* Kleinfeld, *supra* note 10, at 64 ("The new field of rule-of-law reform did not emerge slowly . . . It grew from action—action needed right away—as states tried to keep regions from falling into poverty and anarchy . . . .").

116. *See* DAM, *supra* note 62, at 94 ("Better courts reduce the risks firms face, and so increase the firms' willingness to invest more.").

formation of long-term or complex contracts or contracts involving large sums:

> From the standpoint of economic development, perhaps the most unfortunate consequence of the unreliability of court enforcement is that it impedes the effective use of long-term and complex contracts. . . . Today such contracts are essential in developing countries, especially for electric generating plants, ports, highways, and many other infrastructure projects.[117]

It may also discourage the formation of new business relationships and lead to more conservative business practices overall.[118] Also, "[t]he prospect that courts will resolve these disputes impartially if the contracting parties cannot agree often leads to more reasonable bargaining positions and more prompt compromise."[119] The argument connecting judicial reform and foreign investment has "undeniable common sense appeal—investors will want predictability, security, and the like."[120]

In addition, although some countries reportedly have attracted businesses to invest in their economies despite a weak rule of law, the weaknesses still may have been a negative factor for businesses considering whether to invest and may have deterred more investment.[121] Furthermore, even if weak rule of law may not deter investment in some circumstances, strong rule of law may positively encourage it; and investment may have been greater if rule of law were stronger. No one would be expected to argue that strong rule of law is a "negative" or that the rule of law should be weakened or corruption increased in order to improve the investment climate.[122] Also, no one can preclude the possibility that

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117. *Id.* at 123.

118. *See* THE WORLD BANK, DOING BUSINESS IN 2004: UNDERSTANDING REGULATION 41 (2003) explaining:

> In the absence of efficient courts, fewer transactions take place, and those transactions involve only a small group of people linked through kinship, ethnic origin, and previous dealings.
>
> . . . Courts have four important functions. They encourage new business relationships, because partners do not fear being cheated. They generate confidence in more complex business transactions by clarifying threat points in the contract and enforcing such threats in the event of default. They enable more sophisticated goods and services to be rendered by encouraging asset-specific investments in their production. And they serve a social objective by limiting injustice and securing social peace. . . . Companies that have little or no access to courts must rely on other mechanisms, both formal and informal—such as trade associations, social networks, credit bureaus, and private information channels—to decide with whom to do business. Companies may also adopt conservative business practices and deal only with repeat customers. Transactions are then structured to forestall disputes. Whatever alternative is chosen, economic and social value may be lost.

119. DAM, *supra* note 62, at 123.

120. Carothers, *The Problem of Knowledge*, *in* PROMOTING, *supra* note 10, at 17.

121. *See id.* ("It is clear that what draws investors into China is the possibility of making money either in the near or long term. Weak rule of law is perhaps one negative factor they weigh in their decision of whether to invest, but it is by no means determinative.").

122. *But see* TAMANAHA, *supra* note 29, at 120 (noting problems with rule of law in service of an authoritarian regime).

investment may occur even if rule of law is limited: some percentage of companies may tolerate high transaction risks in exchange for high potential gains or even successfully "navigate" corrupt systems through bribery or other means.[123] However, that is not the optimal situation.

### *E. The Consequence of Rule of Law Failures or Violations*

Rule of law failures may have important consequences. Unfair judicial decision-making may lead to adverse judgments which will damage litigants and their families economically, harm shareholders, eliminate jobs, and interfere with society's ability to create goods and services. The causes of failure include lack of judicial independence (*e.g.*, cases are not decided on the law and facts but as directed by another branch of government or person or to favor campaign contributors or

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123. *See* LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 91 (2007):

> There are also many less formal means for moving beyond the initial dispute and returning to business as usual. A company, unlike an individual, can factor any additional costs into its price structure—and this is what commonly happens to bribes, speed money, and negotiated agreements. Businesses resolve their credit problems by recourse to supplier credit (a euphemism for not paying your bills on time).

*See also* Russell Gold & David Crawford, *U.S., Other Nations Step Up Bribery Battle*, WALL ST. J., Sept. 12, 2008, at B1, *available at* http://online.wsj.com/article/SB122116624489924911.html ("A global crackdown on companies that use bribery to advance their foreign business interests is rapidly gathering steam . . . . 'U.S. companies that are paying bribes to foreign officials are undermining government institutions around the world. . . . It is a huge destabilizing force.'" (quoting Mark F. Mendelsohn, Deputy Chief of the U.S. Justice Department's fraud section)); *id.* at B-6 ("Until 1999 in Germany and until 2000 in France, tax laws allowed bribes to be deducted from corporate taxes . . ."); Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, N.Y. TIMES, April 12, 1996, *available at* http://query.nytimes.com/gst/fullpage.html?res=950DE3D71039F931A25757C0A960958260&sec=&spon=&pagewanted=print:

> [T]the world's richest nations today took an important step to fight corruption in international business dealings by agreeing that bribes paid to foreign officials, often listed as commissions or fees, should no longer be tax deductible . . . . Today's decision by the Organization for Economic Cooperation and Development, a club of industrial countries, commits its 26 members to rewrite tax rules that have effectively encouraged the bribery of foreign officials by making such payoffs tax deductible.

*See also* Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Only a Line Item*, N.Y. TIMES, Dec. 21, 2008, *available at* http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html?_r=1&scp=2&sq=siemens&st=cse.

> The company [Siemens] turned to markets in less developed countries to compete, and bribery became a reliable and ubiquitous sales technique . . . . Inside Siemens, bribes were referred to as "NA"—a German abbreviation for the phrase "nützliche Aufwendungen" which means "useful money." Siemens bribed wherever executives felt the money was needed, paying off officials not only in countries known for government corruption, like Nigeria, but also in countries with reputations for transparency, like Norway, according to court records.
>
> . . . "Bribery was Siemens's business model," said Uwe Dolata, the spokesman for the association of federal criminal investigators in Germany. "Siemens had institutionalized corruption."
>
> . . . Siemens will pay more than $2.6 billion to clear its name: $1.6 billion in fines and fees in Germany and the United States and more than $1 billion for internal investigations and reforms.

local voters); lack of accountability (judges are uneducated, inefficient, or otherwise perform poorly); and even criminal conduct, such as corruption.[124] As a commentator noted, the rule of law is particularly important to developed societies, including their economies:

> The relationship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy. . . . Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy—regulatory mechanisms, tax systems, customs structures, monetary policy, and the like—would be unfair, inefficient, and opaque.[125]

Besides the economic consequences, such violations may also threaten the legitimacy of the court system, dissuade people from using the courts, and effectively deprive them of a fair place for the resolution of their disputes.

## II. AMERICAN JUDICIAL ELECTIONS AND THE RULE OF LAW: ARE OUR PRINCIPLES AT HOME CONSISTENT WITH OUR PRINCIPLES ABROAD?

*To casual observers, the epitome of the rule of law is the United States, and the United States is a leading exponent of the new rule-of-law orthodoxy. When we look closely at the U.S. legal system, however, we find few of these characteristics . . . .*[126]

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*A dark shadow is falling, fairly or unfairly, upon the perceived integrity of judges in many states that elect judges. Justice has been characterized as being "for sale." Impartiality and the judiciary's rule-of-*

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124. *See* Susan Rose-Ackerman, *Judicial independence and corruption*, *in* TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007, *supra* note 10, at 16; Greg Mayne, *Judicial integrity: the accountability gap and the Bangalore Principles*, *in* TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007, *supra* note 10, at 41.

125. Carothers, *The Rule-of-Law Revival*, *in* PROMOTING, *supra* note 10 at 4-5. The essay describes its version of the rule of law using a relatively "thick" definition, including "political and civil liberties," as follows:

> The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.

*Id.* at 4.

126. Upham, *supra* note 104, at 83-84.

*law function are plainly threatened. . . . [C]urrent thinking on how to protect the impartiality of the judiciary is gravitating toward the use and refinement of appointive methods of selection and related processes.*[127]

This section suggests that rule of law dialogue should enter the domestic arena, that domestic reform advocacy should reflect rule of law values, and that lessons learned internationally should be introduced into reform in the United States.[128]

In supporting the rule of law abroad, Americans are advocating concepts of judicial reform that our judicial systems sometimes fail to comply with at home. For example, although international rule of law efforts stress judicial impartiality, independence and accountability, many Americans tolerate judicial elections that do not adequately protect these qualities.[129] Some judicial elections seem to be efforts to achieve the opposite: namely, a tilted or slanted judiciary accountable to interest groups seeking to elect judges likely to decide cases "their way" or to hold judges accountable to popular and party preferences.[130]

In addition, the rule of law embodies the predictable application of the laws to all because the rules are open, known, and equally applied. But if the rules for decision depend on which side contributed or might contribute to (or against) the judge's campaign, or on who votes locally, the rules are no longer known or susceptible to equal application. Instead, they may shift—or appear to do so—from case to case according to the varying identities of the parties, depending on whether they are funders or potential funders, or where they vote.

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127. Donald L. Burnett, Jr., *A Cancer on the Republic: The Assault Upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 FORDHAM URB. L.J. 265, 281-82 (2007).

128. Various terms come to mind to describe the difference in the approach at home as opposed to the approach abroad, including hypocrisy, inconsistency, or cognitive dissonance. None of them is necessarily comprehensive or apt. For example, the same actor may not be involved in both situations so it is difficult to attribute those concepts to a single actor. Thus the United States government or the World Bank may be supporting judicial reforms abroad but are not known to have taken positions on state court judicial elections. Nonetheless, taking the United States as a whole or as a single actor, which may or may not be fair, a pattern of at least inconsistency appears to be arguable. *See, e.g.*, Kleinfeld, *supra* note 10, at 53 ("[R]eformers open themselves to charges of hypocrisy. . . . The highly political process of judicial choice in the United States would never be permitted by reformers elsewhere."); *id.* at 52 ("Practitioners are often following an idealized blueprint of their home system that ignores its own difficulties and flaws, such as the intense political involvement in the picking of the U.S. judiciary or the corruption residing in some European judiciaries.").

129. *See* Charles G. Geyh, *Rethinking Judicial Elections,* BILL OF PARTICULARS, Spring 2003, at 5, *available at* http://alumni.indiana.edu/conpubs/archives/Law-spr03-combined.pdf (last visited Oct. 17, 2008) ("I have reached the conclusion that judicial elections are fundamentally incompatible with judicial independence, and fundamentally incapable of adequately promoting judicial accountability. The time has come to rethink judicial elections, to the end of gradually phasing them out of existence all together.").

130. *See, e.g.*, Upham, *supra* note 104, at 83-84. *See also id.* ("The U.S. judiciary is permeated by politics . . . . If they [*i.e.*, judges] are not constantly aware of the effect of their important rulings on the electorate and the party's leaders, they will not be reelected, and they will cease to be judges.").

### A. *The Rule of Law Concept Is Not Merely International: It Should Be Applied to United States Institutions*

The U.S. and U.S.-based or -supported international development institutions have been looking at rule of law reforms, including judicial reform, worldwide, sometimes country by country.[131] They have spent considerable time studying and assisting foreign states needing such reform.[132] While these organizations are looking outward toward reform, other organizations within the United States are addressing the need for similar reforms in the United States, though rarely under the banner of "the rule of law."[133] In the foreign context, rule of law reform is driven by the need for economic stability and development, and, in some cases, human rights.[134] In the United States context, however, the same principles should apply, with a similar effort, starting with a closer look at state court judicial elections.

This is not to say that the words "rule of law" do not appear in the domestic context. They do, occasionally. Rather, these words do not appear to be commonly used in the same comprehensive sense domestically as they are abroad; sometimes they appear in passing; and they do not appear often enough.[135] Notable exceptions include Justice Anthony

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131. *See* Bryant G. Garth, *Building Strong and Independent Judiciaries through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383, 383 (2002).

132. *See id.* at 384-85.

133. There are many court reform organizations, both national and local; those with a national focus include the National Center for State Courts, Justice at Stake, and the American Judicature Society. The Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center has also had a substantial impact. *See generally* National Center for State Courts, http://www.ncsconline.org/D_About/index.htm; Justice at Stake Campaign, http://faircourts.org/contentViewer.asp?breadcrumb=8,284; American Judicature Society, http://www.ajs.org/ajs/ajs_about.asp; and Sandra Day O'Connor Project on the State of the Judiciary, http://www.law.georgetown.edu/judiciary/ (all sites in this footnote last visited Nov. 19, 2008).

134. The focus of this article is on the economic aspect of the rule of law, not the human rights aspect. The need for judicial reform to ensure human rights is fundamental, even in the United States. *See, e.g.*, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 832-33 (1995); Norman L. Greene et al., *Rethinking the Death Penalty: Can We Define Who Deserves Death?*, 24 PACE L. REV. 107, 115 n.33 (2002) (relating to the effect of judges' rulings in capital cases on their ability to remain in office). *See also* Harris v. Alabama, 513 U.S. 504, 519-20 (1995) (Stevens, J., dissenting). Arguably, the concepts of human rights and economic rights are linked to the extent that both relate to having a decent living standard.

135. *See* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 327-28 (2008) (commenting in passing on the problem of rule of law and judicial elections):

> On account of recent changes to judicial elections making them more open and competitive, elected state courts will indeed have better majoritarian credentials than ever before. But for anyone whose vision of democracy incorporates robust protections for individuals, minorities and the *rule of law*, this does not mean that they will be more democratic. ...In the new era [of judicial elections], the connection between elected state courts and the people grows ever more vigorous, but at a grave cost to other democratic and *rule-of-law* values.

*Id.* (emphasis added). *See also* Symposium, *supra* note 5, at 225; Bright & Keenan, *supra* note 134, at 785 ("A few rulings in highly publicized cases may become more important to a judge's survival on the bench than qualifications, judicial temperament, management of the docket, or commitment to the Constitution and the *rule of law*.") (emphasis added).

Kennedy's observation in a recent concurrence that the aspirations of the rule of law "may seem difficult to reconcile" with state court judicial elections,[136] as well as the work of the World Justice Project.[137]

Popular judicial elections are a peculiarly American custom.[138] Research has not disclosed any concerted effort to encourage judicial elections as part of any international program to improve judiciaries in foreign countries. The opposite appears to be true, with judicial elections simply left out of the sophisticated rule of law and reform dialogue directed internationally. They are not part of the rule of law reform package. Thus it has been observed that the American Bar Association's Rule of Law Initiative, in promoting the rule of law, does not encourage the election of judges.[139] Instead, it considers judicial elections as

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136. N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring). Justice Anthony Kennedy, in his concurrence upholding the constitutionality of New York's election of state court trial judges, used rule of law language to question state court judicial elections. Although finding a rule of law violation was beyond the scope of his concurrence, Justice Kennedy was evidently troubled by the possibility that judicial elections constitute rule of law violations, noting as follows:

> When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.

*Id.* Although not using rule of law language, Justice Stevens's concurrence suggested that the lower court findings "lend support to the broader proposition that the very practice of electing judges is unwise." *Id.* at 801 (Stevens, J., concurring).

137. *See, e.g.*, World Justice Project, Domestic Mainstreaming of the Rule of Law, *supra* note 5.

138. Few other countries elect any judges, and even there, the practice is limited. *See* Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at A1 ("Smaller Swiss cantons elect judges, and appointed justices on the Japanese Supreme Court must sometimes face retention elections, though scholars there say those elections are a formality."); Herbert M. Kritzer, *Law as a Mere Continuation of Politics*, 56 DEPAUL L. REV. 423, 431 (2007) ("The United States is almost unique in its use of elections in the judicial selection and retention process."). *See also* Posting of Walter Olson to PointofLaw.com, Judicial Elections: A Dissenting View, http://www.pointoflaw.com/archives/2008/07/judicial-elections-a-dissentin.php (July 17, 2008, 1:25 EST) ("Again, business litigants widely regard the judicial process of most other advanced democracies—in Western Europe, Japan, Canada—as more predictable and rational than that of state courts in the U.S. And again, in those other advanced democracies, elected judgeships are virtually unknown, being widely seen as part and parcel of the distinctive 'American disease' of law.").

139. E-mail from Simon R. Conté, Director, Research & Program Development, American Bar Association Rule of Law Initiative to author (July 16, 2008, 10:44 EST) (on file with author and *Denver University Law Review*). Mr. Conte noted as follows:

> I wanted to confirm that, consistent with the relevant international standards, ABA ROLI [*i.e.*, Rule of Law Initiative] does not encourage the election of judges. Judicial selection is one of the most important factors analyzed in ROLI's Judicial Reform Index, which is drawn from various international and regional standards, including the UN Basic Principles on the Independence of the Judiciary, Council of Europe Recommendation R(94)12 "On the Independence, Efficiency and Role of Judges," the Universal Declaration on the Independence of Justice, the Syracuse Draft Principles on the Independence of the Judiciary, and the International Bar Association Code of Minimum Standards of Judicial Independence. All of these standards state a clear preference for judicial selection based on

> the method [of judicial selection] least likely to achieve [international] standards [of merit, including professional qualifications, integrity, and independence], due to the politicization of the election process, the conflict of interest arising from the need to fundraise and campaign, and the risk that judges looking ahead to reelection might be influenced by popular opinion.[140]

"To the rest of the world . . . American adherence to judicial elections is as incomprehensible as our rejection of the metric system."[141] Notably, "[t]he rest of the world . . . is stunned and amazed at what we do, and vaguely aghast. They think the idea that judges with absolutely no judge-specific educational training are running political campaigns is both insane and characteristically American."[142]

### *B. State Court Judicial Elections—An Overview of Concerns*

*Insofar as all state judicial offices are filled through the electoral process, every judicial officer in this state is subject to having to decide the merits of a case that involves a party or attorney who contributed to or supported, or, conversely, opposed his or her campaign for office.*[143]

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merit, including professional qualifications, integrity, and independence. Electing judges is the method least likely to achieve those standards, due to the politicization of the election process, the conflict of interest arising from the need to fundraise and campaign, and the risk that judges looking ahead to reelection might be influenced by popular opinion.

140. *Id.*; *see also* Kleinfeld, *supra* note 10, at 31 ("The highly political process of judicial choice in the United States would never be permitted by reformers elsewhere."); *id.* at 53 ("Many legal professionals in the developing world know that the rule of law is a goal toward which even Western institutions are still evolving.").

141. Liptak, *supra* note 138 (quoting Hans A. Linde, a former justice of the Oregon Supreme Court, at a 1988 symposium on judicial selection); *see also* e-mail from Donald Chisholm, then an employee of USAID, to author (Aug. 18, 2008, 16:22:38 EST) (on file with author and *Denver University Law Review*), stating as follows:

> From 2004-2005, I was the Chief of Party for a USAID-financed Rule of Law project [in Peru]. One of the project's chief counterparts was . . . the Presiding Judge of the Anti-Terrorism Chamber. [The judge] was an extremely sophisticated counterpart who had traveled in the US as part of a Department of State-funded program and had good comparative knowledge about other legal systems . . . . We . . . delved into the subject of the election of state judges in the US. He found it surprising that a country that preached the doctrine of judicial independence in its work overseas would permit the election of state court judges by voters.

*See also* e-mail from Erik Jensen, Co-Director, Rule of Law Program, Stanford Law School to author (Sept. 5, 2008, 03:28 EST) (on file with author and *Denver University Law Review*) ("Even with all of [the] shortcomings . . . [of the international rule of law industry,] however, I am not aware of a single international rule of law project that has stooped to consider[] support for a system of judicial elections. The inherent distorting effects of such a selection process are so obvious that it does not pass the most minimal plausibility test.").

142. Liptak, *supra* note 138 (quoting Mitchel Lasser, a law professor at Cornell Law School). Professor Lasser compared the American system of judicial selection to the "much more rigorous French model, in which aspiring judges are subjected to a battery of tests and years at a special school" where "'you have people who actually know what the hell they're doing . . . . They've spent years in school taking practical and theoretical courses on how to be a judge. These are professionals.'" *Id.*

143. Caperton v. A.T. Massey Coal Co., No. 33350, 2008 WL 918444, at *21 (W. Va. July 28, 2008), (Benjamin, Acting C.J., concurring) (refusing to recuse himself from the hearing of the case),

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*Still another objection to the judicial elections has to do with how they are financed. They are usually financed, at least in the Midwest, by contributions from practicing lawyers. The result is the same kind of quasi-corruption that campaign financing generally produces. The people who contribute heavily are doing so, at least in part, in order either to obtain the kind of judge who will make their practice more successful or a judge who will be inclined to favor them out of gratitude or hope for future support. The combination of the financing and selection effects of judicial elections is very bad.*[144]

1. Is Justice For Sale? The Dangers of "Cash in the Courtroom"

No citation is required to establish that the sale or apparent sale of justice does not comply with the rule of law. But concerns arise short of sales or apparent sales. According to USAID, "[i]f a judiciary cannot be relied upon to decide cases impartially, according to the law, and not based on external pressures and influences, its role is distorted and public confidence in government is undermined."[145] The United Nations Basic Principles on the Independence of the Judiciary provide that judges must "decide matters before them impartially, on the basis of facts and in accordance with the law, without . . . improper influences, inducements, [or] pressures . . . direct or indirect, from any quarter or for any reason."[146]

There is increasing alarm from Sandra Day O'Connor and other well-known reformers and reform organizations that our system of judicial elections creates precisely the scenario in which money and the need to be elected influence or appear to influence justice among elected state court judiciaries. That is, rather than there being a rule of law, there is

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*cert. granted*, 77 U.S.L.W. 3051 (U.S. Nov. 14, 2008) (No. 08-22). *See* Marcia Coyle, *High Court Review Sought on Judicial Recusals*, NAT'L L.J. (Aug. 4, 2008), *available at* http://www.law.com/jsp/article.jsp?id=1202423489061 (discussing *Caperton* and describing petition for a writ of certiorari to the United States Supreme Court and background of contributions to judicial campaigns in the case). *See also* Editorial, *Too Generous*, N.Y. TIMES, Sept. 7, 2008 ("Situations like the Massey Energy case create an unmistakable impression that justice is for sale."); Editorial, *Tainted Justice*, N.Y. TIMES, Nov. 13, 2008, *available at* http://www.nytimes.com/2008/11/13/opinion/13thu3.html ("The justices would do a great deal to protect essential fairness by making clear that outsize campaign expenditures trigger a duty of recusal on the part of the beneficiaries."). On November 14, 2008, the United States Supreme Court granted certiorari and agreed to review the case. *See* Caperton v. A.T. Massey Coal Co., No. 33350, 2008 WL 918444 (W. Va. July 28, 2008), *cert. granted*, 77 U.S.L.W. 3051 (U.S. Nov. 14, 2008) (No. 08-22); Marcia Coyle, *Justices to hear recusal case of W.Va. high court judge*, NAT'L L.J. (Nov. 17, 2008), *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426044460 (free registration required).

144. Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 6 (2006).

145. USAID OFFICE OF DEMOCRACY AND GOVERNANCE, GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY 6 (Jan. 2002, revised ed.), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf.

146. *Id.* at app. A para. 2.

the rule of the campaign contributor, not to mention the local voter.[147] As Justice Stephen Breyer noted, judicial "independence means you decide according to the law and the facts. The law and the facts do not include deciding according to campaign contributions."[148] That is the subject of this section.

Various groups (loosely called "special interests") have been extensively funding judicial election campaigns intended to seat judges committed explicitly or implicitly to favor their particular interest group or the group's objectives. These are not the only types of judicial elections, but they are the most notorious. Other types include elections where voters do not turn out to vote or do not know who the candidates are.[149] Alternatively, the candidates are hand-picked by political bosses or otherwise unopposed, with the results then provided to the voters for ratification.[150]

Seeking judges inclined to support one side or another in a dispute—whether that side is a business or an individual plaintiff—may be futile as well as damaging to the rule of law. This is self-evident if only one category of party is involved in the case. For example, the election of a "pro-business" judge has little meaning in the cases which are "business-against-business" and no individual is involved. Conversely, the election of a "pro-individual plaintiff" judge may be futile in cases where individuals are suing each other and no business is involved. In still other cases, both litigants may not be businesses or individuals, but instead one party may be the government.

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147. Gur-Arie & Wheeler, *supra* note 2, at 140. *See also id.* (providing the quote from Mira Gur-Arie and Russell Wheeler introducing this article); Upham, *supra* note 104, at 84 ("Most state judges are elected and serve for a term of years. . . . If they are not constantly aware of the effect of their important rulings on the electorate and their party's leaders, they will not be reelected, and they will cease to be judges.").

148. *Frontline: Justice for Sale* (1999) (PBS television interview of Stephen Breyer & Anthony Kennedy), http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html.

149. *See, e.g.*, Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597, 601-02 (2005) ("Voters in New York, as elsewhere, generally do not even know who the candidates for judge are, and they often do not vote for judicial candidates at all."); *see also* Geyh, *supra* note 129, at 6 ("[A]s much as 80 percent of the electorate typically does not vote in judicial elections . . . . [A]s much as 80 percent of the public—including many who cast ballots in judicial elections—are unfamiliar with and unable to identify the judicial candidates.").

Given the number of arguments, it "would be impractical (not to mention tedious) to canvas[s]" all objections to judicial elections or rebuttals to those objections. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 293 (2008). *See also* Norman L. Greene, *Appointive Selection of Judges, Limited-Jurisdiction Courts with Non-Lawyer Judiciaries, and Judicial Independence*, 43 CT. REVIEW 80, 80-83 (2007) (describing problems of judicial elections and Fordham symposium on what makes a good appointive system)

150. *See* Norman L. Greene, *What Makes A Good Appointive System for the Selection of State Court Judges: The Vision of the Symposium*, 34 FORDHAM URB. L.J. 35, 41-47 (2007) (discussing Second Circuit's decision in N.Y. State Bd. of Elections v. Lopez Torres, 462 F.3d 161 (2d Cir. 2006), *rev'd* 128 S.Ct. 791 (2008) and describing political-boss-controlled elections).

In sum, fueling judicial races to elect a judge inclined to support one category of litigant as against another is not only damaging to the rule of law, but it is pointless in a number of circumstances.

To be fair, some special interest groups consider themselves victims of a system in which opposing groups are seeking to slant the judiciary and in order to prevent another interest group from obtaining a slanted judiciary, they are waging a "defensive" effort to obtain a judiciary with a different "slant."[151] Still others involved in judicial elections might believe that they are supporting candidates who are dedicated to classic principles of impartiality, independence, and accountability; however, if that is occurring, it is not making the news.

Judicial elections have drawn the negative attention of many commentators, including, most notably, former United States Supreme Court Justice Sandra Day O'Connor. According to Justice O'Connor, "[s]pecial interest appeals to emotion and policy preferences tempt voters to join efforts to control the decisions of judges."[152] "No other nation in the world does that [*i.e.*, elects judges] . . . because they realize you're not going to get fair and impartial judges that way."[153] She added that "[w]hat worries me is the manner in which politically motivated interest groups are attempting to interfere with justice."[154] Also, the spending of large campaign sums endangers the legitimacy that the public accords to court decisions, which has led Justice O'Connor to call for the elimination of judicial elections entirely:

> When so much money goes into influencing the outcome of a judicial election, it is hard to have faith that we are selecting judges who are fair and impartial. If I could do one thing to solve this problem, it would be to convince the states that select judges through partisan elections—that is, when a Democrat and Republican run against one another—to switch to merit selection instead.[155]

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151. *See* Joanne Albertsen & Malia Reddick, *Conference Considers Judicial Reform*, 92 JUDICATURE 80 (Sept.-Oct. 2008) (reporting on a conference on the judiciary featuring, among others, Justices Sandra Day O'Connor and Stephen Breyer at Fordham Law School on Apr. 8, 2008; a co-author of the JUDICATURE article, Malia Reddick, was a panelist at the conference; and the author of this article in the *Denver University Law Review* was the organizer of the conference). One panelist observed that the campaign contributions of businesses to judicial elections may be attempts at "fighting bias with bias." *Id.* at 82. Although that may explain the reason that certain businesses believe that they are contributing to judicial campaigns, that would not justify providing slanted information to the public on judicial candidates, let alone false information, if that were occurring. *Id.*

152. Sandra Day O'Connor, *Justice for Sale: How Special-Interest Money Threatens the Integrity of Our Courts*, WALL ST. J., Nov. 15, 2007, at A25.

153. Liptak, *supra* note 138 (quoting Justice O'Connor at the conference on the judiciary at Fordham Law School on Apr. 8, 2008; the reporter, Adam Liptak, was a panelist at the conference, which, as noted above, the author of this article organized). *See also* Albertsen & Reddick, *supra* note 151.

154. Sandra Day O'Connor, *How to Save Our Courts*, PARADE, Feb. 24, 2008, available at http://www.parade.com/articles/editions/2008/edition_02-24-2008/Courts_O_Connor.

155. *Id.*

As Justice O'Connor noted, "We put cash in the courtrooms, and it's just wrong."[156] A New York Times editorial referred to the "escalating millions that special interests are pouring into state judicial elections in an effort to buy favorable rulings."[157] The Times added that "special interests are finding that buying up judges likely to side with them in big-dollar cases is a good investment—the real-life grist for John Grisham's new fictional legal thriller, 'The Appeal.'"[158]

Cash distorts the intended purpose of the American judiciary—namely, to decide cases on the law and the facts, not on who the parties are—and leads some to believe that justice is for sale. Justice O'Connor echoed her positions in the Wall Street Journal, singling out, among others, the State of Pennsylvania:

> The final four candidates running for open seats on the Supreme Court of Pennsylvania raised more than $5.4 million combined in 2007, shattering fund-raising records in Pennsylvania judicial elections.[159]
>
> . . . Most of this money comes from special interest groups who believe that their contributions can help elect judges likely to rule in a manner favorable to their causes. As interest-group spending rises, public confidence in the judiciary declines. Nine out of 10 Pennsylvanians regard judicial fund raising as evidence that justice is for sale, and many judges agree.[160]

Whether bias is a fact or only an appearance, the appearances are not good. "Elections can be very expensive to win, and elected judges may well be viewed by the public as being beholden to their supporters."[161] The potential for bias was highlighted in a recent New York

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156. Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash "in the Courtroom"*, N.Y. TIMES, Apr. 15, 2008, at A22. *See also* Roy A. Schotland, *Judicial elections in the United States: is corruption an issue?*, *in* TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007, *supra* note 10, at 26 ("[A]buse would occur if the judge's performance on the bench were affected by [campaign] contributions received, or hoped for.") (with the exception of Professor Schotland's brief article in the Report, the focus of the Global Corruption Report is international).

157. Samuels, *supra* note 156.

158. *Id. See also* O'Connor, *supra* note 152, at A25; John Grisham, THE APPEAL (Doubleday 2008).

159. O'Connor, *supra* note 152.

160. *Id.*

161. J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence From What and Why*, 58 N.Y.U. ANN. SURV. AM. L. 241, 243 (2001). *See also id.* (comparing federal to state elected judiciary):

> The method by which federal judges in the United States are selected, appointment by the President and confirmation by the Senate, is an attempt to free federal judges from the political pressures associated with elections. Elections can be very expensive to win, and elected judges may well be viewed by the public as being beholden to their supporters. The appointment and confirmation process, combined with the constitutional guarantee of tenure during good behavior and a salary that will not be decreased, is the Constitution's effort both to ensure the independence of the federal judiciary in the face of political pressures, and to assure the people that their disputes will be fairly settled by independent and unbiased arbiters.

Times study of the Ohio Supreme Court. In that study, the New York Times "found that [Ohio Supreme Court] justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time."[162]

Elections could hardly be advocated, much less exported, to another country. If judicial elections were occurring in foreign countries, some of the same international organizations mentioned above would undoubtedly be concerned enough to target the country for rule of law reform. The rule of law, however defined, encompasses impartial decision making. It is therefore unlikely that any credible institution could validly advocate in foreign nations a system that not only requires the raising and expenditure of substantial sums, but which leads the public to believe that courts are deciding in favor of their campaign contributors, let alone local voters. Instead of encouraging foreign investment in a particular country, this is the sort of enterprise that would cause contracting parties to doubt that their bargains would be respected, especially the party which (or who) did not contribute to the campaign, did not vote locally, or even worse, contributed to the judge's opponent.

A Nigerian commentator grasped this point exactly in rejecting judicial elections for Nigeria on the grounds that elections fail sufficiently to promote the concept of judicial independence as he defined it:

> Those appointed to the bench because of their learning in law, their experience at the bar and their moral character are likely to support and defend the independence of the judiciary. . . . Accordingly, it is not desirable that judges should be elected by the people, especially where, in the absence of mutual tolerance, the constituent groups have widely divergent, conflicting and irreconcilable interests.[163]

The commentator told an anecdote about how a Louisiana Supreme Court judge refused to meet him during his visit to New Orleans because of a prejudiced electorate. The author noted that the judge informed him that "such a meeting [with the Nigerian] would be odious to the electorate, making his future election difficult."[164]

The Nigerian article may be dated in terms of its racial references, and the author was a Senior Lecturer at the University of Nigeria at the time it was written and perhaps not steeped in the tradition of American judicial elections. Nor is this article cited to suggest that Nigeria or any other developing nation enjoys a superior judicial selection system to the

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162. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006 at A1. *See also* Liptak, *supra* note 138; Geyh, *supra* note 129, at 6 ("80 percent or more of the public perceives that when a judge is obligated to raise the monies needed to win election or re-election, she is influenced by the campaign contributions she receives.").

163. D.L.O. Ewelukwa, *The Independence of the Judiciary*, 14 NIGERIAN BAR J. 38, 48 (1977).

164. *Id.* at 48 n.25.

United States. Indeed, one may readily conjure up worse selection systems, such as one that makes a judge's job virtually dependent on another branch of government so that the judge could be effectively told what to decide at the risk of losing her job.[165] Examples of this even appear in United States history.[166] But the Nigerian article recognizes the same problems with judges pandering to the voters that other modern American commentators, including Justice O'Connor, have recognized. The comments in the article are especially significant since they preceded the recent escalation of the costs of such elections, which may make judicial candidates even more beholden to campaign contributors and less likely to risk offending them.

Exportation of American judicial elections to foreign nations is a fantasy. But the scenario is interesting to contemplate. It would undoubtedly result in different elections, consistent with local traditions and means. For example, in some nations, it is difficult to imagine major media campaigns. The types of campaign promises would undoubtedly differ in light of local conditions; the candidates might be subject to different canons of ethics governing what they could say (if anything); campaigning itself might be different as would be voter education (if any); and millions of dollars might not be spent on campaigns, although in relative terms the cost might still be expensive. Also, in some places, recruitment of candidates might be difficult, since being a judge might neither be well paid nor desirable; and it might also be dangerous.

The United States has some institutional counterweights and traditions, which some other nations might lack, that would reduce the chance that an elected judiciary fully subject to the negative incentives to pander, may veer off course.[167] (Conversely, the United States may lack

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165. A modern example of this appears in Justice Stephen Breyer's description of "telephone justice" in which Russian party bosses told the judges how to decide their cases:

> I mean, years ago, we heard Russian judges—I did once at a conference—and they were talking about what's called "telephone justice." And telephone justice is where the party boss calls you up on the telephone and tells you how to decide the case. So they said, Well, don't you have that in the United States? Now, really don't you? So I said, No. And I looked around and I said, Well I know you're thinking that even if we did, I would say no. They said, That's right. And I said, Well how can I explain it? It's just that no one in the United States wants that kind of system and it would be outrageous and beyond belief that someone would call up on the phone.

*Frontline*, *supra* note 148.

166. For example, "in the years immediately following the Revolution," state courts were placed "very much under the thumb of state legislatures." F. Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 441 (2004). Thus in Rhode Island, judges who "nullified a legislative act were called before the legislature to explain themselves and were replaced by the legislature when their terms expired the following year." *Id.* "The substantial powers exercised by state legislatures over courts were largely the result of two factors: the lack of a clearly distinct judicial role and an ingrained distrust of colonial judges." *Id.* at 443.

167. For a discussion from an economist's standpoint of the workings of "negative incentives" on judges see F. Andrew Hanssen, *The Political Economy of Judicial Selection: Theory and Evidence*, 9 KAN. J.L. & PUB. POL'Y 413, 413-24 (2000). *See, e.g.*, *id.* at 418 ("Are there groups today that judges might be a little leery about displeasing? It depends on the institutional structure, and

some of the counterweights that other developing countries might have to substitute for an adequate judicial system, such as a well-developed body of informal law.)[168] For instance, appointed courts, such as federal courts,[169] are available for some cases, as well as alternative dispute resolution. In still others, choice of forum clauses may allow parties to select particular states for dispute resolution.[170] To observe that elected judiciaries are sometimes avoidable, however, is hardly to compliment the system that produces them.

Moreover, in some states, such as Indiana and New York, only some or all lower court judges are elected, with appellate judges appointed, which permits correction, if necessary, by an appointed judiciary.[171] The opportunity for appellate correction should not be overstated.

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whether that structure gives particular groups the means to affect a judge's career."). *See also id.* at 417:

> [S]uppose that we are back in the days of King George II and that you are the colonial judge. You serve at his pleasure, and here is how the system works: You render decisions that he likes, you get a big house, a nice fancy carriage with fancy horses, a lot of servants to wait on you. If you render a decision he doesn't like, he cuts your head off. So that is the institutional structure: good decision, nice house and carriage; bad decision, no head.

168. *See, e.g.*, Messick, *Judicial Reform and Economic Development*, *supra* note 10, at 129. As noted previously, informal legal structures, such as reputation based systems, even if otherwise adequate, might be inadequate for a number of transactions or the disputes arising from them, including larger and more complex transactions. *See* Jensen, *Justice and the Rule of Law*, *supra* note 114, at 121; DAM, *supra* note 62, at 125.

169. Andrew J. Art, *Sometimes It's OK to Just Go Ahead and Make A Federal Case Out Of It*, COLUMBUS BUS. FIRST (Aug. 24, 2007), *available at* http://www.cwslaw.com/CmsData/Site/ModuleNews/SDM%20federal% 20case%20reprint.pdf (Ohio article observing that reason for bringing cases to federal court includes the perceptions that "the system of electing state court judges can give rise to the appearance of partiality, particularly when the defendant is from out of state" and "that federal judges are less susceptible to local economic or political pressures."; note that state judges are elected in Ohio). Certain state court decisions are also reviewable in federal court on due process grounds. *See e.g.*, State Farm Mutual Ins. Co. v Campbell, 538 U.S. 408 (2003) (review of punitive damages decision under the due process clause).

170. Alternative dispute resolution, such as arbitration, which is essentially consensual, would have limited applicability in tort cases.

The use of alternate dispute resolution is, of course, not limited to domestic controversies. International arbitration tribunals may also provide a method for limiting the negative impact of certain foreign country court decisions. *See* Michael Trebilcock and Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1541 (2006) ("In contemporary international trade, three non-state institutions of contract enforcement are utilized extensively to mitigate contracting problems arising from cross-border transactions" including "international commercial arbitration. . . . International commercial arbitration has emerged over the past two decades as a common mechanism for settling trade and investment disputes among private parties in different countries."). *But see id.* at 1541 (2006) (referring to "some persistent forms of contractual uncertainty relating to the limits of the enforceability of international arbitration awards within national borders.").

171. *See* American Judicature Society, *Judicial Selection in the States: Indiana*, http://www.judicialselection.us/judicial_selection/index.cfm?state=IN (last visited Oct. 17, 2008); American Judicature Society, *Judicial Selection in the States: New York*, http://www.judicialselection.us/judicial_selection/index.cfm?state=NY (last visited Oct. 17, 2008). The preferred method is commission-based appointment, and variations exist even among those systems. For model provisions for such a system, see generally Norman L. Greene, *The Judicial Independence Through Fair Appointments Act*, 34 FORDHAM URB. L.J. 13 (2007). The American Judicature Society has recently published some of its own model provisions for judicial selection.

For example, in some states, including New York, the highest court is a certiorari court, with no automatic right to appeal to that court in most cases. Furthermore, not every question is reviewable by appellate courts de novo, and deference in various situations is typically given to certain trial court decisions. Finally, in order to prevent enforcement of lower court judgments pending appeal, a monetary judgment often must be bonded; and appeals may be otherwise expensive.[172]

Much is to be said for getting a fair and impartial decision in the first instance; and the question remains why any state judicial system should rely on counterweights, rather than have a good system at the outset.[173]

2. The "Other Problems": Lack of Screening and Voter Knowledge of Candidates and Participation in Judicial Elections

Judicial competence has been made part of the rule of law dialogue by the World Justice Project;[174] and Justice Anthony Kennedy would add a "functioning judiciary respected for its independence, *its professional attainments*,"[175] as well as "neutrality," to that dialogue.[176] The concern about elections is not only a concern about judges and candidates pandering to the electorate or campaign contributors, or retaliation against opponents. Judicial elections are not the most effective way to secure highly qualified judges, and such a judiciary is essential to fair adjudication:

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*See* AMERICAN JUDICATURE SOCIETY, MODEL JUDICIAL SELECTION PROVISIONS (2008 REVISION), http://www.judicialselection .us/uploads/documents/MJSP_ptr_3962CC5301809.pdf.

172. The damage caused by unfair justice in the United States may also be softened in some respects by the availability of insurance to bear or share the costs in some cases. But not every risk is insurable, covered by insurance, or within policy limits; and although the insured may have some of its losses covered by insurance, that coverage does not prevent the harm from falling upon the insurance companies themselves. Thus insurance shifts the risk of substantial loss from one company to another, but loss is still present. Insurance companies may also attempt to recoup some of their losses from the insured and perhaps others through imposing higher future insurance premiums and to spread the risk of loss to other companies through reinsurance.

173. The lack of restriction on judicial campaign speech as a result of the Supreme Court's decision in Republican Party of Minn. v. White, 536 U.S. 765, 786 (2002), and subsequent cases also threatens a loss (or at least perception of loss) of judicial impartiality. Under the rulings of these cases, judicial candidates may now announce their personal views on certain legal and political issues, and within limits, may solicit funds for their campaigns.

174. *See* World Justice Project, *supra* note 41 (providing the World Justice Project's definition of the Rule of Law).

175. N.Y. State Bd. of Elections v. Lopez Torres, 128 S.Ct. 791, 803 (2008) (Kennedy, J., concurring) (emphasis added).

176. *Frontline*, *supra* note 148. As Justice Kennedy noted:

> We have certain constitutional principles that extend over time. Judges must be neutral in order to protect those principles. . . . There's a rule of law, [and it is in] three parts. One: the government is bound by the law. Two: all people are treated equally. And three: there are certain enduring human rights that must be protected. There must be both the perception and the reality that in defending these values, the judge is not affected by improper influences or improper restraints. That's neutrality.

> Most of what courts do is opaque to people who are not lawyers. It is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently. That is a decisive objection to Arizona or any other state deciding to elect judges. In states like Wisconsin and Indiana in my circuit, states that have partisan elections of state supreme court justices, the system is putting an unfair burden on the voter of trying to figure out which candidates would be good judges.[177]

If judges are to be selected with the "utmost care," elections are the wrong way to select them.[178] This is not the same as saying elected judges are more qualified than appointed judges or vice versa. The question is which method used to select judges is better designed to focus on the judge's qualifications. For example, judicial candidates for elections need not undergo mandatory screening[179] or evaluation to run for election; and the only qualifications for office are that they have a law degree, have a specified amount of time in practice (if required), and be elected. These "qualifications" alone are insufficient. A judge requires legal knowledge and ability, including the capability to understand and apply the complexity of the law, a good judicial temperament, and rule of law values.[180] Litigants spend substantial sums in preparing their cases and rely on the courts properly to evaluate and understand their arguments and experts. But legal ability and temperament are rarely meaningfully discussed in an election campaign. The voters are generally unaware of the specific judicial qualifications of the judicial aspirant[181]

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177. Posner, *supra* note 144, at 5.

178. *See* TAMANAHA, *supra* note 29, at 125.

179. New York has a limited amount of bar association screening, political party screening and certain other voluntary screening known as Part 150 commissions. *See generally* 22 Rules of the Chief Administrative Judge, Part 150, Independent Judicial Elections Qualification Commissions, *available at* http://www.nycourts.gov/rules /chiefadmin/150.shtml (last visited Nov. 10, 2008). None of these screening procedures is mandatory or required to enable one to run for a judgeship, and an unfavorable rating does not preclude election.

180. *See* TAMANAHA, *supra* note 29, at 125:

> [J]udges must be selected with the utmost care, not just focusing on their legal knowledge and acumen, but with at least as much attention to their commitment to fidelity to the law (not inclined to manipulate the law's latent indeterminacy), to their willingness to defer to the proper authority for the making of law (accept legislative decisions even when the judge disagrees), to their social background (to insure that judges are not unrepresentative of the community), to their qualities of honesty and integrity (to remain unbiased and not succumb to corruption), to their good temper and reasonable demeanor (to insure civility), and to their demonstrated capacity for wisdom.

181. The voters may know the judge's educational background and years of judicial or related experience. But these factors may or may not relate to the judge's legal skills or temperament which may be better identified through a screening process which reviews the judge's performance in detail. This process, most commonly used in connection with retention elections in appointive systems, such as in Colorado, is known as judicial performance review or evaluation. In Colorado, judges are initially appointed to the bench through a commission-based system; the only judicial election is a retention election for a judge whose term is expiring; and in that election, judges are unopposed. *See, e.g.*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT (2006), http://www.du.edu/legalinstitute/publications2006.html (last visited Oct. 6, 2008) (considering various types of judicial performance

and as previously noted, what judges do is generally "opaque" to the public.[182] Moreover, American judges do not receive pre-judicial education before ascending to the bench, and they either learn on the job or through post-selection judicial education programs.[183]

Electing judges "means that people whom society wants to be exercising a professional judgment, have to engage in a popularity contest instead, and the most popular are unlikely to be the most professional."[184] Voters typically do not know enough about a judge's performance to decide:

> [I]f only a few people can identify the [judicial] candidates, and only a few people vote, can elections really hold judges accountable in any meaningful way? . . . [H]ow are voters supposed to assess the professional competence of judges? It is one thing to expect voters with no training in the law to decide whether the policies favored by legislators and governors (who may not be lawyers themselves) coincide with their own, and quite another to expect them to decide whether the rulings of judges coincide with the law.[185]

Among other things, voters may be generally unable to assess a judge's technical skills, including the judge's mastery of the rules of evidence and the judge's ability to understand complex issues of substantive law.[186] Lacking useful information about judicial candidates, voters sometimes vote "blind" based on cues having nothing to do with judicial quality or perhaps upon the basis of the last political sign or other political advertisement (regardless of its accuracy) that they observed; many do not vote at all.[187] "Without accurate and relevant knowledge about

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review, including reports on particular judges made available to the public before retention elections as voter education).

182. Posner, *supra* note 144, at 5.

183. *See* Gur-Arie & Wheeler, *supra* note 2, at 137; Marc T. Amy, *Judiciary School: A Proposal for a Pre-Judicial L.L.M. Degree*, 52 J. LEGAL EDUC. 130, 134 (2002) (recommending pre-judicial education for U.S. judges).

184. Posner, *supra* note 144, at 6.

185. Geyh, *supra* note 129, at 7.

186. Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 44-45 (2003).

187. *Id.* at 51. *See also* Sarah Elizabeth Saucedo, *Majority Rules Except in New Mexico: Constitutional and Policy Concerns Raised by New Mexico's Supermajority Requirement for Judicial Retention*, 86 B.U. L. REV. 173, 217 (2006) (noting that in retention elections, most voters abstain or "vote blind" because they have to make a "decision on which they have no basis for judgment" (quoting Robert C. Luskin et al., *How Minority Judges Fare in Retention Elections*, 77 JUDICATURE 316, 318-19 (1994)); Karlan, *supra* note 3, at 1046 ("[V]oters [in judicial elections] are likely to cast their ballots in ignorance; they often seem to support (or oppose) every incumbent, vote a straight ticket without any knowledge of the relationship between party and judicial philosophy (if there is one), or simply not vote at all.").

The problem of voters voting on the basis of false or deceptive political advertising in judicial campaigns is a matter of concern. One notable example of such advertising was in the 2008 election campaign between Gableman and Butler for the Wisconsin Supreme Court. See Adam Liptak, *supra* note 138, observing the following about the campaign:

> The vote came after a bitter $5 million campaign in which a small-town trial judge [Gableman] with thin credentials ran a television advertisement falsely suggesting that the

the specific judges at issue, voters are prone to base their decisions on factors such as ethnicity, gender, name recognition, party affiliation, or length of time on the bench. Even worse, without information to inform their choices, a significant number of voters apparently cast a vote without any rationale at all."[188]

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only black justice on the state Supreme Court [Butler] had helped free a black rapist. The challenger unseated the justice with 51 percent of the vote, and he will join the court in August.

. . . Judge Gableman's campaign ran a television advertisement juxtaposing the images of his opponent, Justice Louis B. Butler Jr., in judicial robes, with a photograph of Ruben Lee Mitchell, who had raped an 11-year-old girl. . . . "Butler found a loophole," the advertisement said. "Mitchell went on to molest another child. Can Wisconsin families feel safe with Louis Butler on the Supreme Court?"

Justice Butler had represented Mr. Mitchell as a lawyer 20 years before and had persuaded two appeals courts that his rape trial had been flawed. But the state Supreme Court ruled that the error was harmless, and it did not release the defendant, as the advertisement implied. Instead, Mr. Mitchell served out his full term and only then went on to commit another crime.

[Former Justice Butler noted that] "people ought to be looking at judges' ability to analyze and interpret the law, their legal training, their experience level and, most importantly, their impartiality. []They should not be making decisions based on ads filled with lies, deception, falsehood and race-baiting. The system is broken, and that robs the public of their right to be informed."

Part of the section relating to the problems of judicial elections, particularly the lack of voter knowledge, is taken from Norman L. Greene, *Appointive Selection of Judges, Limited Jurisdiction Courts with Non-Lawyer Judiciaries, and Judicial Independence*, 43 CT. REVIEW 80 (2007).

188. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS, JUDICIAL ACCOUNTABILITY IN CONTEXT 15 (2006) [hereinafter SHARED EXPECTATIONS] (footnotes omitted) *available at* http://www.du.edu/legalinstitute/form-shared-expect.html (registration required). *See also id.* at 3 ("As a consequence, voters tend to vote based on cues unrelated to a judge's performance, such as ethnicity or party affiliation, where that information is available.").

The importance of a judicial candidate's name recognition was reaffirmed in the West Virginia Supreme Court election of 2008, where an advertisement connecting the candidate's name to "ketchup" was concededly helpful in the candidate's success. *See* Justin D. Anderson, *"Ketchup" spot left its mark on voters deciding Supreme Court race*, CHARLESTON DAILY MAIL, Nov. 7, 2008, *available at* http://dailymail.com/News/statenews/200811070217:

> It was a short, simple television ad, meant to familiarize voters with the candidate's uncommon last name. And it was arguably the cleverest and most entertaining ad of the whole election season. [Menis] Ketchum believes it was that ad, and later a sequel, that got him elected [in 2008] to one of two seats coming open on the [West Virginia] Supreme Court by a surprisingly wide margin. "I worked hard, I worked continuously," Ketchum said. "I never stopped. I met a lot of people. But I think the ketchup ad elected me."

Party affiliation determined the results in 2008 trial court elections in Harris County, Texas, where 22 out of 26 Republican judges were replaced by Democratic judges. *See* Mike Tolson, *Sweep revises debate on election of judges: Straight-ticket ballots contributed to multiple defeats at the courthouse*, HOUSTON CHRON., Nov. 8, 2008, *available at* http://www.chron.com/disp/story.mpl/front/6102615.html (describing, among other things, the Democratic sweeps or near sweeps in Dallas County in 2006 and in Harris County in 2008). Texas Supreme Court Chief Justice Wallace Jefferson took the opportunity to comment on the uninformed electorate in judicial elections:

> This is a strange way to select those who guard our legal rights . . . . It is time to decide whether partisan election is the best means to ensure judicial competence. It has become clear that in judicial elections, the public (particularly in urban areas) cannot cast informed votes due to the sheer number of candidates on the ballot.

*Id.*

Also, the amount of money required to run a campaign and the political nature of the election process may discourage qualified candidates from running. Would-be judges just may not want to go "through all of that":

> [E]lecting judges greatly narrows the field of selection. Most people do not have the skills or personality to be a campaigning candidate. Nor is there any correlation between the skills of a judge and the skills of a political candidate. So we lose a lot of people who would be excellent judges but would be total flops as political candidates. And that is certainly bad.[189]

In contrast, seeking a judgeship in an appointment system does not entail the same costs as in an election system: all that is needed is filling out an application and interviewing.[190] The relative simplicity of the process may encourage those qualified persons unlikely to excel in the political arena to apply.

None of these considerations—lack of screening, disincentives to run because of the need for political involvement, or lack of voter knowledge and insight—pertains to a well-designed appointment system. In such an appointment system, screening of the candidate according to established criteria, including knowledge of the law and temperament, is not only commonplace but required.[191] Although adopting the federal system of appointment is rarely suggested for the state courts (and the federal system has its own flaws), federal judicial candidates typically are screened by the senators who suggest them, the presidents who appoint them, and the senate which confirms them. While some may question the suitability of certain appointment systems, what makes a good appointive system was the subject of a recent symposium and could be studied further.[192]

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189. Posner, *supra* note 144, at 6.

190. City of New York Mayor's Advisory Committee on the Judiciary, Judicial Application, http://www.nyc.gov/html/acj/html/application/judicial_application.shtml (last visited October 27, 2008). *Cf.* Sharon E. Grubin & John M. Walker, *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 11, 56 (1997) (appointment system for federal magistrate judge system.).

191. *See, e.g., id.* at 52-53 (federal bankruptcy court judges); Greene, *supra* note 171. *But see* Stephanie K. Seymour, *The Judicial Appointment Process: How Broken is It?*, 39 TULSA L. REV. 691, 693-97 (2004) (overview of federal judicial appointment for federal district and circuit court judges during various past administrations, focusing on problems with the system of appointment).

192. *See Symposium on Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*, 34 FORDHAM URB. L.J. 1 (2007). My model judicial appointment legislation, which is part of the symposium, appears at Greene, *supra* note 171. *Compare* JOSHUA C. HALL & RUSSELL S. SOBEL, IS THE 'MISSOURI PLAN' GOOD FOR MISSOURI? THE ECONOMICS OF JUDICIAL SELECTION, SHOW-ME-INSTITUTE (May 21, 2008), http://showmeinstitute.org/docLib/20080515_smi_study_15.pdf. HALL & SOBEL overlooks this symposium in its discussion on the supposedly little work done on the differences among appointive systems. *See id.* at 9 ("While there has been a tremendous amount of research about the differences between elected and appointed systems, there has been almost no empirical work about the differences among appointive systems."). Some defenses of judicial elections suggest that since appoint-

This does not mean that elected judges are never highly qualified and that appointed judges are always highly qualified. Furthermore, "[t]he quality of the elective judiciary, or of any given elected judge, does not validate the deficiencies of the election system. Good judges can emerge from poor selection systems. Even a monarch, dictator, or a political boss can be capable of selecting a good judge from time to time, but that does not mean that we wish to have our judges selected by such persons."[193] But it does suggest that the system for selecting judges by election is not conducive to identifying the best qualified judges because it does not require screening and depends on fund-raising or campaigning, which have little to do with judicial ability.

This article is well aware of the difficulty in measuring quality and applying the test of quality to each individual judge.[194] An empirical or quantitative comparison would be a major undertaking. The study would have to isolate agreed criteria of quality; the criteria would not only have to be valid but measurable; and the study would need to take account of the different types of elections and appointment systems. All appointment systems are not the same, and for a study to be useful, it would have to include the precise system being studied; and that may or may not be a system that is even in place in any given state.[195] From a structural standpoint, however, all commission-based appointment systems should involve screening of judicial aspirants, and that gives the system an advantage over any electoral system, if the screening is properly done.[196]

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ive systems may have problems, states should stay with the flawed elective systems that they have; or they engage in rhetorical praise of the so-called benefits of the democratic electoral process used to select judges. *See. e.g.*, Norman L. Greene, *Reflections on the Appointment and Election of State Court Judges: A Response to* Adumbrations on Judicial Campaign Speech *and a Model for a Response to Similar Advocacy Articles*, 43 IDAHO L. REV. 601, 612-14, 622-23 (2007); *cf.* Stempel, *supra* note 186, at 44 (noting not every office needs to be elected in a democracy, and well-functioning appointive systems may be substituted for elective systems).

193. Greene, *supra* note 149, at 954 n.26.

194. *See* Greene, *supra* note 192, at 613-14.

195. *Id.* Even if the appointment system were only a model and not yet in effect, the study might evaluate whether such a model was conducive to selecting qualified judges. The issue is not merely what results appointment systems have achieved in selecting qualified judges in the past but what they may be designed to achieve in the future. By way of comparison, in order to evaluate the likelihood of an appointive system achieving diversity, one might consider analyzing the extent to which past comparable appointive systems have done so. But it is also necessary to consider how appointment systems may be designed so as to maximize the chances of achieving diversity in the future. *See e.g.*, Leo M. Romero, *Enhancing Diversity in an Appointive System of Selecting Judges*, 34 FORDHAM URB. L.J. 485 (2007); *see also id.* at 487 ("Ensuring diversity is most likely to occur when the law establishing the appointive system, whether in a constitution or statute, includes language that mandates consideration of diversity.").

196. The author acknowledges that many of our elected judges may be excellent judges and that the criticism of the election system is not intended to be a criticism of any of those selected by it. He trusts that this is obvious regardless whether the criticism of the election system is in this article or coming from Justice O'Connor, who was both elected and appointed to the bench, herself.

### C. The Economic Consequences of Judicial Elections

Although research is ongoing, considerable international development experience teaches that the presence of the rule of law is linked to economic progress, and its failures to the reverse. Thus, if judicial elections are or lead to rule of law violations, economic setbacks may be anticipated in the United States where they occur.[197] Litigants and potential litigants—business and non-business interest groups[198] and policymakers—may consider the evidence, and if the potential consequences are unacceptable, consider how to respond.

The economic consequences of domestic rule of law violations may appear in various ways. For example, if the judicial systems of some states or municipalities are presumed to be unfair, few businesses may wish to locate or sell there, unless, perhaps, the risk is worth it. That hurts businesses by depriving them of potential profits, and it injures the localities by depriving them of tax revenues, jobs, and otherwise available goods and services. In addition, foreign direct investment may be discouraged in those localities. After all, based on international experience, it is questionable whether companies would wish to invest where they could not rely on a judicial system which fairly judged and respected contracts.[199] Foreign investment is desirable in the United States

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197. Whether states with elected judiciaries are poorer than states with non-elective judiciaries or whether they are poorer than they would otherwise be if they had commission-based appointed judiciaries is beyond the scope of this article. Similarly outside the scope is determining if they are poorer, the reason is the fact that the judges were elected and for no other reason.

HALL & SOBEL, *supra* note 192, considers some economic literature with an international focus relating to legal systems and economic development, without extensive analysis of the subject or discussion of the rule of law; however, it concludes that there is a "positive relationship between legal quality and [economic] growth." *Id.* at 3. The authors contend that "[j]udicial independence is critical to a well-functioning legal system, and the quality of a state's judicial system is an important determinant of economic growth." *Id.* (footnote omitted). After taking "as given the existence of a positive relationship between legal quality and growth," they note that "the interesting question here is how judicial selection influences legal quality." *Id.*

198. These other interest groups would cover those historically called trial lawyers or plaintiffs groups, although businesses may equally be plaintiffs as well as defendants. All Americans have a stake in our economy and business, whether through stock ownership, pensions, jobs, bank accounts, and other things too numerous to mention. *See e.g.*, Paul Krugman, *A Slow-Mo Meltdown*, N.Y. TIMES, Apr. 4, 2008, *available at* http://www.nytimes.com/2008/08/04/opinion/04krugman.html?scp=1&sq=economic%20meltdown%20and%20very%20scary%20things&st=cse.

199. *See* DAM, *supra* note 62, at 94 ("Better courts reduce the risks firms face, and so increase the firms 'willingness to invest more.'") (citation to World Bank report omitted). The author acknowledges the comments made by Sheila K. Davidson, General Counsel of New York Life; Mary C. McQueen, President and CEO of the National Center for State Courts; and Thomas J. Sabatino, General Counsel of Schering-Plough Corporation, all of whom were panelists at the conference which the author organized at Fordham Law School on April 8, 2008 entitled *Enhancing Judicial Independence, Accountability, and Selection for the State Court Judiciary: A Program for Reform.* See Albertsen & Reddick, *supra* note 151, at 81-82 for an extensive account of the conference.

Justices Sandra Day O'Connor and Stephen Breyer also made remarks at the conference, where four panels were presented on topics related to judicial reform. The conference was sponsored by the Sandra Day O'Connor Project on the State of the Judiciary (www.law.georgetown.edu/judiciary) and many other organizations, including bar associations, law schools, and court reform organizations. Press coverage or references to the conference included Adam Liptak, *supra* note 138. Other press coverage included Dorothy Samuels, *supra* note 156;

as well as internationally.[200] Company employees may even be disadvantaged if they have personal cases to bring before the courts, and an unfair or otherwise substandard judiciary may make it difficult to attract and maintain such employees. Such effects have been collectively recognized, as follows:

> When entrepreneurs decide where to open a new business, expand operations, or market a new product, they weigh the comparative costs and benefits of different locations. The tax structure, education level of local workers, transportation networks, technological capabilities of area universities, and weather are all factors that are assessed. Another factor is the state's legal system. Is it a secure legal system that is fair and predictable? Does it protect private property rights and render timely court decisions? If the answer is yes, the state will attract entrepreneurs and capital, foster competition, and experience faster economic growth as a result.[201]

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Dirk Olin, Judicial Reports: Judicial Abacus (April 9, 2008), http://www.judicialreports.com/2008/04/judicial_abacus-print.html; and Maggie Barron, O'Connor & Breyer on Judicial Independence (April 9, 2008), http://www.brennancenter.org/blog/archives/oconnorbreyer_on_judicial_independence/.

This was the seventh conference sponsored by the Sandra Day O'Connor Project: three were at Georgetown Law Center in 2006, 2007, and 2008, and three others were held in 2007 in Dallas at Southern Methodist University's Dedman School of Law; Chicago at Loyola School of Law; and Atlanta at Emory School of Law. The author of this article was a speaker at the Dallas conference in 2007.

200. *See* Frank Lavin, Remarks of Frank Lavin Under Secretary of Commerce for International Trade at the American Business Group of Abu Dhabi, Abu Dhabi, United Arab Emirates, (Mar. 12, 2007) (transcript *available at* http://www.commerce.gov/opa/press/Secretary_Gutierrez/2007_Releases/March/03_12_07_Lavin_UAE_Spch.pdf):

> Perhaps alone among the major economies, the United States has not had a federal government program to attract or retain inward foreign investment. All other major world economies have mechanisms such as investment boards and investment promotion activities to encourage FDI [*i.e.*, foreign direct investment]....I am pleased to inform you that the U.S. Government last week launched the Invest in America initiative to facilitate foreign direct investment into the United States.

*See also* JAMES K. JACKSON, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: AN ECONOMIC ANALYSIS (Aug. 15, 2008), http://fpc.state.gov/documents/organization/109490.pdf; U.S. Dept. of State Fact Sheet, How Foreign Direct Investment Benefits the United States (March 13, 2006), http://www.state.gov/r/pa/prs/ps/2006/63041.htm (among other things, considering the extent of foreign direct investment in the United States).

201. LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, U.S. TORT LIABILITY INDEX: 2008 REPORT 53 (Pacific Research Inst. 2008). *See also* HALL & SOBEL, *supra* note 192 (relating quality of courts to economic growth and finding higher quality courts in states using commission-based appointments relying on the U.S. Chamber of Commerce's Institute for Legal Reform's State Liability Systems Ranking Study). Hall & Sobel noted:

> Judicial independence is critical to a well-functioning legal system, and the quality of a state's judicial system is an important determinant of economic growth. States with highly regarded legal systems better protect and define property and contract rights, providing the proper foundation for entrepreneurial activity and economic growth. Bad court systems, on the other hand, can impede economic development by creating uncertainty, driving up the costs of doing business (such as liability insurance or worker compensation), and infringing on the liberties that underpin a free and prosperous market economy.

*Id.* at 3.

Businesses may also be "more likely to incorporate in states with a higher quality judicial system."[202] This likewise has economic consequences.

Business litigants may or should accept the risk that the courts will be impartial and they will sometimes lose. But no litigant would or should have to accept the risk that it is likely to lose unfairly most if not all the time.[203] Fairness and impartiality add predictability to the dispute resolution and corporate planning process. But judicial elections—as rule of law violations—result in unpredictability. Roughly the same facts may lead to different results in different jurisdictions for various reasons, including the influence of cash and local electorates and varying and inconsistent rules on judicial recusal under which judges who receive campaign funds from a litigant may (or may not) disqualify themselves from cases.[204] It is a common concern that judges make or appear to make decisions that are favored by their campaign contributors and local electorates rather than based on the law and the facts; indeed, the danger of state courts adhering to the whims of the local electorate is a concern even apart from campaign contributions. All this interferes with the ability of businesses and others to plan their transactions and forecast risk.[205]

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202. Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection*, 22 J.L. ECON. & ORG. 340, 348-49, 363 (2006) (using the U.S. Chamber of Commerce's 2001 State Liability Ranking Study as its indicator of state court quality). *See also* Albertsen & Reddick, *supra* note 151, at 82 (panelist notes that "corporations, when they are considering branching out to other states, often take into account the reputation of the courts in these states for fairly and reliably resolving disputes").

203. A study on how much business is not being done in a state because of an unfair judicial system if properly conceived might be useful. Questions to be asked as part of that study might be similar to those discussed earlier, such as whether a particular company or companies did or will investigate a country's legal system before deciding whether or not to invest there. *See* discussion *supra* Part I.C.2.a entitled Recognizing Causation Controversies (citing Perry-Kessaris, *supra* note 71, at 688). Designing such a study, however, is beyond the scope of this article. Furthermore, policymakers undoubtedly need to make decisions in advance of such a study.

204. *See* Caperton v. A.T. Massey Coal Co., No. 33350, 2008 WL 918444, at *31-51 (W. Va. July 28, 2008) (Benjamin, Acting C.J., concurring) (citing extensive authority to the effect that campaign contributions from a party or his attorney do not mandate disqualification), *cert. granted*, 77 U.S.L.W. 3051 (U.S. Nov. 14, 2008) (No. 08-22); JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, FAIR COURTS: SETTING RECUSAL STANDARDS 18-20 (2008), http://www.ajs.org/ethics/pdfs/Brennancenterrecusalreport.pdf. The American Bar Association's Standing Commission on Judicial Independence has an ongoing project on judicial disqualification, and a draft report for discussion purposes only is available; AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT (Sept. 2008), http://www.abanet.org/judind/pdf/JDP_DRAFT_FOR_DISCUSSION_PURPOSES_9-08.pdf (last visited Nov. 12, 2008) (on file with author and *Denver University Law Review*).

205. The combination of judicial elections and some other element of unfairness, such as the absence of a right to appeal to a higher court from an adverse trial court judgment, may be a combustible mixture. Yet that occurs in West Virginia where judges are elected, and the losing party has no automatic right to any appeal from a judgment. In a recent case in West Virginia, the Governor stepped in to petition the Supreme Court to review a multi-million dollar trial verdict so that the losing party, DuPont, would have some appellate review. The prevailing party argued that the procedure was fair despite no appeal and that the first and only decision was sufficient:

> Attorney Brian Barr said ... trial Judge Thomas Bedell already reviewed the punitive damages for propriety during and after trial. Had Bedell found the amount excessive or

According to Justice Stephen Breyer, the public's loss of confidence in the judiciary from the campaigning and fund-raising alone may have a negative economic impact on business.[206]

*D. Some Observations on Judicial Selection Reform*

1. Considering Judicial Election Reform

Reforming the state court judicial election process may involve changing it as well as replacing it. Although various commentators suggest such reforms if elimination of judicial elections is impractical in the short term, some recognize that these are limited remedies for a flawed system.[207] The types of change available for state court judicial elections vary in potency and address various deficiencies in the election process.[208] These include creating private campaign conduct committees to discourage inappropriate activities;[209] increasing the filing and disclosure of campaign contributions; improving voter education on specific candidates (such as through preparing and making voter guides widely available); lengthening judicial terms to reduce the number of elections; increasing qualifications for judicial office (including using screening committees, where possible); and instituting nonpartisan elections (which is not recommended).[210]

Heightened recusal standards and public financing of campaigns might reduce the incentive or need to contribute to judicial campaigns

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unfounded, "The court could have taken the punitive damages away," Barr said. "The whole idea that DuPont has not had a review at all is senseless," Barr added, accusing DuPont of stalling. "All DuPont is trying to do right now is protect its money." Only West Virginia and Virginia give their appeals courts complete discretion on whether to hear most civil cases, the governor's brief argued. The rest grant the kind of automatic appeals that West Virginia lacks.

Lawrence Messina, *Manchin Seeks Review of Appeal in Du Pont Lawsuit*, CHARLESTON GAZETTE, July 3, 2008, *available at* http://www.wvgazette.com/News/200807020756. *See also* John O'Brien, *DuPont appeal accepted by W.Va. SC*, THE WEST VIRGINIA RECORD, Sept. 25, 2008, *available at* http://wvrecord.com/news/contentview.asp?c=215028.

206. *Frontline*, *supra* note 148. Justice Breyer noted:

> It [*i.e.*, raising money for judicial election campaigns and campaign advertisements] demeans the process. We all know there are other countries where, for various reasons, the public lacks confidence in the judiciary...And where those things have happened, I think there have been bad results for the people who live in the country, not just for the judges, not just for the lawyers, but for the ordinary man and woman who lives in the country. There tends not to be a method of fairly resolving disputes. *And that means that it's harder to develop businesses.* It's harder to just live an ordinary life in a fair way and it's harder to protect liberty.

*Id.* (emphasis added).

207. *See* ABA COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 74-81 (2003), http://www.abanet.org/judind/jeopardy/pdf/report.pdf [hereinafter ABA COMM'N].

208. *See id.* at 70-86 (2003) (detailing various options for election reform).

209. *See* Al Cross & William H. Fortune, *Kentucky 2006 Judicial Elections*, 55 DRAKE L. REV. 637, 642-51 (2007) (describing, among other things, the Kentucky Judicial Campaign Conduct Committee). *See also id.* at 651 ("While the [Kentucky Judicial Campaign Conduct Committee] cannot claim a great impact on Kentucky's 2006 judicial elections, the authors of this article believe that the committee played a positive role.").

210. *See* ABA COMM'N, *supra* note 207, 74-82.

and therefore might do the most to eliminate cash from the courtroom.[211] The lack of knowledge of candidates by voters may be partly addressed by voter education, such as voter guides, depending on the content and accessibility of the guide to voters.[212] Although campaign conduct committees may have some effect in counteracting unfair judicial campaign conduct, the committees have no power to stop such conduct.[213]

Screening of judicial candidates, whether by bar or governmental committees, is limited and voluntary, and a poor rating does not bar a candidate from running for election.[214] Nonpartisan elections appear to be a poor device, since without party labels, voter knowledge of candidates will be further depleted, leaving the voters to rely on name recognition, demographic factors, or nothing at all on which to base their choice.[215]

In sum, while limited election reform is available, it may not cure the rule of law violations set forth in this article. Based upon international learning in the rule of law field and domestic experience, whether such reforms are sufficient is doubtful. Hazarding a cliché, one might view this as rearranging the deck chairs on the Titanic, or otherwise stated, futile.

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211. *See generally* SAMPLE ET AL., *supra* note 204 ("[C]urrent recusal doctrine makes it extremely difficult to disqualify a judge for having received contributions from a litigant or her lawyer, even though there is ample evidence to suggest that these contributions create not only the appearance of bias but also actual bias in judicial decision-making.") (footnotes omitted). Stricter recusal standards may be necessary not merely in light of the receipt of campaign contributions but also in connection with things which have been said in judicial campaigns. *See also* Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 DRAKE L. REV. 691, 707-20 (2007) (focusing on recusal in view of campaign statements made by candidates).

212. Greene, *supra* note 149, at 602. The utility of the voter's guide will vary, among other things, depending on the relevance of the information to judicial performance; the adequacy of the mechanisms used to collect the information; how effectively the information is conveyed to the voters; and whether the voters are motivated to review the information.

> Nothing could be done to remove the incentive on elected courts to favor local voters in cases where the parties before the court are not all local voters, especially since the judge's future position depends on the good opinion of the voters. Although a judge will not be able to tell whether a local voter had voted for her in the past, every local voter is a potential voter for the judge, and every non-local voter is not a potential voter.

213. Cross & Fortune, *supra* note 209, at 643. Despite such committees, false and misleading attack advertisements may still deceive the public into voting for the judge who is the beneficiary of the attack against her opponent.

214. For an example of governmental screening, see Rules of the Chief Admin Judge, *supra* note 179. A New York commission had previously recommended state sponsored screening of candidates for election. *See* COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 15-26 (2004), *available at* http://law.fordham.edu/commission /judicialelections/images/jud-freport.pdf.

215. Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1513-14 (2005). See also Tolson, *supra* note 188, stating that:

> Texas is one of only four states that uses partisan elected races for all of its state courts. Some states opt for nonpartisan races, but [former Texas Supreme Court Chief Justice Tom] Phillips and others say removing the label does not eliminate many of the problems of partisan races, including the involvement of special-interest groups, the need to raise money and curry votes, and the lack of voter knowledge of judicial candidates.

2. Commission-Based Appointments: Already an American Institution

There is an important difference between American judicial selection reform and international rule of law reform. Since Americans are reforming their own system, the risk of a bad, improper or ill-fitting rule of law reform is less likely. In addition, the proposed reform is not alien to Americans; rather, it is very much an American institution. Commission-based appointive systems are in effect in various states already; they were first established in Missouri in 1940;[216] and Americans have experience with them. There is no need to deal with the problem of a strange or inhospitable institution in the nature of an unreceptive transplant moving from one country to another which may be a concern in international development work.[217] Nor should cost be an issue as in the case of international reform. The change to a commission-based appointment system may even be less costly than an election system since it will eliminate campaign money-raising and campaigning itself.[218] Moreover, the appointment system which is to replace an election system should be a model system which may be the same as or superior to other appointment systems now or previously in place.[219]

One requirement for reform applies to both developing nations and the United States: a political will for change. As stated with respect to developing nations:

> Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the rule of law. . . . Even the new generation of politicians arising out of the political transitions of recent years are reluctant to support reforms that create competing centers of authority beyond their control.[220]

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216. Rachel P. Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 170 (2007).

217. *See* Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 167-68 (2003); Haggard et al., *supra* note 27, at 221 ("[N]otwithstanding the passion of the development policy community for spreading judicial best practice, caution should be exercised in the introduction of an alien legal system.").

218. *See, e.g.*, Kelley Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection, and the Role of State Judges in Society*, 29 CAP. U.L. REV. 625, 647 (2002). Especially since there may be a cost-savings by eliminating judicial elections, there is no question of added costs to consider. Nor should there be the same concern of scarcity of resources that otherwise may be important when deciding on rule of law reforms in developing countries. The United States is not a "developing" country with the same resource concerns, at least not on the same scale. Developing countries may also need to choose between various rule of law reforms, such as between reforming their criminal law or commercial law, increasing their competency and efficiency, and enhancing the government's compliance with law. *See, e.g.*, Thomas Carothers, *The Rule-of-Law Revival*, *in* PROMOTING, *supra* note 10, at 7-8 (2006) (identifying type one, type two, and type three reforms). It is unlikely that any state in the United States would need to make the same choice between improving its criminal or civil law—which may well not need any substantial reform in any case—and reforming its judicial selection methods.

219. *See* Greene, *supra* note 171, at 13-14.

220. Carothers, *Steps Toward Knowledge*, *in* PROMOTING, *supra* note 10, at 4.

It would be unfair to suggest that those who support judicial elections do so because they believe that judicial elections subvert the rule of law. Rather, one may only assume that the supporters share the same values that the opponents of elections do on judicial impartiality and fairness, but that they differ on the means to achieve them. However, in order to bring about change in the United States as well as abroad, a political will to accomplish it is needed.[221]

### *E. Reflections on the Money Race in State Judicial Elections: What to Do in the Meantime and the Next Steps*

The argument that special interest groups should cease the money race in judicial elections is a difficult one to make, especially since some groups think that campaign spending brings at least short-term benefits.[222] However, those benefits seem to be offset by substantial costs,

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221. *See* Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 73 (2003) ("To gain traction with the public, judicial selection must achieve the status of a movement. . . . [and capitalize] on catalyzing events that galvanize public opinion and give [the] movement focus and drive."). In most states which have judicial elections, the requirement is in their constitutions, requiring a constitutional amendment in order to effectuate change. *See, e.g.*, Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, 30 CAP. U. L. REV. 559, 560 (2002). The 2008 judicial elections showed a positive trend toward expanding commission-based appointment systems in certain counties in Alabama (for vacancy appointments) and Missouri and retaining a commission-based appointment system in a county in Kansas. American Judicature Society, Voters in Four Jurisdictions Opt for Merit Selection on November 4 [2008], http://www.ajs.org/selection/sel_voters.asp (last visited November 9, 2008).

222. Olson, *supra* note 138. Olson is a senior fellow at The Manhattan Institute who has written favorably about tort reform and against excessive litigation in the United States. *See* Manhattan Institute for Policy Research, Walter Olson, http://www.manhattan-institute.org/html/olson.htm. The 2008 elections showed some of the polarization noted by Olson, including in the Michigan Supreme Court race in which incumbent Cliff Taylor was defeated. *See* Zachary Gorchow, *Hathaway pulls off an upset in Michigan Supreme Court race*, DET. FREE PRESS, Nov. 5, 2008, *available at* http://www.freep.com/article/20081105/NEWS15/811050449?imw=Y ("Business interests and Republicans said Taylor and his fellow conservatives have taken a more literal interpretation of the law that has created a better climate to do business in Michigan. But Democrats and plaintiffs' attorneys said Taylor has been part of a majority that has overturned years of precedent and stacked the deck against individuals trying to sue businesses and government."). An advertisement in the Michigan Supreme Court campaign made a contested charge that Taylor had slept on a case. Justice at Stake, *Attack Ad Targets "Sleeping Judge"*, Oct. 24, 2008, *available at* http://www.justiceatstake.org/ThisWeek/24Oct08.htm#article2. The fact that the sleeping charge may have been untrue raises the possibility that voters may not merely have voted without knowledge of the candidates but on the basis of false information concerning the candidates. *See also* Dawson Bell, *Balance Tilts on State Supreme Court*, DET. FREE PRESS, Nov. 6, 2008, *available at* http://www.freep.com/article/20081106/NEWS15/811060419/1215/NEWS15 (although Taylor denied the charge, "[t]he sleeping judge ad, coupled with multiple phone, mail and in-person voter contacts from party and interest group activists, appeared to have been particularly effective."). Attack advertisements likewise beset Taylor's opponent. *See* Ben Timmins, *Michigan Chief Justice Loses in Nation's "Dirtiest Campaign"*, http://www.gavelgrab.org/?p=701 (last visited Nov. 11, 2008) ("Ads by the state Republican Party and the Michigan Chamber of Commerce portrayed Hathaway as soft on terrorism and sexual predators, while serving as a County Circuit Court Judge.").

In 2008, Mississippi's Supreme Court judicial elections reportedly ranked "among the nastiest in modern state history--this time with third-parties slinging the mud." Jerry Mitchell, *Third party mud prompts cries for election reforms*, THE CLARION-LEDGER, Nov. 9, 2008, *available at* http://www.clarionledger.com/article/20081109/NEWS/811090363/1001/RSS01. *See also id.* (third-party advertisements in 2008 Mississippi Supreme Court elections unfairly attack candidates, including, among other things, by an advertisement accusing candidate of supporting baby-killers;

and today's prevailing party in judicial elections may be tomorrow's loser. As a commentator noted in observing pro-business gains in judicial elections:

> [I]t is a mistake to observe a tide that has been sweeping out to sea, and conclude that it will continue to sweep out indefinitely. It is hard to deny that the substantive improvement in some of these courts has been bought at a cost of politicization and polarization which inevitably invites the other side to respond in kind when its day comes.[223]

Justice Stephen Breyer expressed a similar thought in an interview regarding the structural damage to democracy threatened by election battles over the courts:

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no disclosure required by third-parties of source of contributions to such advertisements under Mississippi law).

223. Olson, *supra* note 138. *But see* posting of Walter Olson to PointofLaw.com, http://www.pointoflaw.com/archives/2008/07/judicial-elections-some-reacti.php (July 17, 2008, 23:59 EST) (providing links to some positive and negative reactions to the prior Olson article). For a positive reaction, see, for example, posting of Dale Carpenter to The Volokh Conspiracy, http://www.volokh.com/posts/1216311330.shtml (July 17, 2008 23:15 EST) ("Olson makes a good argument and provides some evidence that, on the whole, business interests are better served by a merit system where the judges themselves are more likely to understand the law and try to apply it in a principled way."). For Dale Carpenter's website, see Dale Carpenter's Faculty Profile, University of Minnesota Law, http://www.law.umn.edu/facultyprofiles/carpenterd.html (last visited Oct. 14, 2008).

Some negative reactions express the concern that commission-based appointment systems may be unfair. Among other things, they contend that commissions are dominated by elites or other special interests, are unaccountable to any elected officials, and operate in secret; some prefer the views of at least some elected judges as well. See Dan Pero, A Dissent to Olson's Dissent, The American Courthouse, http://americancourthouse.com/2008/07/17/a-dissent-to-olsons-dissent.html (July 17, 2008), noting how "rule of law judges"—which the author uses synonymously with judges supporting a particular point of view as opposed to "rule of law" in its traditional sense—have had great success recently in winning elections. *See also* Kathy Barks Hoffman, *Ever-More-Expensive Court Races Heading Higher*, Assoc. Press, August 24, 2008, *available at* http://www.mlive.com/news/index.ssf/2008/08/evermoreexpensive_court_races.html, describing Pero's position as follows: "Dan Pero, head of the American Justice Partnership, makes no bones about the fact that his group wants to get more business-friendly judges on state courts." But the use of the phrase "rule of law" to describe judges as pre-committed to any class of litigants, pro-business or otherwise—rather than to characterize them as dedicated to the notions of independence, impartiality and accountability—violates the phrase's generally accepted meaning.

Also, the Pero argument, like others of the same sort, focuses on perceived flaws in certain commission-based appointment systems; relies on words with connotations intended to be negative, such as trial lawyers, unaccountable, secret and elite to characterize them; overlooks or minimizes the flaws in judicial election systems, including the influence of money and lack of screening of candidates; ignores the world-wide peculiarity of the system of electing judges, with judges being appointed essentially everywhere else; and disregards the development and variability of commission-based appointment systems. *See e.g., Symposium on Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*, 34 FORDHAM URB. L.J. 1 (2007) (including my model judicial appointment legislation, Greene, *supra* note 171, at 21-34). *See also* Statement of Gordon L. Doerfer, Regarding Recent Attacks on Merit Selection Systems, American Judicature Society (Aug. 28, 2008), http://www.ajs.org/ajs/ajs_whatsnew-statement.asp:

> The composition and selection of nominating commissions is different in each state . . . . A blanket condemnation of judicial nominating commissions is irresponsible and misleading. Thirty-three states use merit selection to choose some or all of their judges. [T]he vast majority of merit selection systems operate without political controversy and promote public confidence in the judges who are selected.

> [I]f you have one group of people doing it, you'll get another group of people doing it. And if you have A contributing to . . . affect a court one way, you'll have B trying the other way. And you'll have C yet a third way and pretty soon you'll have a clash of political interests. Now, that's fine for a legislature. I mean that's one kind of a problem. But if you have that in the court system, you will then destroy confidence that the judges are deciding things on the merits . . . . And as I said our liberties are connected with that.[224]

By accepting less control over judges now, and agreeing to impartiality rather than judges aligned with one's current preferences, even powerful interest groups may mitigate their losses when they fall out of power.[225]

One might wonder how the world was able to stop the missile race which was theoretically harder or more dangerous. Although the competitors did not unilaterally disarm, they certainly explored the options for ending the race while maintaining their defenses. While expecting unilateral disarmament by either side in the judicial election wars may be unrealistic, all concerned should consider whether there is a better way than the uniquely American mode of electing state court judges and how it may be implemented. In addition, campaign contributors should further consider the importance of the rule of law, how dangerous this continued conduct may be for the rule of law, and whether they should continue to support this practice.

Therefore, while not asking any special interest group to cease their spending on judicial elections, this article suggests that all those involved investigate and support alternatives, including individuals and groups who are working for them. Such alternatives potentially include the election reforms mentioned above but, most importantly, the end of judicial elections and the development and use of well-designed commission-based judicial appointment systems to replace them.[226] In the meantime, questions remain over what is happening to the rule of law in the United States; how severely is our democracy being damaged; what is the financial cost to our economy; and who is being affected and how.

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224. *Frontline*, *supra* note 148.

225. *See* J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 741-43 (1994). Judicial independence is part of a trade which political parties are willing to make depending on their view as to whether they believe that they will have to cede political power at some future time. Parties expecting to lose political power at some point are more willing to accept independent judges than those expecting never to lose. *Id.*

226. An additional alternative is public funding of judicial elections; however, for reasons stated in this article and elsewhere, that reform would still not remove many problems with judicial elections. *See* Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1478-80 (2001).

## CONCLUSION AND OUTLOOK

*The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.* [227]

This article seeks to shift the dialogue in the judicial selection debate to the rule of law and economic development and take the lessons learned from the international development sphere home. Thus it begins this conclusion by quoting a key definition by the World Justice Project of the rule of law.

Analyzing judicial elections through the lens of the rule of law raises substantial concern that judicial elections are threatening or causing violations of the rule of law.[228] At a minimum, judicial elections and the rule of law are difficult to reconcile;[229] however, the better view is that they are irreconcilable.[230] If judges are favoring or appearing to favor campaign contributors or local voters, they are disregarding key components of the rule of law, including fairness, impartiality, independence, and accountability. Also, "to live under the rule of law is not to be subject to the unpredictable vagaries of other individuals;"[231] and if judges are subject to the preferences of campaign contributors and local voters, litigants and potential litigants are in that very unpredictable position. Nor do elections maximize the selection of qualified judges, let alone the selection of judges for their understanding of the rule of law. There is no appropriate screening mechanism for those purposes.

If one were to compare the U.S. judicial system to that of developing countries, despite its flaws, the American system may come out better overall. "Every lawyer in a developed country can point to numerous shortcomings in his own country. Yet judiciaries in developing countries frequently fall far short of developed country standards."[232] But that is

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227. The World Justice Project, Rule of Law Index, *supra* note 51 (stating the World Justice Project's four principles of the rule of law).

228. By suggesting that the rule of law be applied to the United States, the article in essence is suggesting that the telescope be turned backward to determine whether rule of law violations are occurring in the United States as well as internationally and to assess whether the United States economy is being undermined as well.

229. N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring).

230. *See* e-mail from Simon R. Conté, Director, Research & Program Development, American Bar Association Rule of Law Initiative, to author (July 16, 2008, 10:44 EST) (on file with author and *Denver University Law Review*). *See e.g.*, Kleinfeld, *supra* note 10, at 53 ("The highly political process of judicial choice in the United States would never be permitted by reformers elsewhere."). *See also* Burnett, *supra* note 127, at 281-82.

231. TAMANAHA, *supra* note 29, at 122.

232. DAM, *supra* note 62, at 96. *See also* Daniel Kaufmann, *Illinois Governor Blagojevich: sign of endemic corruption in the US?*, The Kaufmann Governance Post, http://thekaufmannpost.net/illinois-governor-blagojevich-sign-of-endemic-corruption-in-the-us/#more-505 (Dec. 11, 2008) (last visited Jan. 5, 2009) ("Granted, the US in general is not a model for the world in terms of control of corruption. Countries like New Zealand and the Nordics are

little solace for an American litigant damaged in a case where the rule of law has failed. The economic damage may be widespread or just in particular states or courts. But for the company or other litigants involved in an unfair decision—its workers and its shareholders, or their families—a repair will come too late.[233]

Policymakers spend billions of dollars on rule of law reforms internationally because they believe, among other things, that the rule of law and economic development are related. The strength of the connection is open to discussion. But even those raising questions are reluctant to deny any relationship and call for the expenditures to stop. The international financial commitment, its rationale, and international learning overall are too substantial to ignore.

Finally, the rule of law is not something that is only applicable to other countries but rather is fully applicable to the United States.[234] It is risky to assume that Americans are the only people in the world who abide by the rule of law; indeed, this assumption overlooks much of our past and present history and ignores critiques from respected sources. American-based or sponsored organizations are trying to uphold the rule of law worldwide; yet if they do not uphold the rule of law in the United States, this may be a proverbial case in which the shoemaker's children have no shoes.[235]

Americans should carefully consider whether state court judicial elections violate the rule of law; if so, whether they may disregard the relationship at home between the rule of law and economic development; and whether the violation mandates an end to judicial elections. This article submits that the case has been made; that further study of the available options and next steps should be undertaken; and that the way

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closer to being a model of integrity instead. There are 18 countries rating better than the US in controlling corruption according to the Worldwide Governance Indicators. Yet there are about 190 countries rating worse.").

233. The focus of this article is on the economic effects of rule of law violations, rather than violations of individual rights. The rule of law concerns reflected in this article, however—*e.g.*, lack of judicial independence—would also apply to individual rights. *See* Theodor Mearon, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 359-60 (2005):

> Judicial independence is also instrumental in the protection of individual rights. Such rights may be enshrined in the country's constitution or laws, but an authority, such as the courts, must be empowered to review, independently and impartially, citizens' complaints and, if necessary, order that infringed rights be vindicated. To do so effectively, judges must be assured that, irrespective of their ruling, no unpleasant repercussions will be visited on them in terms of threats of dismissal, demotion, or even salary diminution.

234. *See, e.g.*, World Justice Project, Domestic Mainstreaming of the Rule of Law, *supra* note 5.

235. *See* The Shoemaker's Children, MICE Website, http://mice.org/blog/about/the-shoemakers-children/ ("[T]he phrase, 'The shoemaker's children has no shoes' . . . [m]eans . . . . [w]hatever a person's skill or talent, those closest to her or him rarely benefit. The proverb appeared in John Heywood's book of proverbs in 1546. It was used by Robert Burton (1577-1640) in 'The Anatomy of Melancholy' (1621-51).").

Americans select judges where they are presently elected should be comprehensively reformed.[236]

*Additional publications by the author**

236. If the international efforts to establish the rule of law in developing countries could be analogized to the Peace Corps program, it is time to establish its domestic equivalent—a Vista program—to achieve the rule of law in the United States. *See* AmeriCorps VISTA: "The Domestic Peace Corps," VolunteerLounge, April 13, 2007, *available at* http://www.volunteerlogue.com/organizations/americorps-vista-the-domestic-peace-corps.html ("Developed in 1964, soon after the Peace Corps, VISTA sends volunteers—who receive a monthly stipend of around $600-800—to communities throughout the US as part of a strategy to alleviate poverty.").

* The author has written a number of previous articles on issues intrinsic to rule of law reform, including some cited in this article. They include the following: *What Makes A Good Appointive System for the Selection of State Court Judges: The Vision of the Symposium*, 34 FORDHAM URB. L.J. 35 (2007) (study of judicial selection reform, including report on symposium organized by author and held in 2006 on designing the best appointive system for selecting state court judges); *The Judicial Independence Through Fair Appointments Act*, 34 FORDHAM URB. L.J. 13 (2007) (proposed model legislation for the selection of state court judges); *Reflections on the Appointment and Election of State Court Judges: A Response to* Adumbrations on Judicial Campaign Speech *and a Model for a Response to Similar Advocacy Articles*, 43 IDAHO L. REV. 601 (2007) (response to article supporting judicial elections and expanded judicial election campaign speech and model response for similar articles); *Perspectives on Judicial Selection*, 56 MERCER L. REV. 949 (2005) (study and recommendations on judicial selection reform in states where judges are elected); *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALBANY L. REV. 597 (2005) (study and recommendations on judicial selection reform in states where judges are elected); *The Governor's Power to Appoint Judges: New York Should Have the Best Available Appointment System*, 7 NYSBA GOVERNMENT, LAW AND POLICY JOURNAL 46 (2005) (a joint publication of the New York State Bar Association and Albany Law School; recommendations for improvement in New York's judicial appointment systems); *Appointive Selection of Judges, Limited Jurisdiction Courts with Non-Lawyer Judiciaries, and Judicial Independence*, 43 CT. REVIEW 80 (2007) (Court Review is a publication of the American Judges Association; study and recommendations on judicial selection reform with observations on New York's use of non-attorney judges in certain courts and on judicial independence); *Preface, Executioners, Jailers, Slavetrappers and the Law: What Role Should Morality Play in Judging*, 19 CARDOZO L. REV. 863 (1997) (judges deciding against conscience; introduction to symposium on the subject); *Introduction, Politicians on Judges: Fair Criticism or Intimidation*, 72 N.Y.U. L. Rev. 294 (1997) (observations on judicial independence); *A Perspective on Temper in the Court: A Forum on Judicial Civility*, 23 FORDHAM URB. L.J. 709 (1996) (judicial intemperance or incivility; introduction to a symposium on the subject); and *A Perspective on Nazis in the Courtroom, Lessons From The Conduct of Lawyers and Judges Under The Laws of the Third Reich and Vichy, France*, 61 BROOKLYN L. REV. 1122 (1996) (introduction to symposium on the functioning of legal systems in totalitarian regimes; questions of conscience versus complicity on the part of judges and lawyers).

# THE USE OF JUDICIAL PERFORMANCE EVALUATION TO ENHANCE JUDICIAL ACCOUNTABILITY, JUDICIAL INDEPENDENCE, AND PUBLIC TRUST

DAVID C. BRODY[†]

In the twenty-first century the American judiciary has been under repeated attacks from multiple sources.[1] Editorials published in the media have called for the removal of judges from the bench for decisions made in individual cases and specific issues.[2] Members of Congress and other politicians have condemned "activist" judges and proposed punitive sanctions against the judiciary for decisions made in high profile, emotionally charged cases.[3] Special interest groups actively seek the removal of judges at all levels who make rulings contrary to the groups' beliefs or interests.[4] Dozens of websites are housed on the Internet that call for increased accountability of judges in general[5] and for the removal of individual judges.[6]

In 2006, attacks on the judiciary included ballot measures supported by highly organized campaigns to amend several state constitutions.[7]

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1. Sandra Day O'Connor, Op-Ed., *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18; Ruth Walker, *O'Connor Assails 'Pervasive Attacks' on Judges and Judicial Independence*, HARV. L. TODAY, Feb. 2007, at 1.

2. Editorial, *Forget Judicial Independence, It's Time for Judicial Accountability*, N. COUNTRY GAZETTE, Mar. 17, 2006, http://www.northcountrygazette.org/articles/031706Accountability.html; *The O'Reilly Factor* (Fox News Channel broadcast Sept. 7, 2007), *available at* http://www.foxnews.com/story/0,2933,296027,00.html.

3. Charles Babbington, *Senator Links Violence to "Political" Decisions*, WASH. POST, Apr. 5, 2005, at A4; Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has 'Run Amok,' Adding Congress Is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, § A, at 21; Francis J. Larkin, *The Variousness, Virulence, and Variety of Threats to Judicial Independence*, 36 JUDGES' J., Winter 1997, at 4, 5-6; William C. Mann, *Frist: Judges Forcing Gay Marriage Debate*, AP ONLINE, June 20, 2004. For a list of judges who have been criticized and specific anti-judge activities, see American Judicature Society, Judges Under Fire, http://www.ajs.org/cji/cji_fire.asp (last visited Oct. 19, 2008).

4. American Judicature Society, Judges Under Fire, http://www.ajs.org/cji/cji_fire.asp (last visited Oct. 19, 2008).

5. *See, e.g.*, Citizens for Judicial Accountability, http://www.judicialaccountability.org/ (last visited Oct. 19, 2008); Center for Judicial Accountability, http://www.judgewatch.org/ (last visited Oct. 19, 2008); PACleanSweep.com, http://www.pacleansweep.com/ (last visited Oct. 19, 2008); Judicial Accountability Initiative Law 4 Judges, http://www.jail4judges.org/ (last visited Oct. 19, 2008); Get Off The Bench, http://www.getyourjusticelive.com/ (last visited Oct. 19, 2008); Victims-of-Law, http://victimsoflaw.net/ (last visited Oct. 19, 2008); A Matter of Justice, http://www.amatterofjustice.org/amoj/00index.cfm (last visited Oct. 19, 2007).

6. *See, e.g.*, Vote No Judge Munger, http://www.votenojudgemunger.com/ (last visited Oct. 19, 2008); Do Not Vote For Judge Kristin Booth Glen!!!, http://www.anusha.com/notoglen.htm (last visited Oct. 19, 2008).

7. Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 200 (2007).

These measures included providing for criminal and civil sanctions against judges for erroneous rulings,[8] subjecting judges to electoral recall,[9] redrawing judicial election districts,[10] and imposing retroactive term limits for appellate court judges.[11]

When considered together, these attacks on the judiciary share a common element: the belief that judges are not sufficiently accountable for the decisions they make. This lack of accountability, it is posited, gives rise to an "activist judiciary" that is free to make law and public policy contrary to the public will without fear of any consequences.[12]

These attacks on the judiciary have met strong resistance from members of the judiciary and the organized bar.[13] Judges and bar leaders generally accept that there needs to be some level of judicial accountability (particularly regarding state court judges).[14] They emphasize, however, that any efforts to increase judicial accountability must not infringe upon the independence of judges to make decisions as they deem just and proper under the law and Constitution.[15]

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8. South Dakota Amendment E, Judicial Accountability Initiative Law (commonly known as J.A.I.L. for Judges). Judicial Accountability Initiative Law 4 Judges, http://www.jail4judges.org (last visited Oct. 19, 2008).

9. Montana Constitutional Initiative 98 would have amended the Montana Constitution to provide for recall by petition of state court justices or judges for any reason. Montana Secretary of State, 2006 Ballot Issues, http://sos.mt.gov/elb/archives/2006/CI/CI-98.asp (last visited Oct. 19, 2008).

10. Oregon Measure 40 would have amended the Oregon Constitution to require all appellate court judges be elected by district rather than statewide. Measure 40, Explanatory Statement, http://www.oregonvotes.org/nov72006/military_vp/m40_es.pdf (last visited Oct. 19, 2008).

11. Colorado Amendment 40 would have applied retroactive term limits for appellate court judges in Colorado. Ballot Title Setting Board, Proposed Initiative 2005-2006 #90, http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/Results%2090.pdf (last visited Oct. 19, 2008).

12. Edwin Meese III & Rhett DeHart, *The Imperial Judiciary—And What Congress Can Do About It*, 81 POL'Y REV. 54, 54 (Jan.-Feb. 1997).

13. *E.g.*, Colorado Bar Association, Vote No 40, http://www.cobar.org/judges/ (last visited Oct. 19, 2008); Susan Marmaduke & Jim Mountain, *Parting Thoughts: Let's Keep Politics Out of the Courts*, OREGON STATE BAR BULLETIN, Oct. 2005, http://www.osbar.org/publications/ bulletin/06oct/parting.html. *See also* American Judicature Society, Welcome to the Center for Judicial Independence, http://www.ajs.org/cji/default.asp (last visited Oct. 19, 2008 (discussing unfair criticism of judges who issue unpopular decisions and advocating judicial independence); American Bar Ass'n, Q&A on J.A.I.L. for Judges, Dec. 2006, http://www.abanet.org/media/youraba/200612/article06.html (discussing State Bar of South Dakota efforts to defeat 2006 Amendment E ballot initiative in South Dakota).

14. Shirley S. Abrahamson, *Thorny Issues And Slippery Slopes: Perspectives On Judicial Independence*, 64 OHIO ST. L.J. 3, 4 (2003); Troy A. Eid, *Judicial Independence and Accountability: The Case Against Electing Judges*, 30 COLO. LAW. 71, 71 (2001); Sandra Day O'Conner & RonNell Anderson Jones, *Reflections on Arizona's Judicial Selection Process*, 50 ARIZ. L. REV. 15, 23 (2008); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1 *passim* (1995); Michael A. Wolff, *Chief Justice Michael A. Wolff: 2006 State of the Judiciary Address*, 62 J. MO. B. 56, 57-58 (2006); James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775 *passim* (2004).

15. O'Connor & Jones, *supra* note 14, at 17; Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1056 (2002); Larkin, *supra* note 3, at 4.

The debate over the proper limits on judicial accountability and judicial independence is not a recent development. The proper role for judges in the American system of government has been hotly debated for more than 200 years.[16] Advocates of a strong, independent judiciary, including Alexander Hamilton, argued that the role of judges is to faithfully interpret the law and constitutions without consideration of outside factors such as politics or popular sentiment.[17] To make fulfilling this role practical, it is argued that judicial independence must be protected by insulating the judiciary from popular election.[18] On the other hand, proponents of a judiciary that is directly accountable to the public view judges as governmental policymakers operating in a democracy.[19] As with other policymakers in government, it is argued, judges must be directly accountable to the public for their actions by means of periodic elections, regardless of the effect this may have on judicial independence.[20]

This philosophical debate has a practical effect on how judges in each of the fifty states are selected and kept in office.[21] Proponents of a highly accountable bench favor direct election of judges.[22] Those who advocate a fiercely independent judiciary favor judges being appointed to their position.[23]

In what has been perceived by many to be an appropriate compromise between those advocating for contested election or direct appointment, in 1940 Missouri adopted a "merit selection" system of selecting state supreme court and court of appeals judges.[24] Under the "Missouri Plan," when a judicial vacancy arises a nominating commission provides a list of three candidates to the governor. The governor then appoints

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16. White, *supra* note 15, at 1053-54; Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 403-404 (1999); Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 35-36 (1998); William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 582-83 (2004).

17. Geyh & Van Tassel, *supra* note 16, at 48.

18. *Id.* at 32.

19. PHILIP L. DUBOIS, FROM BALLOT TO BENCH 28-35 (1980); Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence*, 56 CASE W. RES. L. REV. 965, 975 (2006) (citing BRUTUS, XV, *in* ESSAYS OF BRUTUS (Mar. 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, 438 (Herbert J. Storing ed., 1981)).

20. Philip L. Dubois, *Accountability, Independence and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 38 (1986).

21. Webster, *supra* note 14, at 9.

22. David K. DeWolf, *Electing Judges Keeps Them Accountable*, SEATTLE POST-INTELLIGENCER, Nov. 3, 2006, at B7, *available at* http://seattlepi.nwsource.com/opinion/290941_judgeelection03.html; Michael R. Dimino, *Judicial Elections Versus Merit Selection: The Futile Quest For a System Of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 815-18 (2004); Dubois, *supra* note 19, at 28.

23. Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 304 (2002). *See also* Webster, *supra* note 14, at 13-14.

24. Webster, *supra* note 14, at 29-30.

one of the three candidates to fill the vacancy.[25] After a short period of time—generally a year—the new judge must stand before the voters in a retention election. If a majority of voters do not vote to have the judge remain on the bench, the judge is not retained and the process begins anew. If the judge is retained by the voters, he or she remains on the bench but is subject to periodic retention elections.[26]

Proponents of the Missouri Plan argue that it takes politics out of the initial selection process but still provides for judicial accountability by requiring judges to stand for retention elections.[27] Opponents argue that since judges are rarely unsuccessful in surviving retention elections, any pretence of accountability derived from merit selection is a "sham."[28] Central to this contention is the fact that voters have little information about the qualifications and performance of judges standing for retention.[29] Not coincidentally, voter participation rates in retention elections are nearly always significantly lower than rates in contested elections for other non-judicial elections held concurrently.[30]

The lack of information about judges available for voters to use in retention elections and the effect this has on judicial accountability has been known to be present for a number of decades.[31] In 1975, stemming from concern about voters lacking information to effectively vote in judicial retention elections,[32] Alaska became the first state to take steps to address this issue by requiring the Alaska Judicial Council not only to evaluate judges appearing on a retention election ballot, but also to provide voters with the results of the evaluations along with recommendations as to whether each judge should be retained in office.[33] In 1976, the first judicial performance evaluation (JPE) took place. As of 2008, eight states provide their citizens with information obtained from official judicial performance evaluations of at least some of their judges standing for retention election for the express purpose of enabling voters to cast intelligent, meaningful votes.[34]

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25. *Id.* at 30.

26. *Id.*

27. 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, 318 (1997).

28. Dimino, *supra* note 22, at 806-07.

29. Webster *supra* note 14, at 34.

30. *See* William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 342 (1987).

31. *Id.*

32. Telephone interview with Larry Cohn, Executive Director, Alaska Judicial Council (Aug. 8, 2008).

33. ALASKA STAT. §15.58.050 (2008).

34. The eight states include Alaska, Arizona, Colorado, Kansas, Missouri, New Mexico, Tennessee, and Utah. A number of other states operate judicial performance evaluation programs for self-improvement purposes. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT app. A (2006), *available at* http://www.du.edu/legalinstitute/publications2006.html [hereinafter SHARED EXPECTATIONS].

Judicial performance evaluations are generally centered around responses to standardized, scaled surveys provided by individuals who have had direct dealings with a judge during an evaluation period.[35] The questionnaires ask these individuals, who may include attorneys, jurors, witnesses, court staff, and litigants, to rate the judge on behavior-based items related to process and demeanor, not outcomes.[36] The survey response data, along with other information such as court management data, recusal rates, courtroom observations, and disciplinary filings, are considered by a non-partisan commission made up of attorneys and lay persons.[37] After considering a judge's materials, the commission will come to a conclusion as to whether or not it believes that a judge should be retained in office. This final rating is presented to the public for use in retention election decisions.[38]

The number of states, and in some cases counties, that use JPE programs continues to grow.[39] This growth is being fostered by the American Bar Association, which adopted guidelines for the establishment and operation of judicial performance evaluation programs in 2005.[40] The ability of JPE programs to provide voters with information they would otherwise lack is inarguably beneficial to conducting meaningful judicial elections. It must be noted, however, that support for judicial performance evaluation programs is premised on the assumption that, with the information JPE programs can provide, voters will be better equipped to hold judges appropriately accountable for their performance on the bench without interfering with judicial independence.[41]

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35. Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375, 1380 (2001); David C. Brody, *The Relationship Between Judicial Performance Evaluations and Judicial Elections*, 87 JUDICATURE 168, 170 (2004); Kevin M. Esterling, *Judicial Accountability the Right Way*, 82 JUDICATURE 206, 209 (1999); Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 201 (2007).

36. Andersen, *supra* note 35, at 1380; Brody, *supra* note 35, at 170; Esterling, *supra* note 35, at 209; Kourlis & Singer, *supra* note 35, at 201.

37. *See* SHARED EXPECTATIONS, *supra* note 34, at app. A.

38. *Id.*

39. Kansas recently conducted its first statewide JPE program for use in the 2008 retention elections. *See* The Kansas Judicial Report Card, http://kansasjudicialperformance.org/ (last visited Oct. 19, 2008). Similarly, in 2008, Pierce County, Washington provided voters with the results of a JPE program that had attorneys and jurors evaluating judges before whom they appeared. Adam Lynn, *Judging the Judges: Bar Association Survey Rates Pierce County Judiciary*, THE NEWS TRIB. (Tacoma, Wash.), June 1, 2008, at A1, *available at* http://www.thenewstribune.com/news/local/story/376713.html. In North Carolina, the North Carolina Bar Association is conducting two pilot studies implementing a JPE program for the state's trial court judges, with plans to launch an actual evaluation program for use by voters in judicial elections for the 2010 elections. Interview with Allan Head, Executive Director, North Carolina Bar Association, in Cary, N.C. (June 23, 2008). Two other states, Minnesota and Indiana have committees examining the feasibility of conducting JPE programs in the near future. Interview with Jordan Singer, Director of Research, Institute for the Advancement of the American Legal System, in Denver, Colo. (August 5, 2008).

40. ABA, GUIDELINES FOR THE EVAL. OF JUDICIAL PERFORM. WITH COMMENTARY app. I (2005), http://www.abanet.org/jd/lawyersconf/pdf/jpec_final_commentary.pdf.

41. Kourlis, *supra* note 7, at 203; White, *supra* note 15, at 1061; Roger Handberg, *Judicial Accountability and Independence: Balancing Incompatibles?*, 49 U. MIAMI L. REV. 127, 135 (1994).

This assumption, however, is still just an assumption. While logical, it assumes that the presence of several necessary endogenous items. For a JPE program to fulfill its aim of increasing judicial accountability, the information provided to the public must be received by potential voters, regarded as trustworthy and reliable by the electorate, and used by voters in deciding how to vote in judicial elections. Additionally, to be effective, a JPE program needs to be accepted and trusted by the judges subject to evaluation.[42] If the judiciary does not have confidence in the process or believes that it unduly interferes with judicial independence, then it may undermine the program's credibility with the public and present political or administrative obstacles that retard the short- and long-term operation of the program. Deficiencies in these areas will limit the program's ability to foster both judicial accountability and judicial independence.

To date, systematic assessments of whether JPE programs have any direct or indirect effects on judicial accountability, independence, and related items have been lacking. This article will attempt go beyond the theoretical and consider how states can and should assess the effectiveness of judicial performance evaluation programs. After examining the concepts of judicial accountability and independence, and their relation to state court judicial elections, the article discusses the evolution and operation of judicial performance evaluations and the impact they may have on judicial accountability. The article then examines the specific impacts JPE programs may have on judicial accountability and sets forth criteria and means for examining if such impacts exist. The article concludes by examining the importance of evaluating both the methods used in conducting judicial performance evaluations and the impact the evaluations have on judicial accountability.

## I. JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

The presence of judicial independence and judicial accountability are critical to functioning of America's constitutional democracy.[43] Absent either, the American constitutional system of checks and balances would likely collapse. The following section briefly discusses the definitions of judicial independence and accountability. This will lay an appropriate groundwork for my contention that rather than being contradictory values that are inherently at odds, they are in fact mutually supportive.

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42. Brody, *supra* note 35, at 177.

43. *See* Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 58, 59 (2000); Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69-JAN J. KAN. B.A. 32, 35-37 (2000); Ronli Sifirs, *Weighing Judicial Independence Against Judicial Accountability: Do the Scales of the International Criminal Court Balance?*, 8 CHI.-KENT J. INT'L & COMP. L. 88, 96 (2008); Roger K. Warren, *Judicial Accountability, Fairness, and Independence*, 42 CT. REV. 4, 7 (2005).

### A. Judicial Independence

Judicial independence has been seen as a critical aspect of the American judicial system since before the formation of the nation.[44] During the colonial era, judges in the American colonies were appointed by the King of England and served at his will.[45] The control the King had over the judiciary and the direct control he had over the decisions handed down by colonial judges were sources of great concern and frustration for the colonists.[46] The injustices brought about by this system of "telephone justice"[47] angered the colonists to the extent that the lack of judicial independence of colonial judges was one of the enumerated grievances raised in the Declaration of Independence.[48] Following the colonial experience, it should not be surprising that the tripartite government premised on separation of powers and checks and balances would take great pains to provide for a judiciary that was coequal with and independent of the legislative and executive branches.

Legal scholars and social scientists have examined and defined judicial independence in myriad ways.[49] Conceptually it can be defined as having judges that

> [A]re free to decide cases fairly and impartially, relying only on the facts and the law. It means that judges are protected from political pressure, legislative pressure, special interest pressure, media pressure, public pressure, financial pressure, and even personal pressure.[50]

Judicial independence should be seen as a means to an end.[51] Beyond its own value, it paves the way for a judiciary that treats people

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44. THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See also* Burkeley N. Riggs & Tamera D. Westerberg, *Judicial Independence: An Historical Perspective the Independence of Judges Is . . . Requisite to Guard the Constitution and the Rights of the Individuals . . . .*, 74 DENV. U. L. REV. 337, 351 (1997); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1105 (1976).

45. Kelly J. Varsho, *In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?*, 27 N. ILL. U. L. REV. 445, 447 (2007).

46. *Id.*

47. *Id.*

48. "[King George] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

49. *See* Charles Gardner Geyh, *The State of the Onion: Peeling Back the Layers of America's Ambivalence Toward Judicial Independence*, 82 IND. L.J. 1215, 1223 (2007) (defining judicial independence as a tradition gained over time); G. Alan Tarr, Dep't of Political Sci., Center for State Constitutional Studies, Rutgers Univ., Presentation of Paper at the Annual Meeting of the Midwest Political Science Association: Rethinking Judicial Independence and Judicial Accountability 3-4 (Apr.12-15, 2007), http://www.allacademic.com/one/mpsa/mpsa07/index.php (search "Rethinking Judicial Independence").

50. David J. Beck, *Judicial Independence: Woe to the Generation that Judges the Judges*, 71 TEX. B.J. 572, 572 (2008).

51. Kathryn Reed Edge, *Judicial Independence Judicial Accountability: A Difficult Balance*, TENN. B.J. May-June 1998, at 14; Warren, *supra* note 43, at 5; Frances Kahn Zemans, *The Accountable Judge: Guardian Of Judicial Independence*, 72 S. CAL. L. REV. 625, 632 (1999).

equally under the law.[52] While complaints about activist judges and the need to rein in their independence are frequently raised, it is generally accepted that some degree of judicial independence is a necessary component of American government. This acceptable level of independence centers on the desire for judges to follow the law, to hold the other branches of government accountable to the Constitution, to treat parties that come before the bench equally and with impartiality, and to be free to apply the rule of law without fear of repercussion from the other branches of government.[53]

*B. Judicial Accountability*

Just as it is generally accepted that judges must have some degree of independence to decide matters based on their interpretation of the law and facts presented before them, it is also widely accepted that judges should be held to some manner of accountability.[54] An accountable judiciary is important for a number of reasons. An unaccountable court system has a difficult time being perceived as legitimate and maintaining the trust and respect of the citizenry.[55] Absent public trust, the judiciary, which is dependent on other branches of government to enforce its orders and fund its operation, is greatly imperiled. Moreover, declines in trust and respect for a court system may ultimately lead to the loss of legitimacy in the eyes of the public and other branches of government. Such occurrences make repeated attempts to curtail judicial independence and authority, such as was seen in the 2006 ballot propositions, much more likely.

While judicial accountability is appropriate under the American system of government, the questions of who judges should be accountable to and what this accountability should be based upon depend largely on what is meant by judicial accountability. As noted by Charles Geyh, "[t]he peril of leaving judicial accountability ill-defined is that it can be co-opted and misused more easily."[56] A meaningful method defining

52. Edge, *supra* note 51.

53. *See* Tarr, *supra* note 49, at 21 (acknowledging the general consensus that judges should not be punished "for following the law"); Zemans, *supra* note 51, at 634 (detailing the importance of impartiality for the judiciary).

54. Fein, *supra* note 43, at 59; Handberg, *supra* note 41 at 134; O'Connor & Jones, *supra* note 14, at 23; Wolff, *supra* note 14, at 57.

55. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 710 (1995); Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 311-12 (2003); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 273 (2008); Mark S. Cady & Jess R. Phelps, *Preserving The Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J. L. & PUB. POL'Y 343, 347 (2008).

56. Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 912 (2006).

judicial accountability is to consider two types of performance criteria: *decisional accountability* and *behavioral accountability*.[57]

1. Decisional Accountability

Decisional accountability involves holding judges answerable for their judicial decisions. In considering whether we should hold judges accountable for their decisions, there are several items that must be taken into account. First, was the decision contrary to established precedent? If the decision was contrary to established precedent, accountability can be maintained by appellate review. Were a judge to deliberately ignore precedent, state constitutions should provide for means of removing or disciplining the judge.

On the other hand, if a decision was reasonable and based on precedent, the desire to hold a judge accountable for an unpopular ruling is fraught with peril. It is the impulse to hold judges accountable for legally sound rulings by means of electoral challenges that demonstrates the danger of majoritarian rule premised on decisional accountability.[58]

The dangers of holding judges directly accountable for making necessary but politically unpopular decisions have been noted throughout the nation's history by some of its most noted jurists.[59] In *Dennis v. United States*, Justice Felix Frankfurter wrote, "[c]ourts are not representative bodies. They are not designed to be a good reflex of a democratic society . . . . Their essential quality is detachment, founded on independence."[60] Similarly, Justice Black, in *Chambers v. Florida*, noted that "courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[61]

The classic example of such a campaign involved the defeat of Tennessee Supreme Court Justice Penny White in the 1996 retention election.[62] Justice White was appointed to the Tennessee Supreme Court in 1994. In 1996 Justice White concurred with an opinion which held that a

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57. Wendell L. Griffen, *Judicial Accountability and Discipline*, 61 LAW & CONTEMP. PROBS. 75, 76 (1998). A third type of judicial accountability, institutional accountability, involves the accountability of the judiciary as a branch of government. Institutional accountability concerns items such as being responsible for maintaining a reasonable budget, operating in an efficient manner, and hearing and deciding matters in an acceptably speedy manner given its resources. *See* Geyh, *supra* note 56, at 917-19.

58. *See* Croley, *supra* note 56, at 725-29.

59. Judge Peter Webster compiles several of these statements. *See* Peter D. Webster, *Who Needs an Independent Judiciary?*, FLA. B.J., Feb. 2004, at 24, 25-28.

60. 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

61. 309 U.S. 227, 241 (1940).

62. *See* Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 134 (2007); Traciel V. Reid, *The Politicization of Retention Elections Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 69-70 (1999).

murder committed during the commission of a rape was not automatically "heinous, atrocious, or cruel" and therefore may not serve as an aggravating circumstance warranting execution unless there was evidence that the act "involved torture or serious physical abuse beyond that necessary to produce death."[63] A majority of the court, including Justice White, agreed that such evidence was not present in the case, vacated the death sentence, and remanded the case for resentencing.[64]

In 1996 Justice White was the only member of the Tennessee Supreme Court scheduled to stand for retention election. In response to *Odom*, a coalition of conservative organizations, victim's rights groups, law enforcement agencies, and others organized to mount a campaign to defeat Justice White. In the end, Justice White was defeated, garnering only 45% of the vote in favor of her retention. The defeat of Justice White has been widely viewed as a direct attack on judicial independence based on the improper use of decisional accountability.[65]

2. Behavioral Accountability

As opposed to decisional accountability, behavioral accountability involves holding individual judges answerable for their conduct on the bench.[66] As judges are the human element of the justice system, conduct which reflects badly on the integrity and impartiality of the justice system is likely to decrease public trust in the judiciary. Explicit statements or acts of bias and partiality, *ex parte* communications, rudeness, and a lack of respect for parties or counsel, are examples of actions for which a judge may be held accountable.[67] Acts related to behavioral accountability are universally accepted as being appropriate components of judicial accountability and do not restrict appropriate aspects of judicial independence. Aspects of a judge's performance on the bench are appropriate foci for voters or reappointing authorities to consider in whether a judge should receive another term on the bench. While appropriate, such information is difficult for voters to obtain and examine at a broad enough level to promote judicial accountability.

### *C. The Potential of Co-Occurring Judicial Independence and Judicial Accountability*

Judicial independence and judicial accountability have frequently been viewed as competing forces which need to be counterbalanced against one another.[68] On one hand, judges who possess excessive inde-

63. State v. Odom, 928 S.W.2d 18, 24, 26 (Tenn. 1996).
64. *Id.* at 32-33.
65. *See* Zemans, *supra* note 51, at 648-49.
66. Geyh, *supra* note 56, at 919.
67. White, *supra* note 15, at 1064-1070.
68. Michael R. Dimino, *supra* note 22, at 803; Tillman J. Finley, Note, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49, 49 (2003); David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Selection*, 69 ALB. L.

pendence are free to act without concern for being held accountable for overstepping their authority, employing expansive interpretations of the Constitution, or simply ignoring or nullifying the law when they see fit.[69] On the other hand, if a judiciary is overly accountable to the public, then judges will be fearful of making correct legal decisions that are contrary to the public will.[70]

In reality, judicial independence and accountability are not at odds with each other but are rather "different sides of the same coin,"[71] "yin" to each other's "yang,"[72] and "both desirable."[73] In fact, rather than being seen as counterbalances to each other, it is possible for them to be mutually beneficial.

For courts to operate effectively, citizens must have trust and confidence in judges to decide matters in a fair and impartial manner.[74] Courts have no means to enforce their own orders. The public's use of the court system to resolve disputes and its compliance with judicial orders is dependent on support for courts as legitimate institutions.[75] This legitimacy hinges to a large extent on public trust in the judiciary as an institution and judges as ministers of justice. A trusted judiciary will be respected and viewed as legitimate. A judiciary that is not trusted may have its legitimacy, authority, and eventually orders questioned by the citizenry or by the other branches of government.[76]

An important component of public trust in governmental institutions is the citizenry's ability to hold its officers accountable.[77] A governmental institution that is viewed as unaccountable is likely to lack public trust. On the other hand, as public accountability increases, the trust afforded the institution is likely to increase as well.[78]

Beyond increasing perceived legitimacy, the public's ability to effectively hold judges accountable has the potential to generate what Tom Tyler calls a "reservoir of loyalty"[79] upon which the judiciary can draw. This reservoir grows as the public's trust in the courts and judiciary operate effectively in a transparent manner. After time, this reservoir can

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REV. 985, 987 (2006); Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 111-17 (1986).

69. *See supra* notes 2-6.

70. *See* Croley, *supra* note 55, at 908.

71. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 339 (1999).

72. Geyh, *supra* note 56, at 916.

73. SHARED EXPECTATIONS, *supra* note 34, at 6.

74. George W. Dougherty, Stefanie A. Lindquist, & Mark D. Bradbury, *Evaluating Performance in State Judicial Institutions: Trust and Confidence in the Georgia Judiciary*, 38 ST. & LOC. GOV'T REV. 176, 176 (2006).

75. *Id.* at 177.

76. *Id.*

77. *Id.*

78. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 26 (1990).

79. *Id.*

be drawn upon by judges to foster the acceptance and understanding of politically unpopular decisions that courts are required to make. Such public acceptance in turn serves to increase judicial independence and the ability to make difficult decisions without concern for political ramifications.

While this mutually beneficial series of events is theoretically possible, it first requires a foundation of judicial independence accompanied by appropriate and effective means of judicial accountability. The basis upon which voters hold judges accountable must not infringe upon their ability to decide matters based on the law. While judicial elections provide the vehicle to provide judicial accountability to the public and to provide true accountability that will increase independence, voters need to be given sufficient information with which to make electoral decisions. This dynamic, and the role judicial performance evaluation programs have in it, will be discussed in later sections.

## II. JUDICIAL ELECTIONS AND ACCOUNTABILITY

In thirty-nine states, judges are theoretically held accountable[80] by the public through either contested elections or retention elections.[81] As noted previously, whichever mode of election a state uses to choose or retain its judges, elections allow the public to hold judges accountable by use of democratic means. That being said, simply having an election does not mean it will provide meaningful levels of judicial accountability.

For judicial elections to effectively hold judges accountable, several things are required. First, it is important that the electorate participate in judicial elections at a reasonably high level.[82] Acceptable turnout levels are needed for two reasons: 1) to have the election considered legitimate and 2) to serve as a tool which judges must respect. Elections with dismal levels of participation weaken the perception that they serve as a genuine means to hold government actors accountable for their job performance.[83] As Michael Dimino, a strong advocate of judicial elections, put it, "If judges are to receive the benefit of legitimacy that comes from

80. While beyond the scope of this article, it is worth noting that states that use partisan and non-partisan elections as a means of selecting and retaining judges rarely have contested elections. For example, in 2008 in Washington a state that selects judges via non-partisan elections, 84% of the judges subject to reelection ran unopposed, removing any semblance of public accountability. This level of competition is typical in non-partisan election states.

81. Rachel Caufield, *In the Wake of White: How States are Responding to Republican Party of Minnesota v. White and How Judicial Elections are Changing*, 38 AKRON L. REV. 625, 629 (2005). Throughout this article when the generic term "judicial elections" is used, it refers to both contested judicial elections and retention elections.

82. David Adamany & Phillip Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 736 (1976).

83. STEVEN E. SCHIER, YOU CALL THIS AN ELECTION?: AMERICA'S PECULIAR DEMOCRACY 74 (2003).

having periodic elections, it seems that elections should encourage participation by as many eligible voters as possible."[84]

Low turnout in judicial elections also has the potential to affect the way judges do their jobs. Should judges know that only a small percentage of potential voters are going to participate in a judicial election, the number of people a judge is actually accountable to decreases. Moreover, if the demographic, social, or political characteristics of voters likely to vote in low turnout elections are known, a judge can adjust his or her behavior to satisfy the preference of those individuals.[85] In this respect low levels of turnout may serve to negate any increases in perceived accountability and legitimacy of the judiciary obtained through judicial elections.

A key aspect of increasing turnout and the effectiveness of judicial elections is providing voters with sufficient amounts of relevant information to use in casting their votes.[86] Research has found that low levels of turnout in judicial elections are due largely to the fact that voters know little, if anything, about the names appearing on their ballots.[87] When voters have no information about the candidates on an election ballot, their votes are frequently based on heuristics or voting cues.[88] This leads to election outcomes that are based on name recognition, gender, ethnic preferences, ballot position, or pure luck.[89]

The lack of information about candidates makes it fair to conclude that "judicial accountability through the election process is minimal."[90] This is so because elections are, for the most part, contests in which the public has very little information about the candidates and relatively few voters choose to participate. While advocates of judicial elections may argue that elections do provide for judicial accountability, there are several undeniable facts that refute this position.

It is beyond dispute that judicial elections suffer from high levels of voter "falloff." Falloff is defined as "[t]he difference between how many people go to the polls and how many people actually vote on a specific

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84. Dimino, *supra* note 55, at, 374.

85. Research has consistently shown that in low turnout elections, those who do vote are more likely to better educated and significantly wealthier than non-voters. Georg Lutz & Michael Marsh, *Introduction: Consequences of Low Turnout*, 26 ELECTORAL STUDIES 539, 543 (2007).

86. Martin P. Wattenberg, Ian McAllister, and Anthony Salvanto, *How Voting is Like Taking the SAT Test: An Analysis of American Voter Rolloff*, 28 AM. POL. Q. 234, 247 (2000).

87. Matthew J. O'Hara, Student Note and Comment, *Restriction of Judicial Election Candidates' Free Speech Rights After Buckley: A Compelling Constitutional Limitation?*, 70 CHI.-KENT L. REV. 197, 209-210 (1994); Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Knowledge and Judicial Voting: The Oregon and Washington Experience*, 67 JUDICATURE 235, 239 (1983).

88. Sheldon & Lovrich, Jr., *supra* note 87.

89. *Id.* at 235; *see also* Larry Aspin et al., *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 3 (2000); Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300, 308-09 (1992).

90. Handberg, *supra* note 41, at 132.

[contest]."[91] This occurs because in most elections there are a number of matters for which voters are asked to cast votes. These contests may range from president and governor, to school board and water commissioner. Judicial elections are usually among the lower tier of contests appearing on a ballot. Normally, some people who vote in top level contests do not vote in other races appearing lower down on the ballot, including judicial elections.

Falloff, also referred to as "dropoff", "rolloff" and "ballot fatigue" in the legal and academic literature,[92] is not a new development.[93] Lawrence Baum reported that in judicial elections between 1980 and 1995 roughly 25% of voters who cast ballots in an election did not vote in state supreme court elections.[94] The falloff in these elections was over 20% regardless of whether they involved contested or retention elections.[95]

While a number of factors can affect falloff levels, their primary cause is a lack of information possessed by voters about the given contest.[96] This phenomenon has been compared to how college applicants approach the SAT[97] exam in which points are deducted for incorrect answers, but there is no penalty for skipped questions.[98] As such, it is prudent for test takers to skip over questions for which they lack the necessary knowledge to answer correctly. This is a strategy frequently taken by voters in judicial elections; absent any information about the judge or judges appearing on the ballot, voters skip over the contest and move onto the next.[99]

Of course, not all voters who lack information about judicial candidates refrain from voting. A large number of people who lack any meaningful information about the judge standing for retention or the candidates vying for a contested position nonetheless vote in the contests. Despite the increased level of spending on judicial campaigns and decreased restrictions on judicial campaign speech, the amount of information used by voters in judicial elections has remained low.[100] In fact, having judicial campaigns look more like other election campaigns may

91. Mathew Manweller, *Examining Decreasing Rates of Voter Falloff in California and Oregon*, 36 ST. & LOC. GOV'T. REV. 59, 59 (2004).

92. *Id.* at 65 n.2; *see also* MARK LAWRENCE KORNBLUH, WHY AMERICA STOPPED VOTING: THE DECLINE OF PARTICIPATORY DEMOCRACY AND THE EMERGENCE OF MODERN AMERICAN POLITICS 89-105 (2000).

93. ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 260-67 (1957).

94. Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 19 (2003).

95. *Id.* at 19-20 (finding that partisan elections averaged 22% falloff, while nonpartisan and retention elections averaged 29% and 28% falloff, respectively).

96. Wattenberg et al., *supra* note 86, at 236.

97. The SAT Reasoning Test, formerly known as the Scholastic Aptitude Test.

98. Wattenberg et. al., *supra* note 86, at 236.

99. *Id.* at 236-37.

100. Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 819-21 (2004).

have the effect of decreasing respect for the court as an institution[101] and voter participation.

These facts create a bit of a conundrum. While the public likes having the ability to hold judges electorally accountable and wants more information to use in judicial elections, at the same time, it wants judges to be above politics, sufficiently independent to base rulings on the law and not public opinion, and insulated from special interest groups.[102] In the following section, I discuss how judicial performance evaluations of judges standing for retention or reelection may increase the effectiveness of judicial elections in holding judges accountable.

## III. JUDICIAL PERFORMANCE EVALUATIONS

As discussed above, judicial performance evaluations were first used in the 1970s to provide information for voters to use in judicial retention elections. Since that time nearly twenty states have implemented official JPE systems, with eight doing so to provide information to voters.[103] Typically, JPE programs are based on evaluations of how well a judge demonstrates a number of qualities expected of an excellent jurist submitted by individuals who have experience appearing before the judge. These items generally fall into the categories of legal ability, integrity, communication, judicial temperament, and administrative ability.[104] The keys to JPE systems are that they 1) involve information only from individuals who have first-hand knowledge, through observation, of a judge's performance and 2) expand the sources of information beyond attorneys to include lay persons, jurors, witnesses, and court staff who have served, testified, or worked in a judge's court and had the ability to personally observe the judge's performance. This information is then considered by a commission which makes a retention recommendation to the public for use in considering how to vote in judicial elections.[105]

The information provided to voters by JPE programs has the potential to provide a missing ingredient for judicial elections to appropriately and effectively facilitate judicial accountability. Proponents of an elected judiciary and merit selection systems both agree that the lack of information available to voters is a serious problem associated with judicial elections.[106] Beyond affecting voter participation, the lack of infor-

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101. Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 282-85, 287 (2002).

102. *See* Pozen, *supra* note 55, at 271-72.

103. *See* SHARED EXPECTATIONS, *supra* note 34, at app. a.

104. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., TRANSPARENT COURTHOUSE: A BLUEPRINT FOR JUDICIAL PERFORM. EVAL. 13-14 (2006), http://www.du.edu/legalinstitute/pubs/TransparentCourthouse.pdf. The Institute for the Advancement of the American Legal System provides state-specific information about the criteria and methods used in the JPE programs operated in Arizona and Colorado. SHARED EXPECTATIONS, *supra* note 34, at app. b.

105. *See* SHARED EXPECTATIONS, *supra* note 34, at 10-11.

106. *See* Dimino, *supra* note 22, at 807; Dubois, *supra* note 19, at 32.

mation possessed by voters calls into question the legitimacy of electoral accountability.[107]

As stated shortly after the implementation of Colorado's judicial performance evaluation program:

> In order for citizens to maintain popular accountability of the judiciary, citizens must be involved in evaluating judicial performance . . . . They need to (1) gather information about judicial performance from the citizen's point of view, and (2) communicate their opinions to the judiciary. . . . [T]he main vehicle of judicial accountability is the [election or retention of judges]. Yet this . . . cannot serve its function if citizens do not have the interest to vote or the information necessary to make informed decisions.[108]

The possession of reliable and relevant information by voters is an important ingredient to effective democracy.[109] For government to possess democratic legitimacy it is important that the electorate have the ability to "deliberate" before casting a vote.[110] Moreover, it is important that the government makes the collection of such information easy for all citizens.[111] Absent such information, judicial elections provide little accountability and great peril.

The perceived ability of JPE programs to provide information to voters and to foster judicial accountability in retention election states has been widely applauded.[112] This positive reception is likely because a JPE program that can provide voters with standardized information about a judge's performance has the potential not only to increase judicial accountability, but to increase judicial independence as well.[113]

This position was succinctly summarized in 2006 by the former President of the Kansas Bar Association and current Chair of the Kansas Commission on Judicial Evaluation:

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107. Alex B. Long, *"Stop Me Before I Vote for this Judge Again": Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. VA. L. REV. 1, 42 (2003).

108. White, *supra* note 15, at 1064 (quoting Anne Rankin Mahoney, *Citizen Evaluation of Judicial Performance: The Colorado Experience*, 72 JUDICATURE 210, 216 (1989)).

109. MICHAEL X. DELLI CAPRINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 5-7 (1996); DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 89 (2002); *cf.* Richard R. Lau & David P. Redlawsk, *Voting Correctly*, 91 AM. POL. SCI. REV. 585, 586 (1997) ("[I]f we are going to make judgments about the 'democratic' nature of different forms of government, we should do so at least initially on the basis of the quality or 'correctness' of the political decisions citizens make within that system of government rather than on the basis of the ways in which those decisions are reached.").

110. Loren A. King, *Deliberation, Legitimacy, and Multilateral Democracy*, 16 GOVERNANCE 23, 25-26 (2003) (defining deliberation as "a process of careful and informed reflection on facts and opinions, generally leading to a judgment on the matter at hand.").

111. *See id.* at 41-42.

112. A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 651-52 (1998).

113. White, *supra* note 15, at 1064, 1075-76.

> Why do we need to evaluate our judges? One of the most frequent complaints about retention elections is that no one knows the record of a judge who is up for retention. This creates an information vacuum which is too inviting for groups with a philosophical axe to grind. We've seen recent instances in district court retention races in Douglas and Shawnee counties where narrow focus groups attacked judges running for retention by distorting the judge's performance record to suit the objectives of the attack group. Without unbiased information the voting public is faced with deciding judicial qualifications by sound bites.[114]

JPE programs are designed to fill this vacuum. Beyond providing information for use in holding judges accountable for their performance, JPE programs may foster judicial independence directly by providing information voters can use in judicial elections that is not issue-based, but rather on whether a judge does his or her job as one would expect from a judge.[115] Reviews of judicial performance evaluation programs based primarily on anecdotal evidence have been generally, though not universally, positive. The assessments, however, are very general in nature and based largely on anecdotes. Given that JPE programs have been part of the judicial and electoral landscape for several decades and have had time to mature and evolve, it is time for independent evaluations of their impact at both the state and national levels. The balance of this article examines potential criteria for assessing the effectiveness of JPE programs in increasing judicial accountability, applies these criteria to select programs, and discusses the importance of such an assessment for enhancing the judicial independence and judicial accountability of state judges.

## IV. ASSESSING JUDICIAL PERFORMANCE EVALUATION PROGRAMS

While the specific details surrounding the operation of individual judicial performance evaluation programs vary, a number of programs are charged with providing reliable, relevant information to the public for use in deciding how to vote in judicial elections.[116] This objective is only a means to other ends. As discussed above, the broader objective behind these programs is to increase judicial accountability and independence by facilitating increased voter turnout and informed voting in judicial elections. Evaluating whether JPE programs are able to achieve these ends requires a mixed method that addresses several questions.[117]

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114. Richard F. Hayse, *The Need for Judicial Performance Evaluation*, J. KAN. B. ASS'N, Apr. 2006, at 4.

115. SHARED EXPECTATIONS, *supra* note 34, at 7.

116. *See* SHARED EXPECTATIONS, *supra* note 34, at 13-16 and surrounding text.

117. See Jennifer C. Greene et al., *Toward a Conceptual Framework for Mixed-Method Evaluation Designs*, 11 EDUC. EVALUATION & POL'Y ANALYSIS 255 (1989) for an explanation of mixed-method evaluation design.

### *A. Do Judges with Poor Evaluations Receive Fewer Positive Votes in Retention Elections?*

Logic would seem to indicate that if JPE programs are effective in holding judges accountable, then this would be evidenced by the behavior of voters in retention elections. More specifically, one would expect a positive relationship to be present between the rating a judge receives from a JPE survey or commission and the percentage of voters who vote that the judge should be retained in office. The manner in which JPE results are reported in the majority of states makes such an analysis difficult. Most states that conduct evaluations for use in retention elections do not provide a single numerical measure of a judge's performance. Instead, they either give a recommendation as to whether the judge should be retained without a numerical rating, or they provide ratings for multiple, independent criteria (such as legal ability, integrity, etc.). Absent ordinal rankings of judicial performance that are readily identifiable and sufficiently varied among judges, examining relationships between ratings and voter behavior is not practical.

There are two states—Alaska and Utah—that do provide voters with specific ratings for each judge standing for retention election that permit such an analysis.[118] In an effort to consider the potential effectiveness of JPE programs in holding judges accountable, I examined the relationship between the evaluation ratings received from attorneys by judges standing for retention in the state of Alaska and the percentage of voters who voted that the judge should be retained in office.[119] Figure 1 presents a scatter diagram of these items for the eighty-six judicial retention elections held in Alaska between 2000 and 2006. In the chart presented in Figure 1, each dot represents a judge standing for retention. The percentage of voters voting to retain the judge is measured along the vertical axis, while the overall rating received from attorneys completing evaluation questionnaires is measured along the horizontal axis.[120]

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118. In 2001, Susan Olson examined the impact evaluations had on the results of judicial retention elections involving judges in the Salt Lake City area over three election cycles. Susan M. Olson, *Voter Mobilization in Judicial Retention Elections: Performance Evaluations and Organized Opposition*, 22 JUST. SYS. J. 263, 267 (2001). While Olson found that the three judges who received poor evaluation ratings during that time period received fewer votes in favor of retention than their colleagues, she also reported that the active campaigns against one of the judges had a much greater impact on voters than did the judicial performance evaluations. *Id.* at 278.

119. Alaska election results obtained from the State of Alaska Division of Elections website. State of Alaska Division of Elections, http://www.elections.alaska.gov (last visited Oct. 19, 2008). Judicial evaluation ratings obtained from the Alaska Judicial Council website. Alaska Judicial Council, http://www.ajc.state.ak.us (last visited Oct. 19, 2008).

120. In addition to criteria specific behavior based questions, attorneys were asked to provide an overall performance rating for a judge ranging from 1 (unacceptable) to 5 (excellent). *See, e.g.*, ALASKA JUDICIAL COUNCIL RECOMMENDATION 2 (2008), http://www.ajc.state.ak.us/retent08/coats08.pdf. The average of these ratings received by each judge is used in this analysis.

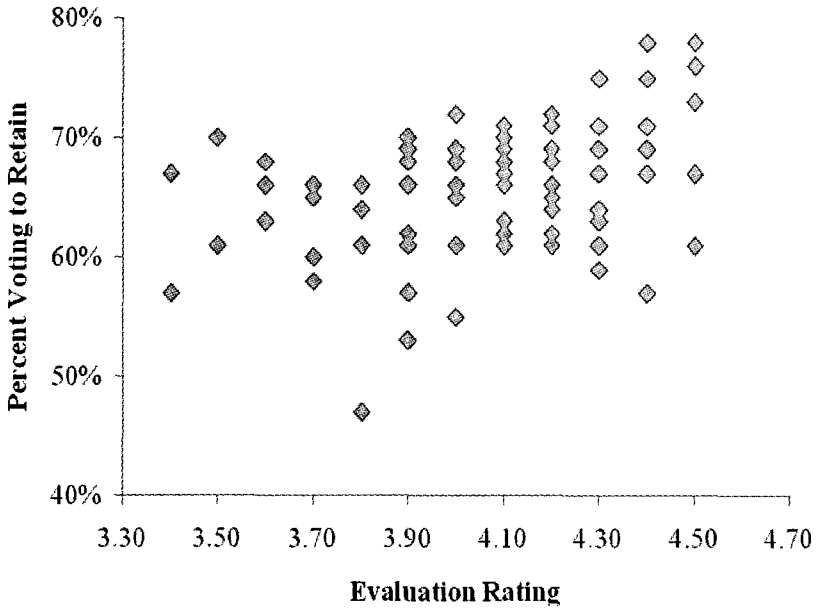


**Figure 1: Alaska Judicial Retention Elections, 2000-2006**

As can be readily seen in Figure 1, there is a significant linear relationship between the rating received as part of the JPE program and the percent voting that the judge should be retained (higher rating associated with increased yes votes received).[121] While one cannot prove direct causation between evaluation ratings and election results, this simple analysis does suggest such an effect is present to some degree.[122]

*B. Do Judges Who Receive Poor Evaluations Remain in Office?*

A fundamental question about the effectiveness of JPE programs in holding judges accountable is whether judges who receive poor evaluations are leaving the bench. While the question itself is straightforward, arriving at an accurate answer is not.

It is an undeniable fact that only a very small number of retention elections result in a judge being voted out of office.[123] Larry Aspin reports that between 1964 and 2006 only fifty-six of the 6,306 judges facing judicial retention elections were defeated.[124] Moreover, there is no

121. The statistically significant correlation between the two variables is .34.

122. Further multivariate analysis could be conducted controlling for possibly confounding variables including location of judgeship, gender, race, presidential election year, as well as many other state-specific factors.

123. Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 807 (2004); Larry Aspin, *Judicial Retention Election Trends 1964-2006*, 90 JUDICATURE 208, 210 (2007).

124. Aspin, *supra* note 123, at 210.

significant difference in retention election outcomes for states with judicial performance evaluation programs as opposed to states without.[125] Such statistics have frequently been used by opponents of merit selection as ammunition for their position that retention elections are ineffective in holding judges accountable.[126]

At first glance, these statistics would seem to indicate judicial performance evaluation programs do little to actually hold judges accountable. Such a conclusion would be purely speculative. One must keep in mind that judicial accountability is premised on holding judges performing below acceptable standards accountable. It does not operate as a quota system or with a mandatory curve by which only a limited number of judges can be found to be performing well. As over 90% of judges evaluated across the country receive positive recommendations from their JPE commissions,[127] the fact that an equally high number of judges are retained in office in retention elections should not be surprising. One might even posit that it is appropriate. After all, if good attorneys are appointed to the bench, and they perform well as judges, voters should happily vote for retention.

From time to time judges do receive negative evaluations that recommend citizens to vote against retention. The election results in such instances have been mixed. In Alaska, of the two judges who have received non-retention recommendations since 1984, one was retained by the voters while one was voted off the bench.[128] In Colorado, of the six judges who have been removed by the voters in retention elections since 1988, five received "do not retain" recommendations.[129] Prior to 2008,[130] the Arizona Commission on Judicial Performance Review found only one judge did not meet judicial performance standards.[131] The judge was subsequently retained by the voters.[132] On the other hand, two Arizona judges who received positive recommendations from the commission were not retained by the electorate.[133]

From the results noted above, it would appear JPE does little to remove poorly performing judges from the bench. In reality, however, it

125. *Id.* at 213.

126. *See* John Andrews, *Judges Coddled by Sweetheart Process*, DENVER POST, Feb. 18, 2007, at E-3.

127. *Id.*

128. ALASKA JUDICIAL COUNCIL, SELECTING AND EVALUATING ALASKA'S JUDGES: 1984-2007, at 36 (2008), http://www.ajc.state.ak.us/Reports/JudgeProfile08.pdf.

129. E-mail from Jane Howell, Executive Director, Office of Judicial Performance Evaluation (Sept. 10, 2008) (on file with author).

130. In 2008, the Arizona Commission on Judicial Review recommended one Maricopa County Superior Court judge not be retained.

131. Mark I. Harrison, Sara S. Greene, Keith Swisher & Meghan H. Grabel, *On the Validity and Vitality of Arizona's Judicial Merit Selection System: Past, Present, and Future*, 34 FORDHAM URB. L.J. 239, 257 n.127 (2007).

132. *Id.*

133. *Id.* at 258.

does. In states that use JPE in conjunction with retention elections, if a judge chooses not to seek another term in office, then his or her performance evaluation is not released to the public.[134] While it is unknown how many retirements from the bench were hastened by poor judicial performance evaluations which were not publicly disseminated, such occurrences take place routinely.[135] Such instances are surely examples of substandard judges being held accountable for their performance.

The clearest example of a judicial performance evaluation program having a direct impact on a judicial election and judicial accountability occurred in 2008 in Pierce County, Washington—a state that does not use the Missouri plan to select judges but rather contested non-partisan elections.[136]

In 2007, the Tacoma-Pierce County Bar Association (TPCBA) contracted to have a judicial performance evaluation conducted of the twenty-two judges sitting on the Pierce County Superior Court bench.[137] As with the JPE programs operated in states with retention elections, the Pierce County JPE was designed to provide information to the judges for self-improvement purposes and to provide information to voters to be used in considering how to cast their votes in judicial elections.[138] An additional purpose behind the bar association's conducting the JPE was to provide information to potential candidates for the superior court bench about which of the sitting judges are performing below expectations.[139]

It is with the goal of fostering the potential for poorly performing judges to be held accountable that the TPCBA made two significant decisions. First, it was decided that the results of the evaluations would be released to the public four weeks before attorneys planning on entering a judicial election must notify the Secretary of State which position on a court they wish to run for.[140] The specific basis for this decision was to enable potential candidates to use the evaluation results to determine which of the sitting judges would be the most vulnerable in an election.

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134. *See* Pelander, *supra* note 112, at 685; *Editorial, Judging the Judiciary: Keep Public Informed*, DENVER POST, Nov. 9, 2007, at B-2.

135. *Judging the Judiciary*, *supra* note 134; Interview with Louise Baca-Sena, Manager, N.M. Jud. Perform. Eval., in Denver, Colo. (Aug. 6, 2008); Interview with Jane Howell, Exec. Dir., Colo. Office of Judicial Perform., in Denver, Colo. (Aug. 7, 2008).

136. *See* WASH. CONST. art. IV, §§ 3, 5. A caveat to this system is that if nobody files with the secretary of state to challenge a sitting judge, the judge automatically retains his or her position for another term. WASH. CONST. art. IV, § 29.

137. *See* Adam Lynn, *Judging the Judges: Bar Association Survey Rates Pierce County Judiciary*, THE NEWS TRIB. (Tacoma, Wash.), June 1, 2008, at A1, *available at* http://www.thenewstribune.com/news/local/story/376713.html.

138. *Id.*

139. *Bar's Judicial Ratings Will Aid the Voters*, THE NEWS TRIB. (Tacoma, Wash.), June 3, 2008, *available at* http://www.thenewstribune.com/opinion/story/379136.html.

140. E-mail from Sal Mungia, Co-chair, Tacoma-Pierce County Bar Ass'n Jud. Perform. Eval. Comm. (Apr. 24, 2008) (on file with author).

The second decision made by the TPCBA was to release to the public the written comments provided by the attorneys and jurors who evaluated the judges. This decision generated considerable controversy and consternation among the superior court's judges as well as other interested individuals and organizations in Washington. Opponents of releasing the comments, including this author, argued that individual comments about a judge can be taken out of context, have no indicia of reliability due to their anonymity, and may shift the focus from a quantitatively reliable evaluation based on established criteria toward salacious innuendo and cherry-picked, non-performance-based comments.[141] Proponents of releasing the comments, including all members of the TPCBA judicial evaluation committee, argued that the comments provided specific and vivid examples of a judge's performance that could not be adequately conveyed by numerical ratings. In the end, the TPCBA decided to release the comments to the public on May 6, one month before the June 6 filing deadline for the election.

While the Pierce County JPE report did not provide an overall score for each judge from the four categorical indices and the responses to the twenty-five specific questions that were reported, there were two judges who were rated significantly lower than the rest of the bench.[142] One of these judges was Sergio Armijo.[143] Based on attorney evaluations, Judge Armijo was the lowest rated judge in the areas of legal ability, integrity, and impartiality, and was near the bottom in the other two categories. His ratings were such that the local newspaper singled him and another judge out as being the worst judges on the bench.[144]

In late May, Michael Hecht, an attorney from Tacoma, Washington, filed to challenge Judge Armijo for his seat on the superior court bench.[145] The campaigns, which ran from late May until election day on August 19, were fascinating in the dissimilarity.

As an incumbent, Judge Armijo ran a traditional, well-funded campaign. He focused on his service to the community and his experience on the bench.[146] He was endorsed by nearly all of the other superior court judges and the local prosecuting attorney's association.[147] He also

141. *Bar's Judicial Ratings Will Aid the Voters*, *supra* note 139.

142. *Id.*; Lynn, *supra* note 137. The Tacoma News Tribune developed an interactive web site to allow visitors to generate their own rankings of the judges based on their preferred criteria.

143. Lynn, *supra* note 137.

144. *Id.*

145. Judge Armijo was the only Pierce County Superior Court judge to face electoral competition in 2008. *Pierce County Superior Court Challengers Face Off*, THE NEWS TRIB. (Tacoma, Wash.), Aug. 4, 2008, *available at* http://www.thenewstribune.com/news/election/story/433275.html.

146. *Id.*

147. WASH. STATE PUB. DISCLOSURE COMM'N, CASH RECEIPTS MONETARY CONTRIBUTIONS (2008) [hereinafter MONETARY CONTRIBUTIONS I], *available at* http://www.pdc.wa.gov/rptimg/Default.aspx?docid=1186949; WASH. STATE PUB. DISCLOSURE COMM'N, CASH RECEIPTS

raised over $45,000 between June and August for his campaign.[148] These funds included nearly $3,000 from judges sitting in Pierce County, $400 from the Pierce County Prosecuting Attorney's Association, and several thousands of dollars from attorneys;[149] each of these groups is a regular source of campaign funding for incumbent judges facing an electoral challenge. Judge Armijo's campaign spent its money on direct mailings (over $20,000), yard signs ($8,000), and a campaign manager (over $2,000).[150]

His opponent, Michael Hecht, ran a much different campaign. Hecht raised only $6,700 for his campaign, none of which came from sitting judges and less than $1,000 of which came from attorneys.[151] The focus of his campaign was on the need to hold Judge Armijo accountable for his poor performance. This is exemplified by the personal statement he provided to the local newspaper, the *Tacoma News Tribune*:

> My opponent's dismal performance has harmed the citizens of Pierce County. Families broken and financially ruined, minorities, senior citizens and women victimized, law enforcement disrespected. It is time for a change. I will not run personal business from my court. I will not ask lawyers who practice before me for their endorsements. Fundamental fairness is a cornerstone of justice, ability to apply the law is paramount. For a fair day in court, elect Hecht Judge.[152]

Similarly, when asked why he would be the best candidate for the position, he responded:

> Necessity. Tacoma Pierce County Bar Association got it right, 2008 Evaluation www.tpcba.com. Judge Armijo rated last of all 22 judges in legal ability, integrity and impartiality. I pledge decisions based on applying the law; fairness and impartiality, protecting families and children, reading and being prepared, and avoiding conflicts of interest. I respect law enforcement and cultural diversity. The judicial process is more important than any one individual. I am committed to being a good judge.[153]

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MONETARY CONTRIBUTIONS (2008) [hereinafter MONETARY CONTRIBUTIONS II], *available at* http://www.pdc.wa.gov/rptimg/Default.aspx?docid=1212507.

148. WASH. STATE PUB. DISCLOSURE COMM'N, CANDIDATE SUMMARY, FULL REPORT, RECEIPTS AND EXPENDITURES, http://www.pdc.wa.gov/rptimg/Default.aspx?docid=1221563.

149. *See* MONETARY CONTRIBUTIONS I, *supra* note 147; MONETARY CONTRIBUTIONS II, *supra* note 147. This figure is from donors who had their occupation listed as attorney on campaign finance disclosure forms submitted to the Washington Public Disclosure Commission. A number of other donors were also attorneys by trade but not listed as such.

150. WASH. STATE PUB. DISCLOSURE COMM'N, EXPENDITURES CONTINUATION SHEET (2008), *available at* http://www.pdc.wa.gov/rptimg/Default.aspx?docid=1192260.

151. WASH. STATE PUB. DISCLOSURE COMM'N, CAMPAIGN SUMMARY RECEIPTS & EXPENDITURES (2008), *available at* http://www.pdc.wa.gov/rptimg/Default.aspx?docid=1214451; WASH. STATE PUB. DISCLOSURE COMM'N, CASH RECEIPTS MONETARY CONTRIBUTIONS (2008), *available at* http://www.pdc.wa.gov/rptimg/Default.aspx?docid=1192049.

152. *Pierce County Superior Court Challengers Face Off*, *supra* note 145.

153. *Id.*

This focus was made even sharper with the launching of the campaign's website, hechtforhelp.com.[154] Throughout the multipage website, references and links to materials pertaining to Judge Armijo's results in the Pierce County Superior Court Judicial Performance Evaluation are found. A page titled "Why I am Running" lays out repeatedly how Judge Armijo was viewed as being the worst judge in Pierce County in the performance evaluation and needed to be replaced.[155] Also on the site are numerous verbatim comments provided by attorneys as part of their evaluation of Judge Armijo.

In an upset, Michael Hecht defeated Judge Armijo in the August election, receiving 51% of the vote.[156] While exit polling was not done after the election—and given the disparity in funds and endorsements—it is safe to say that the performance evaluation was taken to heart by the electorate and served as a primary factor behind Judge Armijo's defeat.

### *C. Do JPE Programs Encourage Higher Voter Participation Rates in Judicial Elections?*

As noted above, a common complaint raised by opponents of merit selection and retention elections is the lack of information provided to voters in retention elections and the low level of voter participation. Research has indicated that there is a distinct relationship between the lack of information possessed by voters regarding judicial candidates and voter turnout. Professors Lovrich and Sheldon found that citizens who voted in judicial elections possessed significantly more knowledge about judicial candidates than citizens who did not vote.[157] Similar results have been found in studies examining falloff and non-judicial elections.[158]

It stands to reason that if lack of information is related to lower voter participation, then providing voters with more useful information should increase participation rates. If we accept this premise and if judicial performance evaluation programs are meeting their goal of informing voters about judges standing for retention, then falloff in judicial retention elections should decrease, indicating increased voter participation.

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154. Michael Hecht, Elect Hecht: Hecht for Help Homepage, http://hechtforhelp.com (last visited Oct. 21, 2008).

155. Michael Hecht, Elect Hecht: Hecht for Help, Why I am Running, http://hechtforhelp.com/abouthecht_why.html (last visited Oct. 21, 2008).

156. *See* Adam Lynn, *Incumbent 15-Year Judge Armijo Ousted in Final Election Result*, THE NEWS TRIB. (Tacoma, Wash.), Sep. 12, 2008, *available at* http://www.thenewstribune.com/news/local/story/480441.html.

157. Sheldon & Lovrich, *supra* note 88, at 238; Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 JUST. SYS. J. 23, 30 (1984).

158. *See* Shaun Bowler, Todd Donovan & Trudi Happ, *Ballot Propositions and Information Costs: Direct Democracy and the Fatigued Voter*, 45 W. POL. Q. 559, 560-61 (1992); John E. Mueller, *Voting on the Propositions: Ballot Patterns and Historical Trends in California*, 63 AM. POL. SCI. REV. 1197, 1200 (1969); Wattenberg et al., *supra* note 86, at 236, 247.

To see if this is in fact taking place, I reviewed election turnout data in Arizona, Colorado, and New Mexico. Each of these states selects its appellate court judges via merit selection and retention elections and has a well established JPE program. The charts presented in Figures 2, 3, and 4 present a level of falloff between the number people who submitted a ballot in an election and the number of people who, on average, in a statewide judicial retention election that appeared on the ballot. Each chart has a line bisecting the horizontal axis, indicating the year in which judicial performance evaluation information about appellate court judges standing for retention was made available to the public for use in retention elections. If the proposition that increased information about judges standing for retention will lead to increased voter participation in retention elections, then the level of falloff should decrease after JPE programs are established. As is evident from the charts, falloff decreased as predicted in two states, Colorado and New Mexico, but increased in Arizona.

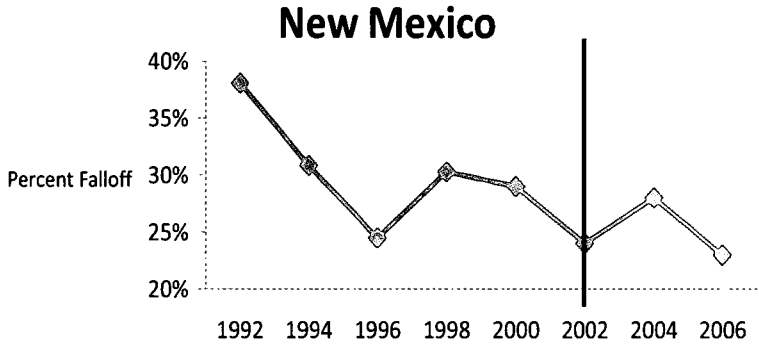


**Figure 2**

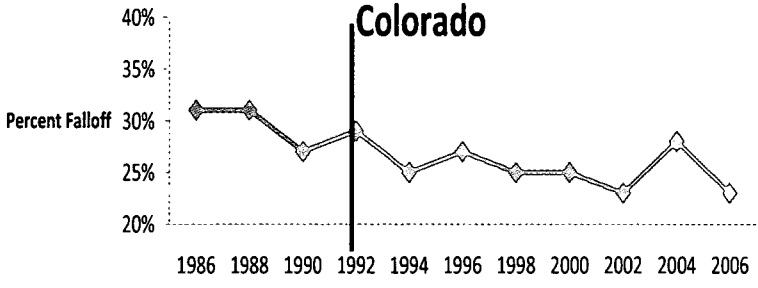


**Figure 3**

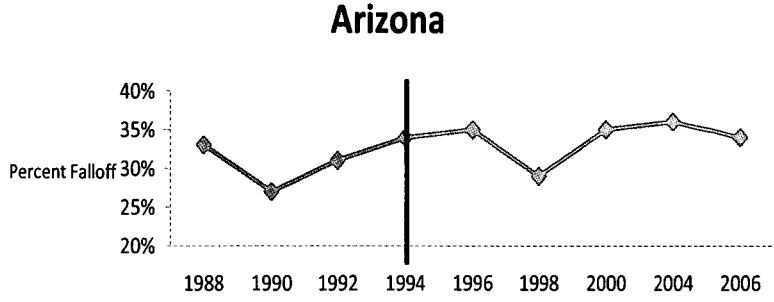


**Figure 4**

What can be gleaned from this information? First and foremost, such a cursory analysis should be considered exploratory. Not only is it impossible for one to make any causal inferences from the results, but there are also a number of items that need to be controlled for statistically before one can make any concrete findings about the effect of JPE programs on voter participation.[159] While preliminary, the information does suggest that JPE programs, in and of themselves, are not likely to be sufficient to eliminate voter falloff.

*D. How do Judges Perceive the Impact of JPE on Judicial Accountability and Judicial Independence?*

A critical component of the ability of JPE programs to promote judicial accountability without negatively impacting judicial independence is how the judges under evaluation perceive the program. Given the sensitive nature of judicial performance evaluation programs in the eyes of judges subject to evaluation, it is important to obtain input on the design, implementation, and assessment of JPE programs from the judges being evaluated.[160] Input from the judiciary is likely to make for smoother implementation and more reliable results than if judicial feedback is not considered.[161] Moreover, by considering the thoughts and concerns of the judges, judges will attain "ownership" of the process which would

159. State and election-specific items such as methods of distributing evaluation recommendations, population transiency, ballot design, length of ballot, and other items must be taken into account before definitive findings and attributions can be made.

160. Daina Farthing-Capowich, *Designing Programs to Evaluate Judicial Performance*, 9 ST. CT. J. 22, 23-24 (Summer 1985).

161. *Id.*

help quell potential concerns raised by judges who are rated more critically than they feel is warranted.[162]

There are several methods that can be used to gather this information from judges. Individual judges can be interviewed in private regarding their perceptions of a JPE program. Interviews have the ability to obtain detailed information and thoughts from judges that can provide much insight. In practicality, however, to interview a representative sample of judges in a state would be a daunting task. Such interviews would likely be very time consuming, expensive, and logistically cumbersome.[163]

A second option would be to conduct a series of focus groups with members of the bench. This would entail meeting with groups of judges and having structured discussions of their perceptions about JPE programs. While this is less time consuming and expensive than individual interviews, it does not provide the confidential atmosphere present with a one-on-one interview setting. It is not unrealistic to expect judges to be less candid in discussing their thoughts about evaluations of the judiciary in front of their fellow judges than they would be in a private setting. Accordingly, the information obtained in focus groups may be incomplete and skewed based on the dynamics of the group.

A third method of gaining insight into what judges think about JPE programs is by conducting a survey. Surveys have the advantages of providing anonymity, being able to obtain quantifiable responses that can be examined for an entire judiciary using standardized scales, and not being cost prohibitive. Additionally, in asking open-ended questions, surveys can contain significant levels of detail and opinions of individual judges.

The limited number of surveys of judges who have been evaluated by JPE programs have revealed interesting attitudes about JPE's effect on judicial independence and accountability. As part of its multistate examination of JPE programs, the American Judicature Society (AJS) surveyed the judges from Alaska, Arizona, Colorado, and Utah who were evaluated by their state's JPE program in 1996 about their perceptions of the programs.[164] AJS found that a significant majority of those judges surveyed believed the JPE programs in their states helped make them "appropriately accountable for [their] job performance."[165] According to

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162. *Id.*; *See* Gary E. Roberts, *Employee Performance Appraisal System Participation: A Technique that Works*, 31 PUB. PERSONNEL MGMT. 333, 334 (2002) (noting that employees are more likely to accept negative feedback if they believe the evaluation process is fair).

163. FRANK H. HAGAN, RESEARCH METHODS IN CRIMINAL JUSTICE AND CRIMINOLOGY 186 (7th ed. 2006).

164. Esterling, *supra* note 35, at 211-14.

165. *Id.* at 211.

one judge, "the public is better informed when making voting decisions and can weed out incompetent judges."[166]

Recently, members of the Colorado judiciary participated in a survey which sheds a great deal of light on the Colorado JPE process.[167] In 2008, the author of this article, in conjunction with Jordan Singer of the Institute for the Advancement of the American Legal System, conducted a study to gain insight into what members of the Colorado judiciary thought about Colorado's system of judicial performance evaluation. As part of the study, surveys inquiring about judicial perceptions of the JPE program were sent to Colorado's 270 district and county court judges as well as the state's twenty-six appellate court judges.[168] In all, 172 (64%) trial court judges and seventeen (65%) appellate court judges returned completed surveys.

While the survey did not ask the judges specifically about whether the JPE process affects judicial accountability, a number of judges raised the issue *sua sponte* in their written comments submitted as part of the survey. A number of judges noted that JPE makes them more accountable to the public. For example, one county court judge noted, "My belief is that the process requires me to be more accountable than I would be without it. The process helps prevent 'black robe disease.'"[169] Similarly, a district court judge wrote, "I think the existence of the process is useful. Knowing that you will be evaluated is a good hedge against judicial arrogance. I also think the process weeds out some appointees who don't turn out to be well suited for the job."[170]

From these and similar comments, it appears that Colorado judges perceive that the JPE process increases their accountability to the public. Furthermore, this increased accountability appears to have a positive impact on judicial behavior. By helping judges identify occasions where they may be suffering from "judicial arrogance" and "black robe disease," the accountability associated with the performance evaluation process appears to operate beyond electoral defeat for the betterment of the judicial system.

In conjunction with considering JPE's impact on judicial accountability, it is worthwhile to examine its effect on judicial independence. Recall, the establishment of JPE programs was based largely on the premise of preserving judicial independence by increasing the ability of

166. *Id.*

167. David Brody & Jordan Singer, 2008 Survey of the Colorado Judiciary About Judicial Performance Evaluation, Mar. 26, 2008 [hereinafter Colorado Judicial Survey] (on file with author).

168. *Id.* (response data on file with author). *See also* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE BENCH SPEAKS ON JUDICIAL PERFORM. EVAL.: A SURVEY OF COLORADO JUDGES (2008), *available at* http://www.du.edu/legalinstitute/publications2008 (for a presentation of an executive summary of the findings).

169. Colorado Judicial Survey, *supra* note 167 (comment of Trial Judge 15).

170. *Id.* (comment of Trial Judge 27).

voters to use retention elections to hold judges accountable based on appropriate, non-decision-based criteria.[171] An evaluation program that fails to adequately preserve judicial independence is likely to lose the support of a large segment of individuals and organizations that worked for its establishment.

The 2008 survey of the Colorado judiciary asked the judges whether the JPE program increases judicial independence, decreases it, or has no effect on it. As can be seen in Figure 5, it is fair to say that the judges were evenly split on what the impact of JPE is on judicial independence.

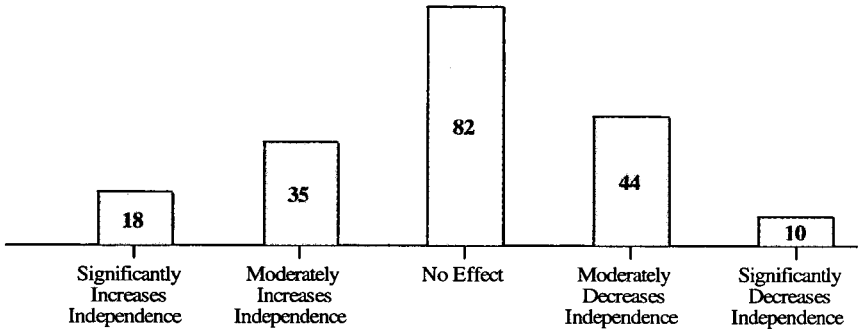


**Figure 5**
**Colorado Judges' Opinions on Effect of Judicial Performance Evaluations on Judicial Independence**

When one considers the written comments that were provided by the judges relating to judicial independence, several items become evident. First, judges who believe JPE increases independence viewed it as a necessary component of Colorado using the Missouri Plan to select judges. As clearly summed up by a district court judge, "Without JPE and its . . . reports to the voters, the retention system would collapse. Therefore, JPE has a significant impact on judicial independence."[172] Similarly, another district court judge stated, "I believe that JPE increases judicial independence because I think it is the price we must pay to continue to have a merit selection system for judges."[173]

As for those who believed JPE decreased judicial independence, no judge provided information about how it did so. Rather, much of the concern about its effects on independence centered on procedural issues associated with the survey process. The importance of considering and

171. *See supra* Section IV.
172. Colorado Judicial Survey, *supra* note 167 (comment of Trial Judge 4).
173. *Id.* (comment of Trial Judge 52).

evaluating the procedures used in conducting a JPE program and the effect the procedures have on perceptions of the effectiveness and trustworthiness of a program are discussed below.

### *E. Are Proper Processes Being Used to Evaluate Judicial Performance?*

"The effectiveness of any judicial performance evaluation project will depend, in large measure, upon the reliability of the information it generates."[174] This statement, included in the American Bar Association's first set of judicial performance evaluation guidelines over twenty years ago, is as true today as it was when written. For judicial performance evaluations to effectively hold judges accountable while not inhibiting judicial independence, the results of the evaluations and the methods used to obtain them must be unquestionably trustworthy.[175]

The methods used and the recommendations and reports generated must be viewed as being trustworthy by the judges being evaluated, the voters who are being asked to use them, the state commissions and overseers who must stand behind them, and state policy makers who make funding decisions.[176] A lack of trust in the methods selected to obtain the information used in the evaluation process by any of these groups is likely to have immediate and long-term consequences for the program. As Seth Andersen, Executive Director of the American Judicature Society put it:

> While the current trend appears to favor adoption of official retention evaluation programs in more states, it is important to note that only six of the nineteen states that hold retention elections at some or all levels of court have adopted such programs. Concerns about the fairness of survey methodologies and evaluation commission procedures, as well as a general reticence among many judges to subject themselves to an evaluation process that may be seen as a threat to decisional independence, have helped to stall the expansion of retention evaluation programs.[177]

Despite the logic behind Andersen's observation, there have not been any external evaluations of the survey methodologies used by JPE programs since the 1990s. Given the importance the trustworthiness and validity of a program's methods and results have on the effectiveness of JPE programs in promoting judicial accountability, it is important that states routinely assess the survey methodologies, commission proce-

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174. SPECIAL COMM'N ON EVALUATION OF JUDICIAL PERFORMANCE, AMERICAN BAR ASSOCIATION GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE 26 (1985).

175. *Id. See also* ABA, *supra* note 40, at 6.

176. *See* N.C. BAR ASS'N JUDICIAL PERFORM. EVAL. STUDY GROUP, REPORT AND RECOMMENDATIONS OF THE NCBA JPE STUDY GROUP ON JUDICIAL PERFORM. EVAL TO THE N. C. BAR ASS'N BOARD OF GOVERNORS 27 (2006), *available at* http://www.ncbar.org/download/ncba/jpeDraftReport.pdf.

177. Andersen, *supra* note 35, at 1375-76 (footnote omitted).

dures, and distribution of results being used, before negative perceptions of their fairness undermine public and political acceptance. The import of such assessments is evident from the activities and events surrounding Colorado's judicial selection and performance evaluation process over the past several years. The following section presents a truncated case study of JPE in Colorado.

## V. JUDICIAL PERFORMANCE EVALUATION IN COLORADO

Colorado has one of the longest running and most well respected judicial performance evaluation programs in the nation.[178] Established by the Colorado legislature in 1988, the Commissions on Judicial Performance conduct evaluations of each appellate and trial court judge prior to the end of the judge's term.[179] The statutes and rules governing the processes and criteria used in the evaluation of judges lay out detailed requirements regarding what the commissions are to consider in conducting their evaluations and how the information should be reported to the public.[180]

As discussed previously, in 2008 I collaborated with the Institute for the Advancement of the American Legal System at the University of Denver to conduct a survey of the members of the Colorado judiciary about their thoughts regarding the JPE program. The judicial survey was the first part of a multistep plan to evaluate the processes used and impact resulting from the JPE program. To help lay the groundwork for future areas of inquiry, the judicial survey was designed to be exploratory and to garner as much information about the process as possible from the people directly affected by the JPE program.

According to Daina Farthing-Capowich, a forerunner in the design of JPE programs, in developing and assessing the effectiveness and validity of a performance evaluation program it is important that judges be given the chance to "vent frustrations, comment, offer suggestions, and review the work product as it takes shape."[181] Input from the subjects of a performance evaluation gives insight into matters that are worthy of assessment and contemplation and provides the impetus in the discovery of systemic shortcomings that can be easily remedied.[182] The 2008 Colorado judicial survey, discussed above, is a classic example of this phenomenon.

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178. Jean E. Dubofsky, *Judicial Performance Review: A Balance Between Judicial Independence and Public Accountability*, 34 FORDHAM URB. L.J. 315, 315 (2007).

179. Commissions on Judicial Performance, COLO. REV. STAT. ANN. §§ 13-5.5-101 to -106 (West 2008). Colorado has 22 local commissions which evaluate trial court judges and a state commission that evaluates supreme court and court of appeals judges.

180. COLO. REV. STAT. ANN. § 13-5.5-105.5 (West 2008).

181. Farthing-Capowich, *supra* note 160, at 24.

182. *Id.*

The judges' responses to the survey showed that nearly all of them were very supportive of the continued use of judicial performance evaluations in Colorado. Over 70% of judges who had been through the process at least once reported that it provided them with information that allowed them to improve their job performance, and nearly 90% believed the Commissions' recommendation process for use in retention elections was fair.[183] They did, however, have a number of strong opinions about the validity of the survey methodology and how the evaluation process could be improved. While much of this information is critical of the process, it also provides important information for the Commission to consider. Given the Colorado Commission's internal assessment of the evaluation process following each round of retention elections, and its support and assistance in the implementation of the survey, the feedback provided by the bench and discussed below will be used to make a model JPE program even stronger.[184]

*A. Perceived Problems with the Survey Methodology*

To help us learn about how judges feel about JPE, the 2008 survey asked the judges whether certain aspects of the evaluation process were problematic to them. As can be seen from the figures in Table 1, most of the judges considered specific procedural items to be of major concern. Specifically, a clear majority of the judges felt that the number of respondents, the manner in which respondents are selected, and the groups of individuals identified to participate were a problem. Perhaps most importantly, only 15 judges (12.3%) responded that the validity and accuracy of the survey responses were not a problem with the Colorado JPE system.

**Table 1: Perceived Problems with JPE Survey Process**

| | Not a problem | Minor problem | Major problem |
|---|---|---|---|
| How job performance criteria are measured. | 32.1% | 49.5% | 18.3% |
| The targeted survey respondent groups. | 31.0% | 36.2% | 32.8% |
| Number of survey respondents. | 13.5% | 33.3% | 53.2% |
| The methods by which respondents are selected. | 28.9% | 40.2% | 30.9% |
| Validity & accuracy of survey responses. | 13.3% | 46.0% | 40.7% |

As striking as these figures are, the magnitude of the dissatisfaction felt by the judges regarding the evaluation methodology is better illus-

183. Colorado Judicial Survey, *supra* note 167.
184. Interview with Jane Howell, *supra* note 135.

trated from the following comments that were provided by a number of judges.

- Survey is unscientific and a joke.[185]
- Asking non-lawyers to address questions of legal knowledge is problematic—there is no legitimate way to know whether the respondents have the requisite knowledge or adequate information to support their ratings.[186]
- The surveys are not statistically valid and are totally unreliable.[187]
- The evaluation information is based on a survey process that has been inherently flawed, thereby limiting the value of any information we receive.[188]
- I have now been on both sides of this evaluation process. Many years ago I was a member of our local judicial performance commission. Back then the methodology of the process of obtaining information from attorneys, witnesses, jurors was more than flawed. The survey methodology astoundingly remains horrible and unreliable. I am shocked that [the contractor] has not improved its process. . . . When a judge's career may hinge on these surveys and the opinion of the commission it is not acceptable to me that the methodology is flawed. All judges deserve better.[189]
- The surveys are a major concern for many judges, including me. For a survey to be valid it must be provided to a wide group of people in various categories, including prosecutors, defense attorneys, court staff, probation officers, police officers, and pro se parties. Many of the results I have seen have a significant number or group that is underrepresented.[190]

To better understand the nature of these concerns, and in an effort to see if there were any areas where the JPE process could be strengthened, I examined the 2008 judicial performance evaluation reports prepared for the Colorado trial court judges standing for retention elections. Three major items involving the evaluation of county and district court judges stood out that should be considered by the Colorado commission.

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185. Colorado Judicial Survey, *supra* note 167 (comment of Trial Judge 14).
186. *Id.* (comment of Trial Judge 1).
187. *Id.* (comment of Trial Judge 18).
188. *Id.* (comment of Appellate Judge 1).
189. *Id.* (comment of Trial Judge 134).
190. *Id.* (comment of Trial Judge 82).

*B. Survey Sample Issues*

A key component of JPE programs is their obtaining evaluation information from individuals who actually appeared before a judge. In Colorado, this information is generated through government records and provided to the consulting firm who administers the JPE surveys for the Commissions on Judicial Performance. These individuals include attorneys, witnesses, jurors, litigants, and victims.[191]

A concern raised repeatedly by the Colorado judges was the small number of attorneys who completed surveys and what the makeup of the attorney sample looked like. In large jurisdictions, an attorney may have appeared before multiple judges during an evaluation period. Out of concern for potential "survey fatigue,"[192] Colorado has adopted a unique policy whereby attorneys are only asked to evaluate up to two judges before whom they have appeared rather than ask all attorneys who appeared before a judge to complete a survey.[193] If an attorney appeared before more than two judges being evaluated by the Commission during an evaluation period, the consultant who administers the evaluation survey process draws a small sample of the attorneys who appeared before a judge, and selects those attorneys to receive evaluations for the judge.[194] While the sampling is based on the number of times an attorney appeared before a judge, it ignores the makeup of the sample and how it may affect the outcome of the evaluation or perception of fairness.[195]

Ideally, a sample would include a weighted cross-section of respondents stratified by key characteristics.[196] In the case of a JPE program, any sampling should consider an attorney's general area of practice (civil or criminal), and whether the attorney is a district attorney/prosecutor, or

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191. COLO. REV. STAT. ANN. § 13-5.5-101-13.5.5-101.5 (West 2008); COLO. RULES GOVERNING THE COMM'NS ON JUDICIAL PERFORM., R. 10(a), 11(a).

192. While survey fatigue or response burden is a concern in asking individuals to complete multiple surveys or evaluations, other JPE programs have attorneys complete many more than two evaluations during an evaluation period without response shortfalls due to survey fatigue. Moreover, as attorneys in the Denver area are likely to appear before fewer than fifteen judges under evaluation in a given year, as opposed to fifty-two in King County, Washington and over seventy in Maricopa County, Arizona, survey fatigue should not be an issue. *See* JUDICIAL EVAL. COMM., KING COUNTY BAR ASS'N, 2007 JUDICIAL EVAL. SURVEY 1 (2007), *available at* http://www.kcba.org /judicial/pdf/2007judicial.pdf; Arizona Comm'n on Judicial Perform. Rev., Judicial Perform. Reports, http://azjudges.info/reports/lastname.cfm (last visited Oct. 21, 2008).

193. The methodology used in the Colorado Judicial Performance Evaluation program is discussed in the individual judge reports. For ease of reference, I will provide the web page and report page number for one report when discussing system wide methods. For explanation of sampling methods and survey fatigue, see COMM'N ON JUDICIAL PERFORM., MARTIN F. EGELHOFF 2008 JUDICIAL PERFORM. SURVEY, 91 (2008), *available at* http://www.cojudicialperformance.com/ images/retentionpdfs/2008_Dst%2002%20Martin%20F.%20Egelhoff.pdf.

194. *Id.* This method of selecting who an attorney may evaluate rather than letting attorneys select what judges they feel capable of evaluating has the potential to severely curtail response rates and levels.

195. *See id.*

196. Edward L. Korn & Barry I. Graubard, *Examples of Differing Weighted and Unweighted Estimates from a Sample Survey*, 49 AM. STATISTICIAN 291, 291 (1995).

a criminal defense attorney. In addition to concerns about the small number of attorneys involved in the JPE process, it is this sampling process that is the cause of the judges' complaints.

To illustrate the nature of these problems, Table 2 contains the attorney samples used for the 2008 performance evaluations for District Court judges sitting in Denver.[197] First, consider the overall number of attorneys included in the sample and completing evaluations. Despite the fact that each of the district court judges sitting likely has hundreds of attorneys appear before him or her annually, on average only seventy-four attorneys received requests to complete surveys per judge. Furthermore, an average of only thirty-four attorneys completed evaluations per judge. Having only thirty-four attorneys evaluate a judge is not an *unreasonably* low figure, but the goal of any JPE program should be to have as great a number of respondents as possible.[198] To achieve this goal, one should not deliberately use small sample sizes when they are not necessary. This is especially true for urban areas with where large numbers of attorneys are likely to have appeared before each judge.[199]

197. Information used in this analysis was obtained from the 2008 individual judge reports prepared by the Colorado Commission on Judicial Performance: COMM'N ON JUDICIAL PERFORM., ANNE MANSFIELD 2008 JUDICIAL PERFORM. SURVEY, 93 (2008), *available at* http://www.cojudicialperformance.com/images/retentionpdfs/2008_Dst 02 Anne Mansfield.pdf; COMM'N ON JUDICIAL PERFORM., JOHN MADDEN 2008 JUDICIAL PERFORM. SURVEY, 93 (2008), *available at* http://www.cojudicialperformance.com/images/retentionpdfs/2008_Dst 02 John Madden.pdf; COMM'N ON JUDICIAL PERFORM., LARRY J. NAVES 2008 JUDICIAL PERFORM. SURVEY, 93 (2008), *available at* http://www.cojudicialperformance.com/images/retentionpdfs/2008_Dst 02 Larry J. Naves.pdf; COMM'N ON JUDICIAL PERFORM., MARTIN F. EGELHOFF 2008 JUDICIAL PERFORM. SURVEY, *supra* note 193, at 93; COMM'N ON JUDICIAL PERFORM., ROBERT S. HYATT 2008 JUDICIAL PERFORM. SURVEY, 93 (2008), *available at* http://www.cojudicialperformance .com/images/retentionpdfs/2008_Dst 02 Robert S. Hyatt.pdf; COMMI'N ON JUDICIAL PERFORM., ROBERT L. MCGAHEY, JR. 2008 JUDICIAL PERFORM. SURVEY, 93 (2008), *available at* http://www.cojudicialperformance.com/images/retentionpdfs/2008_Dst 02 Robert L. McGahey, Jr..pdf; COMM'N ON JUDICIAL PERFORM., SHEILA ANN RAPPAPORT 2008 JUDICIAL PERFORM. SURVEY, 93 (2008), *available at* http://www.cojudicialperformance.com /images/retentionpdfs/2008_Dst 02 Sheila Ann Rappaport.pdf.

198. *See* JUDICIAL EVAL, COMM., *supra* note 192, at 3.

199. In rural counties, low numbers of attorneys completing surveys may be unavoidable to the small population of attorneys practicing locally. This is generally not the case in urban locales such as Denver.

**Table 2: 2008 Attorney Evaluation Participants, Colorado District Court Judges, District 2**

| Judge | District Attorney | | Criminal Defense | | Civil Attorneys | | Attorneys (Unknown Role) | | TOTAL ATTORNEYS | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Sent | Complete | Sent | Complete | Sent | Complete | Sent | Complete | Sent | Complete |
| Egelhoff | 28 | 14 | 25 | 14 | 11 | 4 | 35 | 15 | 99 | 47 |
| Hyatt | 27 | 18 | 3 | 0 | 34 | 17 | 9 | 4 | 73 | 39 |
| Madden | 3 | 2 | 45 | 20 | 9 | 0 | 0 | 0 | 57 | 22 |
| Mansfield | 1 | 0 | 51 | 15 | 4 | 2 | 13 | 4 | 69 | 21 |
| McGahey | 13 | 5 | 8 | 3 | 43 | 25 | 9 | 4 | 73 | 37 |
| Naves | 13 | 9 | 2 | 1 | 6 | 3 | 16 | 6 | 37 | 19 |
| Rappaport | 20 | 13 | 0 | 0 | 32 | 20 | 9 | 6 | 61 | 39 |

**Table 3: 2008 Non-Attorney Evaluation Participants, Colorado District Court Judges, District 2**

| Judge | Law Enforcement | | Criminal Defendant | | Other | | Civil Litigant | | Jurors | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Sent | Complete | Sent | Complete | Sent | Complete | Sent | Complete | Sent | Complete |
| Egelhoff | 161 | 18 | 116 | 5 | 141 | 20 | 38 | 1 | 284 | 107 |
| Hyatt | 4 | 0 | 99 | 3 | 21 | 0 | 10 | 0 | 137 | 84 |
| Madden | 1 | 0 | 195 | 9 | 0 | 0 | 1 | 0 | 170 | 71 |
| Mansfield | 0 | 0 | 239 | 13 | 119 | 15 | 85 | 25 | 143 | 53 |
| McGahey | 113 | 7 | 77 | 5 | 147 | 9 | 20 | 1 | 247 | 126 |
| Naves | 1 | 1 | 14 | 0 | 37 | 1 | 0 | 0 | 184 | 102 |
| Rappaport | 5 | 0 | 45 | 4 | 8 | 0 | 1 | 0 | 272 | 154 |

Of greater concern with the samples used for the Denver judges is the professional makeup of the attorneys. Ideally there should be a reasonable balance between the number of prosecutors and defense attorneys who evaluate a judge. While this is the case for two of the Denver judges, Eglehoff and McGahey, the same cannot be said for the five other judges. For three of the judges, surveys were sent to more than a dozen district attorneys while three or fewer defense attorneys were included. For the other two judges the opposite is true. For Judges Madden and Mansfield, surveys were sent to forty-five and fifty-one criminal

defense attorneys, but to only three and one district attorneys, respectively. Given that a judge who hears criminal matters is likely to have both prosecutors and defense attorneys appear in his or her court, this disparity is puzzling and of understandable concern to the bench.

The same is true for the distribution of surveys to witnesses and litigants. As shown in Table 3 above, there was great disparity in the numbers of surveys sent to law enforcement officers for each judge. For two judges over 100 surveys were sent to law enforcement personnel, while for the other five judges five or fewer were sent to police officers per judge. At the same time, judges who had the opportunity to be evaluated by five or fewer law enforcement officers had surveys sent to dozens of criminal defendants each.

The fact that it is done intentionally is problematic; however, improved perceptions of the reliability and trustworthiness of the process can be obtained when these items and the judges' concerns about them are addressed in future evaluations.

### *C. Use of a Single Survey for Non-Attorney Evaluators*

The second area of concern raised by the judges involves the non-attorney survey instrument that is used in the JPE process. The reason behind having lay persons evaluate judges as part of a judicial performance evaluation is that they bring different perspectives into the assessment process.[200] To make use of the different perspectives it is important that a survey questionnaire be specifically tailored to the nature of the interaction each group of respondents had with a judge.[201] While all lay persons have some common interactions with a judge, the nature of sitting on a jury for several days or weeks makes the experience and perspective it provides inherently different than that of a witness who testified for one hour. For this reason, all state JPE programs have evaluation questionnaires tailored specifically for jurors, apart from those used with witnesses and litigants. This gives respondents an opportunity to provide in-depth evaluations about the judge involving certain events and observations that are not relevant or applicable to other lay persons.

Under the Colorado JPE process, all non-attorneys complete the same evaluation questionnaire. The practice of having jurors, litigants, criminal defendants, social workers, law enforcement officers, and victims complete the same survey limits the value of the information they can provide. Compounding the matter, when evaluation reports are prepared for each judge, the responses of all non-attorney respondents are pooled together and reported as one measure.[202] Given the fact that in the aggregate jurors may perceive a judge's behavior differently than law

200. ABA, *supra* note 40, at 14; Esterling, *supra* note 35, at 210.
201. *See* SHARED EXPECTATIONS, *supra* note 34, at 65.
202. COMM'N ON JUDICIAL PERFORM., *supra* note 193, at 92.

enforcement officers who evaluate a judge, a judge's rating could potentially be increased or decreased depending on the number of each type of lay person that complete an evaluation.[203]

*D. Non-Attorneys Rating Legal Ability*

While one of the most important aspects of judicial performance evaluations is their ability to provide information about a judge's performance as seen from lawyers and non-lawyers alike, it is essential that both groups evaluate judges only on areas in which they are competent.[204] Of particular import is having only individuals with legal training and experience evaluate a judge's legal ability.[205] Under the Colorado JPE system, not only do all non-attorneys complete the same survey, but they are also asked to evaluate the judge on matters involving his or her "application of the law." Specifically, jurors, litigants, witnesses, and other non-attorneys are asked to rate trial court judges on three criteria under the heading "Application of Law":[206]

1. Giving reasons for rulings.

2. Willing to make decision without regard to outside pressure.

3. Being able to identify and analyze facts.

While such questions are appropriate for attorneys to answer, expecting non-attorneys to be able to intelligently assess whether a judge applied the law appropriately is unacceptable, and justifiably troubling to the bench.[207] The problems with the information obtained from non-attorneys are further amplified by having non-attorneys rate the judge's *sentencing practices*. The Colorado survey explicitly asks non-attorneys to assess whether the judge's sentencing practices are generally too harsh or too lenient. This is unacceptable for several reasons. First, rather than focus on a judge's behavior, this asks for assessments on decision-based criteria. More importantly, it asks people to rate a judge on information for which they have no basis of knowledge.[208] Jurors are not present at a

203. This problem is exasperated by the decision to rank judges based largely on these evaluation scores. *See* Matt Masich, *Judge Performance Evals To Be Released At 1 P.M.*, L. WK. COLO. ONLINE, Aug. 5, 2008, *available at* http://www.lawweekonline.com/default.asp?sdetail=6673. For the rankings, *see* COMM'N ON JUDICIAL PERFORM., COMBINED OVERALL AVERAGE & RANK 1-2 (2008), *available at* http://www.cojudicialperformance.com/CO%20Web%20Ranking%20%2008-04-08a.pdf.

204. Daina Farthing-Capowich & Judith White McBride, *Obtaining Reliable Information: A Guide to Questionnaire Development for Judicial Performance Evaluation Programs*, 11 ST. CT. J. 5, 7 (Winter 1987).

205. *Id.*

206. COMM'N ON JUDICIAL PERFORM., *supra* note 193, at 98.

207. Beyond the appropriateness of having non-lawyers rate legal ability, the fact that jurors, witnesses, litigants, and the like are frequently not privy to bench and in chambers conferences and rulings, not a complete view of all of the facts at issue in a matter before the court. As such, any evaluation on such matters is pure conjecture.

208. A rudimentary premise in the design of any performance evaluation program is that evaluations by subjects who have not had the opportunity to observe the behavior they are evaluating is a

criminal sentencing, and therefore have no basis to provide a rating. The same is true for most witnesses and other non-attorneys who appear before a judge. While criminal defendants may be present at sentencing, many will not have a basis to evaluate the judge's relative harshness. Having non-attorneys address sentencing practices can do nothing but negatively affect the creditability of the JPE process.

These concerns expressed by the Colorado judiciary have the potential to have a negative impact on the future of the state's judicial performance program. Recall, in 2006, Colorado voters were asked to consider a ballot initiative that was anti-judiciary. The initiative was born out of a belief in some quarters that the Colorado judiciary was unaccountable to the public with or without a JPE program.[209]

Critics of the Colorado Commissions on Judicial Performance believe that it fails to effectively hold judges accountable.[210] They cite the fact that, since 1988, fourteen trial court judges and no appellate court judges have received "do not retain" recommendations.[211] During this time period six trial court judges have not been retained by voters and no appellate court judges have been voted off the bench.[212]

Due to what was perceived as a lack of judicial accountability, particularly among appellate court judges, in 2006 a political committee titled Limit the Judges was established. The goal of this group was to remove sitting appellate court judges by establishing retroactive term limits. The group's efforts led to Amendment 40 appearing on the November 2006 general election ballot. Amendment 40 provided for retroactive term limits of ten years for Colorado Supreme Court and Court of Appeals judges.[213] Proponents of the amendment argued that the current system of retaining judges, including the Colorado Commissions on Judicial Performance, serves as a rubber stamp for judges seeking another term in office.[214]

Opponents of the amendment argued that it is foolhardy to deprive the state of its most experienced jurists arbitrarily. They also argued that judicial performance evaluations do work to hold judges accountable, but

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major source for unreliability in performance measurement, and must be avoided. *See* Bryant F. Nagle, *Criterion Development*, 6 PERSONNEL PSYCHOL. 271, 277 (1953); Hannah R. Rothstein, *Interrater Reliability of Job Performance Ratings: Growth to Asymptote Level With Increasing Opportunity to Observe*, 75 J. APPLIED PSYCHOL. 322, 322 (1990).

209. *See* John Andrews, *Judges Coddled by Sweetheart Process*, DENVER POST, Feb. 18, 2007, at E3.

210. *See id.*

211. An additional ten judges have received recommendations of "no opinion." For more information, see COMM'N ON JUDICIAL PERFORM., JUDICIAL PERFORM. FACT SHEET 3 (2008), *available at* http://www.cojudicialperformance.com/2008%20fact%20sheet1.pdf.

212. *Id.*

213. COLO. SEC'Y OF STATE, PROPOSED CONST. AMEND. FOR 2006 BALLOT (2006), http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/Final%20Text%2090.pdf.

214. *See* John Andrews, *The Case for Judicial Term Limits*, COLO. LAW., Feb. 2008, at 44, 46.

acknowledged that the system needs be improved.[215] After a bitter campaign in which over one million dollars was spent, the Amendment was defeated by a 57% to 43% tally.[216]

Limit the Judges and their allies did not take this loss lying down. After their defeat, the forces vowed to ask the voters in 2008 to vote to adopt a refined version of Amendment 40.[217] In response to this threat, opponents of term limits and supporters of a strong, independent judiciary went on the offensive to assure the public that the state's judges are and will be increasingly accountable. As part of this effort, not only was the use of judicial performance evaluation in Colorado emphasized, but acknowledgements of the need to strengthen and improve the evaluation system were made.[218]

In 2008, the Colorado legislature and State Commission on Judicial Performance did enact several reforms aimed at increasing the openness of the evaluation process and the improved ability of voters to hold poorly performing judges accountable. Several public and community hearings were held by the legislature in which representatives of the state bar, civic organizations, and other interested parties spoke in support of the renewal of the JPE program. The Commissions on Judicial Performance were reauthorized by the legislature. Importantly, representatives from the judiciary also testified in support of retaining judicial performance evaluation. With a comfortable margin, the Commissions on Judicial Performance were reauthorized in the spring of 2008.[219] Reforms enacted as part of the reauthorization bill included the implementation of a notice and comment period for enactment of rules governing the evaluation process and additional evaluation criteria provided for. None of these reforms generated much controversy.

In a more drastic move designed to increase the accountability of judges, the Colorado Commissions on Judicial Performance chose to not only release retention recommendations for judges standing for retention election in 2008, but to also rank the trial court judges based on an average of the ratings attained in attorney and non-attorney evaluation questionnaires.[220] The premise behind this move was that by presenting evaluation results in this manner, it would be possible that judges who scored

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215. *See* Bruce Finley, *Performance Reviews Proposed for Judges*, DENVER POST, Oct. 3, 2006, at B4.

216. Colorado Cumulative Report, http://www.sos.state.co.us/pubs/electionresults2006G (last updated Dec. 13, 2006).

217. Limit the Judges: Campaign for Judicial Term Limits, Judicial Term Limits Target 2008 Ballot, http://www.limitthejudges.com (last visited Oct. 20, 2008).

218. Rebecca Love Kourlis, *Facing a Need for Reform: More Openness Would Aid Courts*, DENVER POST, Nov. 26, 2006, at E1.

219. The Colorado Index: Illuminating Colorado Issues, http://thecoloradoindex.typepad.com/the_colorado_index/2008/03/senate-bill-054.html; SB 08-054, 66th Gen. Assem., 2nd Reg. Sess. (Colo. 2008).

220. COMM'N ON JUDICIAL PERFORM., *supra* note 203.

relatively poorly in the evaluation surveys, but were judged worthy of retention by the commissions, could still be held accountable by the voters.

This effort may well increase judicial accountability. It may also, however, have a negative effect on the judiciary's continued support of the JPE process. An unscientific survey found that judges were overwhelmingly opposed to the new ranking system.[221] Given the move to increase accountability, and the judiciary's frustration with the methods used in conducting the evaluations, judicial support for the performance evaluations may begin to erode if their concerns are not taken into account.[222]

## CONCLUSION

The selection of state judges in the United States is riddled with contradictory values and preferences. The public wants a fair and impartial judiciary that decides cases according to the law independent of political or professional consequences.[223] At the same time Americans want the ability to hold judges accountable should they abuse their power or betray the public trust.[224] While they prefer being able to hold judges electorally accountable, a large segment of voters, when given the opportunity to vote in judicial elections opt not to participate due to not having the information necessary to make an informed decision in a judicial election.[225] When provided information about judges via expensive, vigorous campaigns, voters express concerns about special interest groups "buying judges" and the negative effect campaigning and having to raise money has on judicial independence and impartiality.[226] While these contradictions provide great challenges for states to overcome, they are not insurmountable.

Any efforts to address these issues must center on trust. While the public wants an independent judiciary, its general lack of trust in governmental institutions and democratic ideals has led to the wide use of judicial elections and expensive campaigns and an informational vacuum. Judicial performance evaluations have the ability to provide information that can be used to hold judges accountable and limit the need for special interest groups and issue based campaigns to fill the informa-

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221. Masich, *supra* note 203.

222. As the Colorado Commission is committed to providing a system the judges can trust, in all likelihood, the Colorado State Commission will consider the thoughts of the judiciary in planning for the future. Interview with Jane Howell, *supra* note 135.

223. Bert Brandenburg, *Seizing the Accountability Moment: Enlisting Americans in the Fight to Keep Courts Fair, Impartial, and Independent*, 42 CT. REV. 22, 24 (2006); *see also* Pozen, *supra* note 55, at 272.

224. Brandenburg, *supra* note 223, at 24; Pozen, *supra* note 55, at 272.

225. *See supra* Part IV.

226. *See* Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 54-55 (2003).

tion void. For JPE programs to achieve this aim it is necessary that the methods used and the product produced are deemed trustworthy, reliable, and valid by the public and the judiciary. Put another way, JPE programs must be accountable before voters will fully use them to hold judges accountable.

The development and maintenance of transparently accountable JPE programs can help build this public trust as well as the trust of the judiciary and policy makers. The potential impact of this is impressive. With this increased ability to hold judges accountable, the public is likely to forestall efforts to curtail judicial independence at the ballot box. With increased ability to hold judges accountable, voters may vote to replace poor performing judges on the bench with greater frequency and, in the process, help increase the quality of the judiciary. With increased reliable information to use in judicial elections more voters will likely participate in selecting their judges. With increased trust in the method upon which they are evaluated judges may publicly support JPE programs and encourage voters to make informed decisions when voting in judicial elections. With reliable information about the effectiveness of JPE programs achieving their stated goals, policy makers and legislators are more likely to support their continued operation, and potentially their expansion.

Much can be gained by taking the steps needed to maintain effective and trustworthy JPE programs. It is up to those conducting the evaluations of the judges to evaluate themselves with an eye towards self-improvement and the betterment of the judicial system.

# ACCOUNTABILITY IN THE ADMINISTRATIVE LAW JUDICIARY: THE RIGHT AND THE WRONG KIND

EDWIN L. FELTER, JR.†

*Accountability, n. The mother of caution.*

*—Ambrose Bierce,* The Devil's Dictionary

## INTRODUCTION

How many forms of accountability are there in the administrative law judiciary? And, by comparison, how many forms of accountability are there in the judicial branch? Let me count the ways. This article begins with an analysis of the interplay, and mutual dependence of, judicial independence and accountability. It next illustrates how various judicial philosophies maintain different ideas about judicial accountability. Thereafter, an analysis of the importance of judicial independence to our system of justice follows.

Delving into more specific forms of judicial accountability, the article moves from accountability through "reasoned elaboration," as an underpinning of meaningful appellate rights, to accountability through judicial review, and the requirement that lower tribunals must follow precedent in all but the most unusual instances. The article illustrates the implications of an official refusal to follow precedent, for example, the Social Security Administration's (SSA) policy of non-acquiescence (which maintains that SSA administrative law judges need not follow precedent established by federal circuit courts of appeal outside the circuit in which the administrative law judge sits).

The next form of accountability with which this article deals is the most significant and compelling form of accountability, the accountability of judges to the controlling codes of judicial conduct in their jurisdictions, the underpinnings of which are effective complaint mechanisms to enforce those codes. For the sake of comparison to the administrative law judiciary, there is an analysis of disciplinary mechanisms for judges in state judicial branches. Also, there is an analysis of the newer phenomenon of judicial performance commissions in the states (which, in theory, exist to assist judges in improving their performance).

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Judgmental evaluations (evaluations that may result in pay raises, demotions, or even firings) are contrasted with developmental evaluations (for the purpose of self-improvement) of administrative law judges.

Lastly, inappropriate judicial performance evaluations and their negative consequences on the American values of integrity, impartiality, and judicial independence of our judges are considered.

## I. JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Jane Q. Public cherishes independent judges, especially when she prevails over the establishment in court, or before an administrative law tribunal. Yet, she demands judges who are accountable. The proposition is as simple as the idea that freedom comes with certain responsibilities. Judicial independence comes with great accountability.

Judges have a great deal of power over the lives and fortunes of those who appear before them. It is not always obvious to the litigant that judges are constrained to apply the law to the facts, to obey codes of judicial conduct and, in the case of the administrative law judiciary, to meet specific performance objectives for civil servants, plus observe the rules of professional conduct for lawyers.

Perhaps the greatest source of misunderstanding (and demand for more accountability) concerning judges stems from their remoteness from the public, which is based in part on the standards of conduct contained in the code of judicial conduct.[1] Also, the process by which judges arrive at decisions in cases is sometimes mysterious to the public. In ancient times, people believed that judges were merely interpreting the divine will.[2] This concept evolved into the belief that judges' interpretations of the law became a sacrosanct component of our jurisprudence. The concept extended down to the trial level whereby the trial judge's findings of fact were considered to become the absolute and immutable truth concerning the facts in controversy. The findings assumed a quality of unassailable dignity, above and beyond the evidence upon which they were based. The school of judicial realism maintains that judges should not deceive themselves concerning the true nature of their findings of fact—guesses on the guesses of the witness's human and imperfect grasp of the facts.[3] Judges have an obligation to avoid fueling the fires of arrogance and misunderstanding. What judges do is not by consecration into the holy order of the robe. They are technicians who apply the law to the

1. AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

2. Charles D. Reid, Jr., *Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent's Commentaries*, 5 AVE MARIA L. REV. 47, 52 (2007).

3. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE, (Princeton Univ. Press 1973).

facts and, in doing this the application of the law should be laced with human understanding, common sense, compassion, and justice.

Indeed, judges (through codes of judicial conduct) are, in fact, subject to higher standards of conduct than those applicable to lawyers, who are subject to the rules of professional conduct. Judges in the administrative law judiciary—insofar as they must be attorneys in good standing—are also subject to the rules of professional conduct for lawyers in addition to judicial ethics codes and civil service performance standards.

There is a public clamor for more accountability of judges, especially when a legally correct, but unpopular and misunderstood opinion, is released by an appeals tribunal and receives a lot of press coverage. Indeed, if judges do not ensure that accountability measures and mechanisms, meaningful to the public, are in place, interest groups, through citizen initiated constitutional amendments, will get ill-advised and inappropriate accountability measures on the ballot, and launch expensive campaigns to defeat judges whose "minds are not right," in the opinion of a few crusaders to get-the-judges. One extreme example was South Dakota's 2006 "Jail for Judges" initiative (J.A.I.L: Judicial Accountability Initiative Law), which would have abolished judicial immunity for South Dakota judges and made them liable in criminal and civil actions for official acts, deemed improper by dissatisfied litigants.[4] There is no authority for the proposition that "judicial immunity" is a right protected by the U.S. Constitution. Judicial immunity, in some cases, may be statutory, or in a state constitution (within the "sovereign immunity" family), but it has mainly evolved through case law.[5] Fortunately, South Dakota voters defeated the "Jail for Judges" measure by eighty percent, thus indicating that they valued judges who could function "without fear or favoritism." It is hard to imagine who would want to be a judge in South Dakota if the "Jail for Judges" measure had passed.

Rebecca Love Kourlis, former Colorado Supreme Court Justice and present Executive Director for the Institute for the Advancement of the American Legal System at the University of Denver, states, "there is a buzz of public dissatisfaction about our courts, fueled at least to some extent by the perception that our courts and judges are remote and *unaccountable*."[6] She also states:

> The willingness of judicial leaders in places like Colorado, Utah, and New Hampshire to promote accountability measures is heartening and heralds a new mind-set among judges. This new judicial attitude is also reflected in eloquent remarks by Chief Justice John Broderick of New Hampshire, who is working to export key elements of Colo-

4. S.D. CONST. amend. E (2006).

5. *See* Martinez v. Winner, 771 F.2d 424, 434 (10th Cir. 1985).

6. Rebecca Love Kourlis, Op-Ed, Guest Commentary: *Colorado Judiciary a Leader*, THE DENVER POST, June 29, 2008, at D3 (emphasis added).

> rado's program to their court system. [Chief Justice Broderick observed] "Our best ally is public trust and confidence. Without it, we will lose support. . . . Sunlight and openness purify."[7]

Justice Kourlis indicates: "We have now also taken to measuring the courts, from public opinion polls, to state-by-state rankings and performance evaluations. This is a very healthy development."[8]

Although the administrative law judiciary often "flies under the radar," perhaps because administrative law has a reputation for being a boring subject, the administrative law judiciary could be especially vulnerable if an interest group, affected by a decision of the administrative law judiciary it did not like, decided to launch a campaign to make the administrative law judiciary more "accountable" to the group's preferred way of thinking about issues. The reason for the greater vulnerability would be due to the narrow and specialized subject matter with which the administrative law judiciary deals.

Indeed, some members of the public believe that administrative law judges are mere extensions of the agencies that are at odds with them. Nothing could be further from the truth. Administrative law judges stand between the agency and the person. The agency stands as another litigant before the administrative law judge, and the administrative law judge's job is to provide a fair and impartial hearing to all sides. Sometimes the agency loses and it has the right to appeal in the same manner as any other appellant.

## II. JUDICIAL PHILOSOPHIES AND ACCOUNTABILITY

Colorado State Senator Mark Hillman, who the author describes as a textualist, states: "Conservatives have long decried 'activist judges' and 'judicial activism.' Those terms have a specific meaning, referring to courts that do not simply interpret the law but instead change the meaning of the law under the guise of interpretation."[9] The Senator goes on to state: "Writing the law is the constitutional role of the legislative branch, which is elected by and accountable to the people. The role of the judiciary is to interpret, which *The American Heritage Dictionary* defines as 'to explain the meaning of.'"[10] Therein lies some public misunderstanding and dissatisfaction with some high profile judicial opinions, perceived to be the product of "activist" judges. Political campaigns against these opinions add more fuel to the fires of misunderstanding.

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7. *Id.*

8. Rebecca Love Kourlis, Perspective: *Do Our Courts Measure Up?*, THE DENVER POST, July 11, 2008, *available at* http://www.denverpost.com/search/ci_9844319.

9. Senator Mark Hillman, *The Essence of Judicial Activism*, John Jay Institute for Judicial Interpretation Journal (Mar. 15, 2004) http://www.libertyparkusafd.org/lp/Jay/Journal/2004/The%20Essence%20of%20Judicial%20Activism.htm (last visited Nov. 4, 2008).

10. *Id.*

Judicial philosophies, labeled as textualism[11] and originalism,[12] are the banners under which those calling for more judicial accountability often fly. Pragmatism[13] (which has become the subject of public opprobrium among those clamoring for more "judicial accountability") bears the stigma of judicial liberalism and those who appear to subscribe to this philosophy are often labeled as "judicial legislators," or "judicial activists." The late Justice Thurgood Marshall of the U.S. Supreme Court, in response to a question about the "original intent" of the founding fathers, reputedly indicated that the founding fathers did not contemplate the law of the air or space. Justice Marshall was considered a judicial legislator by some because he would be flexible in interpreting the law of transport for horses and buggies as applicable to aircraft and space craft.

## III. JUDICIAL INDEPENDENCE: AN AMERICAN VALUE

In 2001, when I was Chair of the National Conference of the Administrative Law Judiciary of the American Bar Association, I was invited to speak at an international administrative law conference in Quebec City, the theme of which was "Universal Values in Administrative Law."[14] I decided on a presentation entitled "Judicial Independence: A Universal Value." Part of the presentation made reference to Steven Spielberg's 1997 movie *Amistad,* starring Djimon Hounsou as the leader of the 1839 slave rebellion on the schooner *Amistad,* and Anthony Hopkins, starring as John Quincy Adams, his lawyer. A rebellion broke out on the schooner along the coast of Cuba and the schooner was taken over by a group of captives who had earlier been kidnapped in Africa and sold

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11. "Textualism" looks to the ordinary meaning of the language of the text, not merely the possible range of meaning of each of its constituent words. *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 319 (1988). Justice Scalia has written:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and the most likely to have been understood by the whole Congress which voted on the words of the statute, (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by benign fiction, we assume Congress always has in mind.

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

12. "Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because the ratifiers understood themselves to be enacting must be taken to be what the public *of that time* would have understood the words to mean." ROBERT H. BORK, THE TEMPTING OF AMERICA 144 (The Free Press 1990) (emphasis added).

13. "[T]he pragmatist judge believes that constitutional interpretation involves the empathic projection of the judge's mind and talent into the creative souls of the framers rather than slavish obeisance to the framers' every metronome marking. In the capacious, forward-looking account of interpretation that I am calling pragmatic, the social consequences of alternative interpretations often are decisive; to the consistent originalist, if there were such a person, they would always be irrelevant." RICHARD A. POSNER, OVERCOMING LAW 253 (Harvard Univ. Press 1995).

14. Edwin L. Felter, Jr., Judicial Independence: A Universal Value, Speech at the Council of Canadian Administrative Tribunals Fourth International Administrative Law Conference, Quebec City, Quebec (June 2001).

into slavery. The Africans were later apprehended on the vessel near Long Island, New York, by the U.S. Navy and taken into custody. Widely publicized litigation ensued. The movie depicts one lonely federal judge standing up against the administration of President Martin Van Buren (whose administration, trying to avoid a conflict between North and South, supported the property rights of those to whom the alleged slaves were consigned) and Congress. The federal judge found that the initial transport of the Africans across the Atlantic (which was not on the Amistad) had been illegal and the rebels were not legally slaves but free. The U.S. Supreme Court affirmed this finding on March 9, 1841, and the Africans traveled home in 1842.[15] The movie presents a moving portrayal of the cherished American value of judicial independence, standing firm against the weight of public sentiment, Congress, and the presidential administration of Martin Van Buren. Indeed, without judicial independence implementation of the Civil Rights Act of 1964 may have been a long-time coming.

The decisional independence of judges, including judges in the administrative law judiciary, is the cornerstone of our constitutional system of separation of powers. Legislative bodies make the laws, based on their perceptions of the popular will, and they have the power to implement the laws through the power of appropriating monies. The executive branch enforces the laws through its police and sheriffs. The judicial branch, including the administrative law judiciary (within the executive branch), has neither the power to appropriate monies nor the police force to enforce its decrees. It has been characterized as the weakest branch of government, yet it has the last word. The judicial power lies in the public's silent and enduring agreement to abide by the decisions of the judiciary, and to treat the decisions as final unless appealed. Indeed, the judiciary's legitimacy and efficacy derives largely from the public's confidence in its fairness and fidelity to the law.[16] Public confidence is essential to the judicial branch.[17] To citizens of those countries where independent judiciaries are not a given, the respect Americans accord judicial decisions (whether they agree or disagree) is a great mystery. The administrative law judiciary is meant to represent a fair and impartial mechanism in the executive branch, whereby the individual person and the government agency stand on equal ground. Indeed, the administrative law judge's obligation to be decisionally independent is the same as the obligation of a judicial branch judge.

15. United States v. Libellants & Claimants of The Schooner Amistad, 40 U.S. 518, 597 (1841).

16. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 752 (1999).

17. United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

The late Chief Justice William Rehnquist said that an independent judiciary is the "crown jewel of our democracy."[18] A colleague tells a story about his experience as a civil procedure consultant in Vietnam. He told his Vietnamese audience about the U.S. Supreme Court opinion that affirmed a federal judge's decision ordering President Harry Truman to cease and desist from barring a strike of one of the nation's largest steel companies at the beginning of the Korean War.[19] A member of the audience asked if the judge was taken out and shot. My colleague replied, "No, he went on to his next docketed case." In our system, even the President of the United States must obey court orders.

Judicial independence is a cherished international and national value. The Bangalore Principles of Judicial Conduct (2002),[20] Value 1, provides: "Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects."[21]

Canon 1 of the American Bar Association Model Code of Judicial Conduct (2007) states: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary . . . ."[22] Most jurisdictions in the United States have provisions in their codes of judicial conduct concerning the independence of the judiciary similar to those in the ABA Model Code.[23]

Decisional independence, especially for members of the administrative law judiciary, does not come without great accountability. Indeed, the American Bar Association felt it necessary to adopt a resolution supporting the decisional independence of administrative law judges, conditioned on the proposition that "members of the administrative [law] judiciary be held accountable under appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct."[24]

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18. Edwin L. Felter, Jr., *Maintaining the Balance Between Judicial Independence and Judicial Accountability in Administrative Law*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 89, 93 (1997).

19. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

20. BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002) (adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002 (those countries participating included Brazil, the Czech Republic, Egypt, France, Mexico, Mozambique, The Netherlands, Norway, The Philippines, Madagascar, Hungary, Germany, Sierra Leone, United Kingdom, and the U.S.A)).

21. *Id.*; Value 1: Independence, Principle. Application 1.1 provides: "A judge shall exercise judicial function independently (emphasis added) on the basis of the judge's assessment of the facts in accordance with a conscientious understanding of the law, free from any extraneous influences, pressures, threats, or interference, direct or indirect, from any quarter or for any reason." *Id.*

22. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

23. *See, e.g.*, COLO. CODE OF JUDICIAL CONDUCT Canon 1 (2007) (stating "A judge should uphold the integrity and independence of the judiciary.").

24. ABA HOUSE OF DELEGATES RES. 101B (2001) (enacted) (on file with author).

## IV. ACCOUNTABILITY THROUGH "REASONED ELABORATION" AND THE RIGHT TO APPEAL

Legislative bodies make decisions, based on public comment and perceptions of the public will, without being required to support those decisions with underlying reasons (other than a prefatory statement in a bill to the effect: "In order to protect the public health, safety and welfare . . . ."). Legislative decisions are reflected in bills that become laws. The executive branch, charged with enforcing those laws, may or may not be required to give reasons in support of executive branch enforcement actions (administrative law adjudications are *not* part of these enforcement actions). The policeman making an arrest is not required to articulate underlying reasons for doing so, other than stating the facts, which must establish probable cause before a court. A court then decides whether or not there was probable cause to believe that the subject committed the crime and should be bound over for trial. Because judicial branch decisions are not based on majority vote reflecting the popular will, or on a clear mandate to enforce the law, one of the forms of accountability for judicial outcomes is a requirement of "reasoned elaboration,"[25] applying the law to the facts and giving reasons why the judge arrived at the specific outcome in the case.

The right to appeal is another form of accountability, whereby the appeals tribunal must state reasons why the judge below was correct or incorrect. This requirement is especially visible, and more pronounced, in the administrative law judiciary, after an agency takes final agency action on the administrative law judge's findings of fact, conclusions of law, and order. Although the ALJ functions in the executive branch, the ALJ performs a judicial function. In the judicial branch, "reasoned elaboration" may not always be formally required at the trial level. It most certainly is required at the appellate level. "Reasoned elaboration" is almost universally prescribed by a codified and formal mechanism at the first level of adjudication by the administrative law judiciary.[26]

The Federal Administrative Procedure Act (APA),[27] as well as the APA of almost every state,[28] requires the administrative law judge to

25. "Reasoned elaboration" is the notion that the rules and guidelines involved in judicial decisionmaking are sufficient to create substantial constraint on both process and outcome, and, when properly followed, will incline courts towards the substantively best outcome. The constraints emphasized in "reasoned elaboration" are public explanation, consistency, and sensitivity to (legislative) purpose. ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 126-27, 138-42 (Cambridge Univ. Press 1998).

26. *See* Professor Michael Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact & Conclusions of Law*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 151, 171 (1997).

27. 5 U.S.C. § 557(c)(3) (2008) (providing "All decisions, including initial, recommended, and tentative decisions . . . shall include a statement of findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record . . . .").

28. ALA. CODE § 41-22-15 (2008); ARIZ. REV. STAT. ANN. § 41-1063 (2008); ARK. CODE ANN. § 25-15-210 (West 2008); CAL. GOV'T CODE § 11425.50 (West 2008); CONN. GEN. STAT.

articulate findings of fact and conclusions of law that tie the findings of fact into the applicable rules, statutes, or cases, and stating the reasons for the decision. The Proposed Model State Administrative Procedure Act (2008), requires that a recommended or final order "must include separately stated findings of fact and conclusions of law on all material issues of fact, law, or discretion . . . ."[29] California's Administrative Procedure Act adds one more measure of accountability in ALJ decisions: an ALJ is required to articulate reasons supporting credibility determinations.[30] On judicial review, the reviewing tribunal "shall give great weight to the [credibility] determination" to the extent that it "identifies the observed demeanor, manner, or attitude of the witness that supports it."[31]

## V. RIGHT TO APPEAL / ACCESS TO THE COURTS

The right of access to judicial review of executive branch actions was first clearly pronounced in *Marbury v. Madison*.[32] One hundred and sixty-four years later, the U.S. Supreme Court announced a presumption of reviewability of administrative agency actions, including ALJ decisions.[33] The Federal APA and each state APA provides for judicial review of final administrative agency actions.[34]

APA provisions for judicial review set forth appellate standards for correcting lower tribunal errors. The scrutiny of an appellate tribunal is an important accountability measure for outcomes in specific cases. In-

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ANN. § 4-179 (West 2008); DEL. CODE. ANN. tit. 29, § 10128 (2008); D.C. CODE § 2-509(e) (2001); FLA. STAT. ANN. § 120.57(1)(k) (West 2008); GA. CODE ANN. § 50-13-17(b) (West 2008); HAW. REV. STAT. § 91-12 (2008); IDAHO CODE ANN. § 67-5248 (2008); 5 ILL. COMP. STAT. ANN. 100/10-50(a) (West 2008); IND. CODE ANN. § 4-21.5-3-27 to -28 (West 2008); IOWA CODE ANN. § 17A.16 (West 2008); KAN. STAT. ANN. § 77-526 (2006); KY. REV. STAT. ANN. § 13B.120 (West 2008); LA. REV. STAT. ANN. § 49:958 (2008); ME. REV. STAT. ANN. tit. 5, § 9061 (2008); MD. CODE ANN., STATE GOV'T § 10-221 (West 2008); MASS. GEN. LAWS ch. 30A, § 11 (2008); MICH. COMP. LAWS § 24.285 (2008); MINN. STAT. § 14.62 (2007); N.J. STAT. ANN. § 52:14B-10(c) (West 2008); N.M. STAT. § 12-8-12 (West 2008); N.Y. A.P.A. LAW § 307 (McKinney 2007); N.C. GEN. STAT. ANN. § 150B-34 (2008); OHIO REV. CODE ANN. § 119.09 (West 2008); OKLA. STAT. ANN. tit 75, § 311 (West 2008); R.I. GEN. LAWS § 42-35-12 (2008); S.C. CODE ANN. § 1-23-350 (2007); S.D. CODIFIED LAWS § 1-26-25 (2008); TENN. CODE ANN. § 4-5-314 (2008); TEX. GOV'T CODE ANN. § 2001.141 (Vernon 2008); UTAH CODE ANN. § 63G-4-208(1) (2008); VT. STAT. ANN. tit. 3, § 812 (2007); VA. CODE ANN. § 2.2-4020 (2008); WASH. REV. CODE § 34.05.461 (LexisNexis 2008); W. VA. CODE ANN. § 29A-5-3 (LexisNexis 2008); WIS. STAT. ANN. § 227.47 (West 2008); WYO. STAT. ANN. § 16-3-110 (2008); *see* TEX. GOV'T CODE ANN. § 2001.058(e) (Vernon 2008) (providing that "a state agency may change a finding of fact" and must state written reasons for the legal basis of the change); *see also* Shelia Bailey Taylor, *The Growth and Development of a Centralized Administrative Hearing Process in Texas*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 113, 115 (1997).

29. MODEL STATE ADMIN. ACT § 417(d) (Proposed Draft 2008). The corresponding provision in Colorado, for example, requires the same ingredients in an ALJ decision. *See* COLO. REV. STAT. § 24-4-105(14)(a) (2008).

30. CAL. GOV'T CODE § 11425.50(b) (2008).

31. *Id.*

32. 5 U.S. 137, 146 (1803).

33. Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967).

34. 5 U.S.C. § 704 (2008); *see, e.g.*, ARK. CODE ANN. § 25-15-212 (2008); OKLA. STAT. tit. 75, § 318 (2008).

deed, appeal is the appropriate remedy to address legal errors at lower court and administrative agency levels.

Adherence to the doctrine of *stare decisis*,[35] or precedent, in the Anglo-American system of jurisprudence provides another measure of judicial accountability. Once a precedent-setting court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it in all future cases, where the facts are substantially the same.[36] Nevertheless, when a judge commits a legal error, appeal on the merits, as opposed to judicial discipline, is usually the appropriate avenue of recourse.[37] Legal error, however may amount to judicial misconduct in unusual cases, making judicial discipline appropriate. Such recourse is highly sensitive because of the potential impact on decisional independence.[38]

In *Oberholzer v. Commission on Judicial Performance*,[39] the California Supreme Court distinguished legal error from judicial misconduct, setting forth the following factors relevant to a finding of misconduct: repeated error, bias, abuse of authority, disregard for fundamental rights, *intentional disregard of the law*, or any purpose other than the faithful discharge of judicial duty.[40]

In a highly publicized California case, Justice Anthony Kline (of an intermediate appellate court) stated in a dissenting opinion that he would decline to follow the decision of California's highest appellate court, indicating that the opinion in question was "analytically flawed and empirically unjustified," and Justice Kline opined that his dissent constituted one of the "rare instances in which a judge of an inferior court can properly refuse to acquiesce in the *precedent* established by a court of superior jurisdiction."[41]

Justice Kline was charged with "refusal to follow the law as established by the California Supreme Court in violation of the Code of Judicial Ethics."[42] Ultimately, the Commission applied *Oberholzer* standards and concluded that Justice Kline's "argument for a narrow exception to

35. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990) ("To abide by, or adhere to, decided cases.").

36. Moore v. City of Albany, 98 N.Y. 396, 410 (1885).

37. *See, e.g., In re* Quigley, 32 N.Y.S. 828, 829 (1895); Murtagh v. Maglio, 195 N.Y.S.2d 900, 905 (1960); State *ex rel.* Okla. Bar Ass'n v. Sullivan, 596 P.2d 864, 869 (Okla. 1979).

38. *See* Gerald Stern, *Is Judicial Discipline in New York a Threat to Judicial Independence?*, 7 PACE L. REV. 291, 303-45 (1987).

39. 20 Cal. 4th 371 (1999).

40. *Id.* at 397-98.

41. Morrow v. Hood Commc'ns, Inc., 59 Cal. App. 4th 924, 926-27 (1997) (Kline, J., dissenting) (emphasis supplied).

42. *In re* Kline, No. 151 (Cal. Comm'n on Jud. Performance August 19, 1999) (decision and order of dismissal).

the *stare decisis* principle . . . was [not] so far-fetched as to be untenable."[43]

Some agencies, however, have refused to adhere to *stare decisis* as a matter of policy. In the 1920s, the Internal Revenue Service created the concept of *non-acquiescence* as a method to inform taxpayers of its intention not to follow a decision of the Board of Tax Appeals, which Congress created to provide an independent tribunal to hear taxpayer appeals.[44] The Social Security Administration (SSA) follows a policy of non-acquiescence, which is that the SSA only follows the decisions of the U.S. Supreme Court and not those of the U.S. Circuit Court of Appeals unless it decides to change regulations based on a court of appeals opinion, or unless the SSA decides to acquiesce in a particular decision. Its rationale is to maintain uniformity throughout the United States.[45] This policy forces the SSA administrative law judges to choose between obeying the administrators of the SSA, or following the law as interpreted by the respective circuit court of appeals, as is ordinarily done by other litigants.[46]

Anecdotally, a friend, who is a U.S. District Judge, characterizes the SSA's policy of non-acquiescence as a "recipe for anarchy." The author agrees and sees the policy as significantly undermining the principle of *stare decisis*, which in fact extends into the administrative law judiciary, and replacing the supremacy of the courts with the supremacy of the executive branch bureaucracy at the top of the SSA. This may be reminiscent of one of the banana belt republics of yore, where the highest court of the country was accountable to, and obeyed, the president of the republic. Originalists and textualists must concede that this is not what our founding fathers (original framers) had in mind.

## VI. ACCOUNTABILITY TO CODES OF JUDICIAL CONDUCT

A code of judicial conduct provides every canon or rule necessary to make judges accountable in all respects. Administrative law judges in three central panel[47] states (Colorado, Georgia and Minnesota) are officially subject to the code of judicial conduct for the respective state's

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43. *Id.*

44. Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471, 474 n.5, 478 n.17 (1986).

45. *See* Ass'n of Admin. Law Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1139 (D.D.C. 1984).

46. Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U. L. REV. 1, 8-10 & n.60 (1987). For a thorough discussion of the predicament of ALJs at the SSA, see Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 267 (2003).

47. A "central panel" is an independent agency in which a jurisdiction's adjudications are centralized. Central Panels are best described as an executive branch judiciary.

judicial branch.[48] Several states provide that the rules of professional conduct for attorneys apply to the ALJs.[49] Other states have adopted their own codes of judicial conduct, patterned after the ABA Model Code of Judicial Conduct for State Administrative Law Judges.[50]

Members of a state administrative law judiciary, who are civil servants, are subject to their respective constitutional provisions, statutes, and rules dealing with performance of duties by state employees, and providing sanctions for misconduct. In Colorado, for instance, members of the administrative law judiciary are appointed to their positions under the State Personnel System, which is in the state constitution.[51] According to the Colorado Constitution:

> A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with *standards* of efficient service or competence, or for *willful misconduct*, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude . . . .[52]

By virtue of the fact that the judicial branch code of judicial conduct applies to the administrative law judges in Colorado's central panel,[53] it follows that a breach of the code of judicial conduct would be either "failure to comply with standards" or "willful misconduct" under the constitutional state personnel system and, if proven after notice and a hearing, the ALJ could ultimately be dismissed, suspended, or otherwise disciplined for a violation of the code of judicial conduct.

The American Bar Association Model Code of Judicial Conduct (2007) notes: "Each jurisdiction should consider the characteristics of particular positions within the administrative law judiciary in adopting, adapting, applying, and enforcing the Code for the administrative law

48. COLO. REV. STAT. § 24-30-1003(4)(a) (2008); GA. CODE ANN. § 50-13-40(c) (2008) (subjecting ALJs by virtue of the chief administrative law judge's adoption of a rule); MINN. STAT. ANN. § 14.48(d) (2007).

49. COLO. OFFICE ADMIN. CTS., *Comparison of Central Panel States Chart*, Table B (2003) (citing Arizona, California, Michigan, Missouri, North Carolina, North Dakota, and South Carolina) (on file with author).

50. *See* LA. REV. STAT. ANN. § 49:996 (2008); MD. CODE ANN., STATE GOV'T § 9-1604(a)(9) (2008) (stating that the Chief Administrative Law Judge is required to develop a code of professional responsibility for administrative law judges); N.J. STAT. ANN. § 52:14F-5 (2008); TENN. CODE. ANN. § 4-5-321(a)(4)(b) (2008); TEX. GOV'T CODE ANN. § 2003.022(d)(3) (2008) (emulating the ABA Model Code for State ALJs).

51. COLO. CONST. art. XII, § 13, cl. 8; *see also* Dep't of Insts. v. Kinchen, 886 P.2d 700, 704 (Colo. 1994) (en banc).

52. COLO. CONST. art. XII, § 13, cl. 8 (emphasis added); *see also* COLO. REV. STAT. § 24-50-125(1) (2008).

53. COLO. OFFICE ADMIN. CTS., *supra* note 49.

judiciary."[54] The ABA Federal ALJ Model Code and the ABA State ALJ Model Code are both endorsed by the ABA National Conference of the Administrative Law Judiciary.[55]

The U.S. Court of Appeals for the Ninth Circuit addressed the applicability of the ABA's Model Code for Federal administrative law judges and found that the Code is not binding on those judges within the Social Security Administration because the SSA had not specifically adopted it as binding.[56]

For the purposes of this article, reference is made to the ABA Model Code of Judicial Conduct (2007) to illustrate tenets of conduct in typical codes of judicial conduct. Also, the Bangalore Principles of Judicial Conduct (2002)[57] set forth fundamental principles of judicial conduct.

The ABA Model Code sets forth four principal canons: (1) "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid the appearance of impropriety"; (2) "A judge shall perform the duties of judicial office impartially, *competently*, and *diligently*"; (3) "A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office"; and (4) A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.[58] The canons, which state overarching principles of judicial ethics, are broken down into *rules*, which are enforceable in judicial disciplinary actions.[59]

The Bangalore Principles of Judicial Conduct present six judicial ethics values: (1) Independence; (2) Impartiality; (3) Integrity; (4) Propriety; (5) Equality; and (6) Competence and Diligence. These values are broken down into tenets, referred to as "Application," which deal with more specific mandates relating to the specific "Value."[60]

The Bangalore Principles, the ABA Model Code, and all other codes of judicial conduct set forth a comprehensive set of performance standards for judicial branch and executive branch judges (administrative law judges). An examination of the enforceable rules under the ABA

54. MODEL CODE OF JUDICIAL CONDUCT Application, pt. VI, cmt. n.1 (2007); *see, e.g.*, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES (1989); MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES (1995).

55. MODEL CODE OF JUDICIAL CONDUCT Application, pt. VI, cmt. n.1 (2007); MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES (1989); MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES (1995).

56. Lowry v. Barnhart, 329 F.3d 1019, 1023-24 (9th Cir. 2003).

57. *See* BANGALORE PRINCIPLES OF JUDICIAL CONDUCT, Values, *supra* note 20.

58. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007); MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2007) (emphasis supplied); MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2007); MODEL CODE OF JUDICIAL CONDUCT Canon 4 (2007).

59. MODEL CODE OF JUDICIAL CONDUCT Scope, para. 2 (2007).

60. *See* BANGALORE PRINCIPLES OF JUDICIAL CONDUCT, Values, *supra* note 20.

Model Code illustrate that no other performance standards are necessary in order to achieve a high degree of judicial accountability.

For those administrative law judges who are not subject to a code of judicial conduct, but only to the rules of professional conduct for lawyers (assuming a law license is necessary to serve), the code of judicial conduct is the only yardstick available to hold a lawyer and administrative law judge accountable for misconduct of a purely judicial nature. Indeed, judicial misconduct, when there is no adopted code of judicial conduct, would amount to "conduct that is prejudicial to the administration of justice,"[61] under the rules of professional conduct for attorneys.

Administrative law judges who are licensed attorneys may be subject to three separate legal schemes of accountability and discipline: the code of judicial conduct; the rules of professional responsibility for lawyers; and, civil service rules concerning ethical and efficient standards of public service. If certain administrative law judges are neither lawyers nor civil servants, they will be subject to internal standards developed by their respective organizations, and potentially to political accountability, depending on how politically responsive their employing agencies are on adjudication issues. The administrative law judges, however, may dodge the bullet of political accountability depending upon the good graces of their supervisors and their appointing authorities.

In Colorado for instance, a certified civil servant may be "dismissed, suspended, or otherwise disciplined . . . upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude . . . ."[62] Violation of the code of judicial conduct in the performance of judicial duties qualifies as a violation of the civil service provisions. For misconduct of a purely judicial nature, attorney regulation systems and state appointing authorities that are responsible for dealing with civil servant misconduct and discipline, if appropriate, will use the code of judicial conduct as a yardstick, whether or not it has officially been made applicable.

## VII. AN EFFECTIVE COMPLAINT SYSTEM IS NECESSARY FOR ACCOUNTABILITY

Accountability to "reasoned elaboration," appeals on the merits, codes of judicial conduct, and performance codes will only be meaningful if an effective enforcement mechanism to address misconduct exists. Such mechanisms exist for the federal judiciary, and for the judiciary of

61. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (1980).
62. COLO. CONST. art. XII, § 13(8); COLO. REV. STAT. § 24-50-125(1) (2007).

every state in the U.S.[63] One hundred years ago, the only way to remove a federal, Article III, judge was through impeachment and conviction by Congress.[64] Now, there is a mechanism for the discipline of errant federal judges.[65] State administrative law judges who are civil servants are accountable to their respective state performance codes. These performance codes derive authority either from the state constitution or from statutory law.

Federal administrative law judges, who are under the Federal Administrative Procedure Act (APA), are independent of the agencies over whose adjudications they preside. The Office of Personnel Management prescribes their pay without regard to agency evaluations.[66] A federal agency *cannot* take disciplinary action against a federal ALJ, who is under the Federal APA. The agency stands in the position of a party litigant (complainant), and it must establish that good cause for discipline exists through a formal adjudicatory proceeding before the Merit System Protection Board (MSPB), an independent agency that has its own independent administrative law judges. The MSPB then may impose discipline, if appropriate.[67]

State administrative law judges are treated as "employees" on the one hand, and as "judicial officers" on the other hand.[68] These individuals either work in an agency or in an independent central panel.[69] With the exception of New Jersey (the Governor appoints each ALJ) and South Carolina (the House of Burgesses appoints each ALJ), the Chief ALJ or Director of the central panel is usually the appointing authority with the duty of hiring and firing ALJs.[70] The power to hire and fire administrative law judges for the central panel of the District of Columbia is in its Commission on Selection and Tenure of Administrative Law Judges.[71] In central panel states, where the judges are civil servants, the chief's (appointing authority's) firing decisions are subject to appeal to a state civil service commission, which frequently has its own independent

63. American Judicature Society, http://www.ajs.org/ethics/eth_conduct-orgs.asp (last visited Oct. 18, 2008).

64. *See* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006).

65. *See* Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364 (2008).

66. 5 U.S.C. § 5372 (2008).

67. 5 U.S.C. § 3105 (2008).

68. *See* Edwin L. Felter, Jr., *Special Problems of State Administrative Law Judges*, 53 ADMIN. L. REV. 403 (2001).

69. *See* Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75 (1994) (describing central panels as operating in complete independence from agencies). At present there are 25 state central panels (Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Iowa, Louisiana, Massachusetts, Maryland, Maine, Michigan, Minnesota, Missouri, North Carolina, North Dakota, New Jersey, Oregon, South Carolina, South Dakota, Tennessee, Texas, Washington, Wisconsin, and Wyoming), and three city central panels (Chicago, New York City and Washington, D.C.) COLO. OFFICE ADMIN. CTS., Comparison of OAC to Other Central Panels, Table A (on file with author).

70. COLO. OFFICE ADMIN. CTS., *supra* note 69.

71. D.C. CODE § 2-1831.11 (2008).

administrative law judges.[72] In jurisdictions without central panels, administrative law judges are generally hired and fired by the agency or by the agency's general counsel. In these jurisdictions, if the agency employees are civil servants, the administrative law judges in the agency are generally civil servants.

State administrative law judges who are civil servants are ordinarily accountable through "judgmental" performance evaluations, which could result in a firing, demotion, pay raise or promotion.[73] "Judgmental evaluations" count in terms of pay, status, tenure, promotion, demotion or firing, and they have been a fact of life for state administrative law judges, who are civil servants, for a long time. "Developmental evaluations" cannot affect pay, status, tenure, promotion, demotion, or firing. They are for the edification and improvement of the judge being evaluated. Developmental evaluations are becoming more and more prevalent for the judicial branch with the establishment of twenty state judicial performance evaluation programs,[74] which are discussed in more detail below. The results of developmental evaluations in the judicial branch, as structured and analyzed below, can have career-ending consequences for the judicial branch judges evaluated.

With the exception of the District of Columbia Office of Administrative Hearings (where performance evaluations are done by a commission[75]), the chief administrative law judge usually ratifies the one-on-one performance evaluation of a supervisory judge. Potential flaws, and potential inappropriate influences on judicial independence, are noted in an article indicating that the goals of any system are often difficult to meet because of inherent weaknesses of human beings.[76] Alexander Hamilton noted in the Federalist papers that "in the general course of human nature, a power over a man's subsistence amounts to a power over his will."[77] In contrast, judicial branch performance evaluations may have less potential for being flawed because they are done by commissions that are appointed in a manner similar to the method of appointment for judicial discipline commissions, and members of the commissions presumably end up being accountable to each other.

Colorado's central panel of the administrative law judiciary sets forth a detailed system for the handling of complaints against administra-

72. Felter, *supra* note 68, at 406 (including California, Colorado, Florida, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Washington, and Wisconsin).

73. *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 55.

74. Rebecca Kourlis, Op-Ed., *Colorado Judiciary a Leader*, THE DENVER POST, June 29, 2008, at D3.

75. D.C. CODE, *supra* note 71.

76. *See* Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 1 (1997).

77. THE FEDERALIST No. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

tive law judges on its website.[78] Section II (b) of the policy states: "Complaints about a particular judge must be in writing, and must be addressed to the Office Director (Chief Judge)."[79] Section III (a) provides: "In no instance shall the complaint be disclosed to the judge during the pendency of the matter in question."[80] Section III (c) states:

> Following the final conclusion of the matter, the Chief Judge shall discuss the complaint with the judge (this includes an investigation, if necessary) to determine whether it is well grounded and whether any changes are warranted. Complaints found to be both warranted and serious may be made a part of the judge's personnel file (inherently included in such a finding is the potential of discipline, up to and including termination from employment).[81]

## VIII. DISCIPLINE IN THE JUDICIAL BRANCHES OF THE STATES

State judicial discipline commissions are housed within the judicial branch of government. These commissions ordinarily do not have jurisdiction or authority over administrative law judges because they are in the executive branch of government. The creators of the commissions implicitly recognized a constitutional separation of powers problem if the power to hire and fire executive branch employees (administrative law judges), outside of the context of an appeal, were bestowed on a judicial discipline commission. Other than those discussed herein, there are additional judicial discipline commissions at the state level.[82]

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78. Colorado Office of Administrative Courts Homepage, http://www.colorado.gov/dpa/oac/DirectorsPolicies.htm (last visited Oct. 18, 2008).

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* Florida Judicial Qualifications Commission, http://www.floridasupremecourt.org/pub_info/jqc.shtml; Georgia Judicial Qualifications Commission, http://www.georgiacourts.org/agencies/jqc/; Indiana Judicial Qualifications Commission, http://www.in.gov/judiciary/jud-qual/about.html; Iowa Judicial Qualifications Commission, http://www.judicial.state.ia.us/Self_Help/Complaints/About_Judges/index.asp; Kansas Commission on Judicial Qualifications, http://www.kscourts.org/Appellate-Clerk/General/commission-on-judicial-qualifications/default.asp; Kentucky Judicial Conduct Commission, http://courts.ky.gov/jcc/; Maryland Commission on Judicial Disabilities, http://www.mdcourts.gov/cjd/about.html; Missouri Commission on Retirement, Removal, and Discipline of Judges, http://www.courts.mo.gov/SUP/index.nsf/0/d9e62cc0dfa6cf1f86256620005b4f38?OpenDocument; Montana Judicial Standards Commission, http://courts.mt.gov/supreme/boards/jsc.asp; Nebraska Commission on Judicial Qualifications, http://www.supremecourt.ne.gov; New Hampshire Judicial Conduct Committee, http://www.courts.state.nh.us/committees/judconductcomm/index.htm; New York State Commission on Judicial Conduct, http://www.scjc.state.ny.us/Legal%20Authorities/legal.htm; Ohio Board of Commissioners on Grievances and Discipline, www.sconet.state.oh.us/boc; Oregon Commission on Judicial Fitness and Disability, www.ojd.state.or.us/aboutus/cjfd/index.htm; Rhode Island Commission on Judicial Tenure & Discipline, www.courts.state.ri.us/supreme/jtd/defaultjtd.htm; South Carolina Commission on Judicial Conduct, www.judicial.state.sc.us/discCounsel/commissionJC.cfm; South Dakota Judicial Qualifications Commission, http://www.sdjudicial.com/index.asp?category=jqc&nav=0; Tennessee Court of the Judiciary, www.tsc.state.tn.us/OPINIONS/TSC/RULES/TNRulesOfCourt/ctjudindex.htm; Texas State Commission on Judicial Conduct, http://www.scjc.state.tx.us/; Utah Judicial Conduct Commission,

Common threads of similarity run through judicial discipline mechanisms in the states. Most commissions are creatures of their respective state constitutions and their members are appointed by a constitutionally prescribed mix of individuals, e.g., the chief justice, the governor, the attorney general, the bar association.

In some cases, the commissions have the power to remove judges from the bench or impose other discipline. In other cases, the commissions make recommendations for removal or discipline to the highest court of the state. In all cases, the commissions function as tribunals that deal with complaints against judges. They are constituted to function in a manner similar to an attorney discipline system, i.e., receiving complaints, handling the complaints informally, conducting "probable cause" proceedings, and conducting full blown hearings on the merits where the judge is afforded the full panoply of due process rights, including the right to be represented by counsel, the right to discovery, and the right to have the charging authority prove the allegations against the judge by a recognized standard of proof, ordinarily by "clear and convincing evidence."

In appropriate cases, a commission may also provide for diversion of a judge with mental or substance abuse problems. Ordinarily, the proceedings are confidential until and unless public discipline is imposed. The unwritten, inherent reasons for the confidentiality are that it would not be good to air the dirty linen of the judiciary in public on a frequent basis because of the great potential of eroding the public confidence and independent and competent judiciary.[83]

## IX. JUDICIAL PERFORMANCE EVALUATIONS IN THE ADMINISTRATIVE LAW JUDICIARY: ANOTHER FORM OF ACCOUNTABILITY

Judicial performance evaluations for administrative law judges, who are civil servants, are ordinarily performed by a supervisory ALJ. Using Colorado as an example, primarily as a concession to the shortness of life, there are three principal tools for the measurement of performance and the accountability of Colorado administrative law judges. These tools include: (1) "judgmental" performance evaluations mandated by the State Personnel System: (2) an annual, anonymous ALJ performance survey; and, (3) a "quality assurance review" program (a developmental, confidential peer process for the review of decisions).

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http://jcc.utah.gov/aboutus.html; Vermont Judicial Conduct Board, www.vermontjudiciary.org/Committees/boards/jcbcomplaint.htm; Virginia Judicial Inquiry & Review Commission, www.courts.state.va.us/jirc/main.htm; Washington State Commission on Judicial Conduct, www.cjc.state.wa.us; West Virginia Judicial Investigation Commission, http://www.state.wv.us/wvsca/JIC/geninfo.htm; Wisconsin Judicial Commission, http://www.wicourts.gov/about/committees/judicialcommission/index.htm; Wyoming Commission on Judicial Conduct & Ethics, http://judicialconduct-wy.us/const.php (all websites listed supra last visited Oct. 17, 2008).

83. *See* Appendix *infra*, at pp. 24-28.

*A. Judgmental Evaluations of ALJs*

Performance criteria for administrative law judges in the Office of Administrative Courts (Administrative Courts) are included on a standard form prescribed by the State Department of Personnel and Administration.[84] There are general criteria for all employees of the Department,[85] designated as core competencies (communication, customer service/interpersonal skills, and credibility/accountability/job knowledge).[86] Adherence to the code of judicial conduct is measured under the "Core Competency" standards.[87] Next, there are specific performance measurement standards for administrative law judges, including "decision quality,"[88] "quality of hearings"[89] ("conducting hearings effectively and fairly"), and "timeliness of decisions."[90]

There are three levels of rating in the Department's and Administrative Court's Performance Management System: (1) exceptional; (2) successful; and (3) needs improvement ("needs improvement" is tantamount to an unsatisfactory rating). An overall "exceptional" rating results in a non-base building cash bonus for the year (usually $500). An overall "successful" rating results in the maximum base building cost-of-living increase for the professional class of which administrative law judges are a part. An overall "needs improvement" rating may result in a "corrective action," and if the ALJ does not meet the goals of the corrective action in the time specified in the corrective action for meeting those goals, it may result in dismissal from state service.[91]

*B. Developmental, Anonymous Performance Surveys of ALJs*

Besides the "judgmental" performance evaluations of ALJs in Colorado, the Integrated Document Solutions (IDS) Unit of the State Department of Personnel and Administration conducts an anonymous, "developmental" survey of each ALJ, sending out questionnaires to 2,000 people, selected by IDS, who appeared or were otherwise present before an administrative law judge for the year surveyed.[92] Neither the OAC nor the Department of Personnel and Administration have access to or know the names of those surveyed; and, they do not have access to the process until the process is completed.[93] Respondents to the survey are asked to

84. COLO. OFFICE ADMIN. CTS., Performance Management Form (on file with author).
85. The Colorado Office of Administrative Courts is a division of the State department of Personnel and Administration. *See* Colorado Department of Personnel & Administration, Office of Administrative Courts, http://www.colorado.gov/dpa/oac/ (last visited Oct. 18, 2008).
86. COLO. OFFICE ADMIN. CTS., *supra* note 84, at 1 (on file with author).
87. *See* Appendix *infra* at 28.
88. *Id.* at 29.
89. *Id.* at 30.
90. *Id.* at 3 (on file with author).
91. *Id.* at 4 (on file with author).
92. *Id.*
93. *Id.*

grade each ALJ from "A" to "F" (fail) in a number of different performance areas.

Respondents to the IDS Survey are asked to grade each ALJ, from "A" to "F", in the following categories: (1) explaining the proceedings, and what's going on in the hearing; (2) being prepared for the hearing and familiar with the case; (3) treating all participants with courtesy and respect; (4) providing adequate time for both sides to present their case ("allowing the questioning of witnesses without excessively or unnecessarily interrupting them"); (5) maintaining appropriate control over proceedings; (6) conducting proceedings in a neutral manner; (7) demonstrating knowledge of the applicable law; (8) applying rules of procedure and evidence appropriately; (9) timeliness of ruling on motions and other pre-hearing matters; (10) being clear and understandable; (11) showing an understanding of the issues in the case; (12) addressing all of the legal and factual issues in the case; (13) giving reasons for decision; (14) timeliness in issuing post-hearing decision; and, (15) doing a good job overall. Respondents are then encouraged to make written, anonymous comments on the administrative law judges' strengths and weaknesses.[94]

### *C. The Quality Assurance Review Program*

An additional accountability measure in the Colorado Office of Administrative Courts involves a "developmental" and confidential "Quality Assurance Review (QAR)" of decisions by peers. The QAR program is collegial and non-binding. Judges periodically submit up to six decisions a year to a colleague for a quality review. There are seven factors on the QAR Checklist: (1) appropriate title for decision; (2) clarity of language; (3) clarity of format; (4) grammar; (5) findings of fact support conclusions of law; (6) findings of fact properly distinguished from conclusions of law; and, (7) legal reasoning and citations to authority.[95]

## X. PERFORMANCE EVALUATIONS OF JUDGES IN THE JUDICIAL BRANCH

Originally, judicial performance evaluations were performed by bar associations for the purpose of imparting meaningful information on a judge's performance to the voting public. These evaluations were "developmental" (non-binding) and the results were for the judge's and the public's edification so the under performing judge could develop better judicial attributes. Now, many states have established official judicial performance evaluation commissions, often constituted in a manner quite similar to the manner judicial discipline commissions are constituted. These commissions have taken the place of bar association surveys, but they have far more clout. A judge with problem surveys is generally

94. COLO. OFFICE ADMIN. CTS., Performance Survey (on file with author).
95. COLO. OFFICE ADMIN. CTS., Quality Assurance Review Program (on file with author).

required to meet with the commission and address the problems indicated. One example of how a judicial performance commission functions was a situation where the public survey revealed that a judge, who shall remain unnamed, had an anger problem. The commission met with the judge and gave him an opportunity to respond. After the meeting, the commission and the judge agreed that the judge would attend anger management classes. This fact later appeared in the local newspaper, not because there was a leak, but because the commission's actions, for the most part, are deemed a matter of public record. In most instances, the outcomes are made public.

## XI. INAPPROPRIATE JUDICIAL PERFORMANCE EVALUATIONS

Despite (1) the widespread existence of constraints on judicial behavior, both public and private, (2) judicial discipline mechanisms and criteria for discipline, and (3) judicial evaluation mechanisms and criteria for evaluations, most of which is available to the public in order that it may make informed decisions on the retention or reelection of judges, there continues to be a public clamor for more accountability. The public sometimes does not seem to be quite sure of what kind of accountability they mean, or of what precise problems require more accountability. They just seem to know that those "darned judges go against the public will, make unreasonable decisions, and are accountable to no one the way legislators and other elected officials are accountable."

The U.S. Supreme Court opinion in *Republican Party of Minnesota v. White*[96] opened the door to the potential of more inappropriate judicial accountability measures. Essentially, the U.S. Supreme Court held that the "announce clause" in the Minnesota Supreme Court's canon of judicial conduct, which prohibited candidates for judicial election from *announcing* their views on disputed legal or political issues, violated the First Amendment to the U.S. Constitution.[97] Although an application of *Republican Party of Minnesota v. White* is limited to judicial election and reelection campaigns, the U.S. Supreme Court effectively determined that the First Amendment trumps state codes of judicial conduct concerning extra-judicial statements of judges in their campaigns.[98]

James Bopp, Jr., a Terre Haute, Indiana lawyer, who successfully argued *Republican Party of Minnesota v. White* before the U.S. Supreme Court, is on a crusade to eliminate prohibitions "against judicial candidates making 'pledges,' 'promises' or 'commitments' on controversies or issues that are inconsistent with impartiality on the bench."[99] Mr. Bopp is also challenging judicial canons that prohibit "partisan political activi-

96. 536 U.S. 765 (2002).
97. *Id.* at 788.
98. *Id.*
99. Terry Carter, *The Big Bopper: This Terre Haute Lawyer is Exploding the Cannons of Judicial Campaign Ethics*, 92 A.B.A. J. 30, 32-33 (Nov. 2008).

ties and direct solicitation of campaign funds" by judicial "candidates." He states, "While his clients want to know a candidate's personal values on issues such as abortion, they expect judges to follow the facts and law wherever they lead."[100] According to Mr. Bopp, "judicial candidates can be prohibited from saying 'I'll throw all drunk drivers in jail' or 'I'll overturn *Roe v. Wade* if given the chance . . . .'"[101]

Mr. Bopp's argument is disingenuous. It maintains that unless the judge announces a clear-cut pre-judgment, outright, e.g., "I'll overturn *Roe v. Wade* as soon as I get a chance," the judge can publicly express whatever controversial views he so desires without exposure to any consequences. Presumably, a logical extension of Mr. Bopp's argument is that the First Amendment trumps the ABA Model Code of Judicial Conduct (2007), and its state counterparts, which provide that a judge should *not* "participate in activities that will lead to frequent disqualification of the judge."[102] The underlying rationale of the argument would also appear to be at odds with the judicial ethics value of "helping one's colleagues with their caseloads."

Indeed, it is not that difficult to imagine the loneliest judge on the bench, who has received substantial reelection contributions from the Right-to-Life Committee, The Sons of Italy, and MADD (Mothers Against Drunk Driving) and who, in the exercise of her First Amendment right to speak publicly about controversial issues, says that she has very strong feelings against abortion, stem cell research, political demonstrators against our patriotic Columbus Day Parade, drunk drivers, and others. Thereafter, she gets a rash of cases involving any one or more of these controversial issues. The judge is then faced with motions to disqualify herself. Arguably, she could deny the motions, stating that, despite the political contributions and despite the public announcement of her strongly held views, she will be fair and impartial because she never said that she would rule against abortion clinics, drunk drivers, criminals, or Native American demonstrators at the Columbus Day Parade.

An appeals court may, however, reverse her on the basis that she should have disqualified herself; thus, the parties would have to go back to square one with another judge. Based on this scenario, the lonely judge could wind up being not very busy, and her colleagues would have to shoulder the added load resulting from her frequent disqualifications, triggered by the reversal of her previous refusal to disqualify herself.

Nevertheless, under Mr. Bopp's inherent argument, the First Amendment may trump the judge's ethical obligation to "cooperate with other judges and court officials in the administration of court busi-

100. *Id.* at 33.
101. *Id.*
102. MODEL CODE OF JUDICIAL CONDUCT Canon 3.1(B) (2007).

ness."[103] Indeed, one can imagine judicial campaign rhetoric, reminiscent of the movie *Hang 'Em High,* starring Clint Eastwood and Pat Hingle, stating, "elect me and I'll string 'em up high" (regardless of any considerations or factors contained in the Probation Department's presentence report, or other considerations concerning the imposition of an appropriate sentence based on the facts and the law).

Mr. Bopp is forcing the issue of judges' views on controversial political issues with the use of interest-group questionnaires being sent to judges up for retention or re-election, and to their challengers. The message behind the questionnaires is "judge, you can no longer hide behind the code of judicial conduct, in light of the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*, and if you decline to answer what my client constituency wants to know, it'll most likely cost you their votes."[104]

The receipt of the political questionnaire forces a different kind of accountability, such as: Is the respondent-judge the interest group's kind of judge? The other side of the controversy concerning the controversial political issue may have a problem with the judge's fairness and impartiality on that issue.

## CONCLUSION

The central question is whether we truly want judges who are politically accountable to the political clamor of the moment. If so, it may be better to have a legislative body, which represents constituencies of the public, vote on the resolution of specific controversies between litigants. Legislators are better suited to withstand the slings and arrows of public opinion. And, if they are wrong they can be tossed out of office in the next regular election. This is not what the founding fathers intended when they set up a system of separate but equal branches of government, with checks and balances. Indeed, the real strength of the United States is embedded in the legal mechanisms designed to respect the rights of minorities, no matter how unpopular or repugnant to the majority the exercise of those rights may be.

Indeed, if we could read the deepest hopes and values in the hearts of people in this country, we would find evidence that the judicial independence of their judges is a cherished value. We may find that Jane Q. Citizen believes that she has a chance to win against big government or big business or, in the case of administrative law, the big agency. We may also find an appreciation of the fact that judges are far more accountable than any other public official in the legislative or executive branch of government. We may find an appreciation of the proposition

103. *Id.* at Canon 2.5(B).
104. *See* Carter, *supra* note 99, at 34.

that "with great responsibility comes great accountability." The isolated horror stories in the press, concerning a few cases of extreme judicial misbehavior, and what happens to the misbehaving judges, illustrate that judges are accountable. Things do not end well for these judges.

Judges themselves must constantly create, develop and implement accountability measures and mechanisms that demonstrate to the public the high degree of accountability to which they are subject. Like Caesar's wife, they must at all times be above reproach, not only refraining from improprieties, but avoiding even the *appearance* of impropriety, despite the fact that they are human beings and heir to the frailties of the flesh.[105] The continued well-being of our system of government is dependent upon independent judges who are accountable to "reasoned elaboration," (i.e., giving reasons for their decisions); to being appealed and reversed if they make a legally wrong decisions; and to an appropriate code of judicial conduct that ensures that their conduct is above reproach; that they are fair and impartial to all; and, that they dispatch judicial business in a timely fashion. Judges have a continuing mission to educate the public that it is in their best interests to make sure that inappropriate judicial accountability measures are clarified so the public that cherishes judicial independence can see the measures for what they are, to get judges who are bought and paid for by one interest group or another.[106] By the same token, judges have an obligation to constantly demonstrate to the public that they are accountable to fairness, propriety, and the rule of law.

## APPENDIX

This appendix expands on the discussions in three of this article's sections: "Discipline in the Judicial Branches of the States"[107]; "Judgmental Evaluation of ALJs"[108]; and "Performance Evaluations of Judges in the Judicial Branch."[109]

First, "Discipline in the Judicial Branches of the States" provides an overview of eighteen states' mechanisms for judicial discipline, and includes citations for interested readers.

Second, "Judgmental Evaluation of ALJs" gives a full account of the criteria used by the Office of Administrative Courts for judgmental

105. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 1.2, which states: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." When faced with removing "the appearance of Impropriety" language from the Rule, the National Conference of State Chief Justices voted to leave it in. *See* Mark I. Harrison, *The 2007 Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 257, 262 (2007).

106. *See* JUDGE RICHARD FRUIN, JUDICIAL OUTREACH ON A SHOESTRING: A WORKING MANUAL (Judicial Division, ABA 1999).

107. *See* discussion *supra* Part VIII.

108. *See* discussion *supra* Part IX.A.

109. *See* discussion *supra* Part X.

evaluations. Because of the difficulty of obtaining the source for these criteria (it is on file with the author), the pertinent parts of its text are included here.

Finally, "Performance Evaluations of Judges in the Judicial Branch" discusses, in greater depth than the main text, Colorado's performance evaluation system for judges in the judicial branch, and then surveys thirteen other states' judicial performance evaluation mechanisms.

*A. Discipline in the Judicial Branches of the States*

The Constitution of the State of Alabama establishes a Court of the Judiciary, consisting of one appellate judge, two judges of circuit courts, one district judge, two members of the state bar, two non-lawyers appointed by the Governor, and one person appointed by the Lieutenant Governor.[110] The Court of the Judiciary has authority, after notice and public hearing:

> (1) to remove from office, suspend without pay, or censure a judge, or apply such other sanction . . . for violation of a Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or (2) to suspend with or without pay, or to retire a judge who is physically or mentally unable to perform his or her duties.[111]

The Alaska Commission on Judicial Conduct consists of three judge members, three attorney members and three public members.[112] Under the Commission's Rules of Procedure, Rule 15 (a), the Commission may recommend a full range of sanctions, up to and including removal from office, to the Supreme Court of Alaska.[113]

The Arizona Commission on Judicial Conduct was created in 1970.[114] It consists of eleven members with diverse backgrounds. Six judge members are appointed by the state supreme court: two from the court of appeals, two from the superior court, one from a justice court, and one from a municipal court.[115] Two attorney members are appointed by the board of governors of the State Bar of Arizona. Three public members who cannot be attorneys, or active or retired judges, are appointed by the governor and confirmed by the state senate.[116] The Com-

110. ALA. CONST. art. VI, § 157.

111. *Id.*

112. Alaska Comm'n on Judicial Conduct, http://www.ajc.state.ak.us/CONDUCT.htm (last visited Oct. 18).

113. Alaska Judicial Conduct Comm'n Rules, http://www.state.ak.us/courts/jcc.htm#15 (last visited Oct 18).

114. Arizona Comm'n on Judicial Conduct, http://www.supreme.state.az.us/ethics/Commission_on_Judicial_Conduct_Overview.htm (last visited Oct. 18, 2008).

115. ARIZ. CONST. art. 6.1 § 1.

116. Arizona Comm'n on Judicial Conduct, http://www.supreme.state.az.us/ethics/Commission_on_Judicial_Conduct_Overview.htm (last visited Oct. 18, 2008).

mission enabling provisions explicitly state that it "does not have jurisdiction over court employees, *administrative law judges* or federal judges."[117] The commission may reprimand an Arizona judicial branch judge informally for violating the Code of Judicial Conduct, or in some cases, the commission may file formal charges and hold a public hearing to consider evidence about the judge's conduct. If it finds that the judge committed misconduct, the commission can recommend that the state supreme court censure, suspend without pay, or remove the judge from office.[118]

The Judicial Discipline and Disability Commission of Arkansas may reprimand or censure a judge or, after notice and hearing and by majority vote, may recommend to the supreme court that a judge or justice be suspended, with or without pay, or be removed. Through silence, the Commission has jurisdiction and authority over constitutional judges but not over administrative law judges. In a hearing involving a justice of the Arkansas Supreme Court, all justices shall be disqualified from participation.[119]

The California Commission on Judicial Performance[120] hears cases involving judicial misconduct,[121] handles judicial disability retirement applications,[122] and is responsible for enforcement of the restrictions on judges' receipt of gifts and honoraria.[123] It has jurisdiction over California constitutional judges.

The Colorado Commission on Judicial Discipline consists of two judges of district courts and two judges of county courts, each selected by the supreme court; two licensed attorneys appointed by the governor with the advice and consent of the state senate; and four citizens, none of whom shall be a judge, active or retired nor admitted to practice law, appointed by the governor with the consent of the senate.[124] By virtue of its constitutional status, the Commission has jurisdiction over constitutional judges but not over executive branch statutory judges (administrative law judges). The Commission may order a formal hearing concerning discipline and, if the charges are substantiated, may recommend to the Colorado Supreme Court removal, retirement, suspension, censure, reprimand, or discipline.[125]

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117. *Id.*
118. *Id.*
119. ARK. CONST. Amend. 66(a), (c).
120. CAL. CONST. art. VI, §§ 8, 18-18.1 18.5; CAL. GOV'T CODE §§ 68701–68756 (West 2008).
121. CAL. CONST. art. VI, § 18 (i).
122. CAL. GOV'T CODE §§ 75060–75064.
123. CAL. CIV. PROC. § 170.9.
124. COLO. CONST. art. VI, § 23(3)(a).
125. *Id.* § 23(3)(e).

In Connecticut, the Judicial Review Council was created by statute.[126] It has jurisdiction of judicial officers, including state referees, within the judicial branch.[127] The Commission has the authority to recommend removal of a judge to the Connecticut Supreme Court.[128]

The Judiciary Commission of Louisiana has jurisdiction over justices and judges of all courts, including commissioners, magistrates, justices of the peace, and mayors performing judicial functions.[129]

The Michigan Judicial Tenure Commission "strives to hold state judges, magistrates, and referees accountable for their misconduct without jeopardizing or compromising the essential independence of the judiciary. The basis for Commission action is a violation of the Code of Judicial Conduct or Rules of Professional Conduct . . . ."[130]

The Massachusetts Commission on Judicial Conduct has jurisdiction over all judges in the judicial branch. Grounds for discipline include, inter alia,

> (c) willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute; (d) conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, whether conduct in office or outside judicial duties, that brings the judicial office into disrepute; or (e) any conduct that constitutes a violation of the codes of judicial conduct or professional responsibility.[131]

A majority of the Commission members may recommend discipline to the supreme judicial court, up to and including removal from office.[132]

Minnesota's 1971 Legislature created a Board on Judicial Standards to assist the Supreme Court[133] and to implement the constitutional removal or discipline of judges for cause.[134] The Minnesota Supreme Court has adopted the Minnesota Code of Judicial Conduct that applies, by statute, to Minnesota's central panel of the administrative law judiciary.[135]

The Mississippi Commission on Judicial Performance may recommend to the state supreme court a public censure or reprimand through removal from office for misconduct including, inter alia,

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126. CONN. GEN. STAT. § 51-51g (2008).
127. *Id.* § 51-51h.
128. *Id.* § 51-51j.
129. LA. CONST. art. V, § 25.
130. MICH. CONST. art. 6, § 30; MICH. CT. R. 9.200.
131. MASS. GEN. LAWS ch. 211C § 2 (2008).
132. *Id.* § 7 (10).
133. MINN. STAT. §§ 490A.01-.02 (2008).
134. MINN. CONST. art. 6, § 9.
135. MINN. STAT. § 14.48 (3)(d).

> (c) willful and persistent failure to perform . . . duties; (d) habitual intemperance in the use of alcohol or other drugs; or (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute; and may retire involuntarily any justice or judge for physical or mental disability seriously interfering with the performance of his duties, which disability is likely to become of a permanent character.[136]

The website of the Nevada Commission on Judicial Discipline states that it does not have the authority to consider complaints concerning legal errors, alleged to have been made by a judge: "That is the role of the Appellate Court system."[137]

The Judicial Standards Commission of New Mexico[138] conducts hearings on judicial misconduct complaints and may recommend to the Supreme Court removal from office or retirement of a judge or magistrate.

North Carolina's constitution provides for the impeachment of judges,[139] but statutory law provides for the investigation and resolution of inquiries concerning the qualification or conduct of any judge, including the procedure for discipline before the Judicial Standards Commission.[140]

The Oklahoma Council on Judicial Complaints has jurisdiction over all persons subject to the Code of Judicial Conduct, including state, municipal and administrative law judges.[141] If any part of the administrative law judiciary in Oklahoma were subject to the Code of Judicial Conduct, by statute, the judicial branch would ostensibly have jurisdiction and authority to remove an ALJ serving in the executive branch. Such a situation would appear to violate the constitutional separation of powers doctrine, whereby the judicial branch commission would be in the position of functioning as the ultimate appointing authority for executive branch ALJ found culpable of misconduct.

The Pennsylvania Judicial Conduct Board as part of the judiciary is an independent entity having its own constitutional and statutory provisions regarding proceedings.[142]

The website of the Washington State Commission on Judicial Conduct states:

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136. MISS. CONST. art. VI, § 177A.

137. State of Nevada Comm'n on Judicial Discipline, Purpose of the Commission, http://judicial.state.nv.us/purposenjdc3new.htm (last visited Oct. 18, 2008); *see* NEV. CONST. art. VI, § 21(5); NEV. REV. STAT. § 1.4677 (2008).

138. N.M. CONST., art. VI, § 32; *see also* N.M. STAT §§ 34-10-1 to -4 (2008).

139. N.C. CONST. art. IV, §§ 4, 17.

140. N.C. STAT. §§ 7A-374.1 to -378 (2008).

141. Oklahoma Bar Ass'n, Oklahoma Council on Judicial Complaints, http://www.okbar.org/public/judges/council.htm (last visited Oct. 18, 2008).

142. PA. CONST. art. V, § 18; *see* 42 PA. CONS. STAT. §§ 2101-2106 (2008).

> All fifty states and the District of Columbia have judicial conduct agencies to receive and investigate allegations of judicial misconduct. These agencies only act on complaints involving judicial misconduct and disability. *They do not serve as appellate courts reviewing judges' rulings.*"[143]

*B. Judgmental Evaluations of ALJs*

The criteria for "quality of decisions" includes three principal groupings: (1) "well reasoned;" (2) "well written;" and (3) "supported by applicable law." "Well reasoned" includes "conclusions are supported by applicable law"; and "reasoning employed is understandable, logical and persuasive."[144] "Well written" includes eleven criteria:

> (1) rationale for decision is clear and understandable; (2) paragraphs and sentences are properly structured; (3) paragraphs and sentences are logically related to each other and in an order which lends itself to a clear understanding of the discussion; (4) decision employs correct grammar and spelling; (5) format of decision assists the reader to understand the conclusions reached and their underlying rationale; (6) specific findings of fact are made and cover all material factual areas; (7) decision deals with all significant arguments raised by the parties (to the extent determinable from the four corners of the decision); (8) decision avoids use of intemperate or injudicious language or language that indicates bias; (9) findings of fact are properly distinguished from conclusions of law; (10) issues are understandable; and, (11) title of decision is appropriate.[145]

The general criterion of "supported by applicable law" includes: (1) "relevant or controlling statutes, judicial and administrative decisions, and regulations are considered"; and (2) "authorities cited support the propositions for which they are cited."[146]

The criteria for "conducting hearings effectively and fairly are divided into six major groupings: (1) "opening remarks in merits hearings"; (2) "control of proceedings/demeanor"; (3) "handling of exhibits"; (4) "questioning of witnesses"; (5) "ruling on motions and objections"; and (6) "closing the hearing."[147] The "opening remarks" grouping is broken down into ten criteria: (1) identifies case; (2) permits parties/counsel to enter appearances or identifies them; (3) allows opportunity for preliminary matters or questions; (4) allows opportunity for opening statements; (5) identifies self; (6) states date; (7) defines issues;

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143. Washington State Comm'n on Judicial Conduct, Background, http://www.cjc.state.wa.us/About_CJC/background.htm (last visited Oct. 18, 2008) (emphasis added).

144. COLO. OFFICE ADMIN. CTS., *supra* note 84, at 1 (on file with author).

145. *Id.* (on file with author).

146. COLO. OFFICE ADMIN. CTS., *supra* note 84, at 4 (on file with author).

147. *Id.* at 5 (on file with author).

(8) indicates party bearing burden of proof; (9) describes hearing procedures; and, (10) explains and seeks waiver of right to counsel, if appropriate.[148]

The "control of proceedings/demeanor" grouping is broken down into eleven criteria:

> (1) begins hearing promptly at beginning of day and after recesses (or explains any unavoidable delay); (2) controls hearing in firm but fair manner, including interactions of participants; (3) evidences familiarity with file and adequate preparation; (4) permits off-the-record discussions only when justified and makes record of discussions; (5) treats litigants, counsel and witnesses with respect and courtesy; (6) provides appropriate explanations/guidance to self-represented litigants; (7) uses *no* intemperate or injudicious language or language that indicates bias; (8) shows *no* favoritism to one party over another; (9) makes effort to make parties and witnesses feel at ease; (10) accommodates special needs of participants; and (11) is attentive to proceedings.[149]

The "handling of exhibits" grouping is broken down into five criteria:

> (1) ensures exhibits are marked and identified; (2) ensures copy of exhibits available to other party; (3) makes supportable rulings on admissibility of exhibits; (4) has system of recording exhibits admitted or excluded; and (5) collects/receives all exhibits offered and not withdrawn.[150]

The "questioning of witnesses" grouping includes five criteria:

> (1) administers oath; (2) permits cross, redirect, and re-cross of witnesses; (3) offers opportunity for rebuttal and surrebuttal; (4) limits number of own questions, asks questions that do not reflect bias, only questions when necessary (to clarify), avoids questions that reflect advocacy; and (5) encourages efficient examination of witnesses, when appropriate.[151]

The "ruling on motions and objections" grouping sets forth two criteria: (1) rules on all motions and objections; and (2) rulings are supportable.[152] The "closing the hearing" is a criterion that is defined as: "Offers the opportunity for closing statements in merits hearings and indicates procedure for issuance of the decision."[153]

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. COLO. OFFICE ADMIN. CTS., *supra* note 84, at 5.
153. *Id.*

The "timeliness of decisions" criterion is described as follows: "To issue decisions, dispositive orders and orders upon remand within the time limits set forth by statute, regulation or Office of Administrative Courts policy."[154] To receive an "exceptional" performance rating, in this category, for any given performance year, an ALJ must issue "no unexcused late orders, a majority of decisions were issued ahead of time, and the judge had a higher than average workload."[155] For a "successful" rating, an ALJ is required to have "issued no more than two unexcused late orders" for the performance year.[156] An ALJ who "issued three or more unexcused late orders" would receive a "needs improvement" rating.[157]

### *C. Performance Evaluations of Judges in the Judicial Branch*

#### 1. Colorado

Colorado first established judicial performance evaluation commissions in 1988.[158] The Colorado General Assembly created a state commission on judicial performance[159] to develop techniques for evaluating judges and to make recommendations concerning the retention of justices of the Supreme Court, and judges of the court of appeals.[160] The Colorado Legislature also created commissions on judicial performance for each judicial district in the state.[161] These district commissions are empowered to interview judges and other appropriate persons, accept information and documentation from interested parties, conduct public hearings,[162] and make recommendations on the retention of district and county court judges.[163]

The 2008 Colorado General Assembly established an Office of Judicial Performance Evaluation in the Judicial Department.[164] This new law spells out explicit review duties of the commissions, including the review of decisions.[165] It also details performance criteria upon which judges are reviewed.[166] The criteria for the state commission and the district commissions are as follows:

> (a) integrity, including but not limited to whether: (I) the justice or judge avoids impropriety or the appearance of impropriety; (II) the

154. *Id.*
155. *Id.*
156. *Id.*
157. COLO. OFFICE ADMIN. CTS., *supra* note 84, at 5.
158. COLO. REV .STAT. § 13-5.5-102 (2008).
159. *Id.* § 13-5.5-103.
160. *Id.* § 13-5.5-106.
161. *Id.* § 13-5.5-104.
162. *Id.* § 13-5.5-105.
163. COLO. REV. STAT. § 13-5.5-106.
164. *Id.* § 13-5.5-101.5.
165. *Id.* § 13-5.5-103(1)(a) – (q).
166. *Id.* § 13-5.5-105.5.

> justice or judge displays fairness and impartiality toward all participants; and (III) the justice or judge avoids ex parte communications; (b) legal knowledge, including but not limited to whether: (I) . . . opinions are well-reasoned and demonstrate an understanding of substantive law and the relevant rules of procedure and evidence; (II) . . . opinions demonstrate attentiveness to factual and legal issues before the court; and (III) . . . opinions adhere to precedent or clearly explain the legal basis for departure from precedent: (c) communication skills, including but not limited to whether: (I) . . . opinions are clearly written and understandable, and (II) . . . questions or statements during oral arguments are clearly stated and understandable; (d) judicial temperament, including but not limited to whether: (I) . . . demonstrates courtesy toward attorneys, litigants, court staff, and others in the courtroom; and (II) . . . maintains appropriate decorum in the courtroom; (e) administrative performance, including but not limited to whether: (I) . . . demonstrates preparation for oral argument, attentiveness, and appropriate control over judicial proceedings; (II) . . . manages workload effectively; (III) . . . issues opinions in a timely manner and without unnecessary delay, and (IV) participates in a proportionate share of the court's workload; (f) service to legal profession and the public by participating in service-oriented efforts designed to educate the public about the legal system and to improve the legal system.[167]

A few differences in the stated criteria for the district commissions include: Subsection (b) (III) "the judge appropriately applies statutes, judicial precedent, and other sources of legal authority"; Subsection (c) (II) "the judge's oral presentations are clearly stated and understandable and the judge clearly explains all oral decisions; and (III) the judge clearly presents information to the jury"; Subsection (d) (II) "the judge maintains and requires order, punctuality, and decorum in the courtroom"; Subsection (e) (II) "the judge uses court time efficiently . . . (IV) the judge effectively manages cases . . . (V) the judge takes responsibility for more than his or her own caseload and is willing to assist other judges, and (VI) the judge understands and complies with directives of the Colorado Supreme Court."[168]

2. Other States

Based on available information, judicial branch performance evaluation (as opposed to judicial discipline) mechanisms are discussed for several (twelve) but not all twenty of the states having such mechanisms.[169]

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167. *Id.* § 13-5.5-105.5(1)(a) – (f), (2)(a) – (f).

168. COLO. REV. STAT. § 13-5.5-105.5.

169. Alaska, Arizona, California, [Colorado has been discussed at length], Connecticut, Hawaii, Kansas, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, Rhode Island, Utah, Washington, and Wisconsin.

Arizona's Commission on Judicial Performance review has thirty-four members appointed by the Supreme Court, who are: (1) public members; (2) attorneys; (3) judges; and, (4) legislators.[170] The duties of the Commission are:

> (1)(a) to develop, review and recommend amendments on written performance standards, to be approved by the Supreme Court; (b) to formulate policies and procedures for collecting information and conducting reviews; and to create and supervise a program of periodic review of the performance of each judge and justice who is subject to the merit selection system; (2) to identify key areas where improvement is needed and work with the Committee on Judicial Education and Training to prioritize areas and offer required courses to meet educational needs; and, (3) to request public comment and hold public hearings on the performance of all judges and justices subject to retention.[171]

The California Commission on Judicial Performance consists of one judge of a court of appeal and two judges of superior courts, each appointed by the Supreme Court; two members of the State Bar of California, who have practiced law for ten years, each appointed by the Governor; and six citizens who are not judges, retired judges, or attorneys, two of whom are appointed by the Governor; two by the Senate Committee on Rules; and two by the Speaker of the Assembly.[172]

The Connecticut Judicial Selection Committee[173] is charged with making a performance evaluation of any judge made by the Judicial Department available to members of the legislative joint standing committee on the judiciary prior to any public hearing on the nomination of any such judge and to the members of the Judicial Selection Commission.[174]

The Supreme Court of Hawaii has established a Judicial Performance Program. Its stated goal is ". . . the periodic evaluation of a judge's performance is a reliable method to promote judicial excellence and competence."[175] "All full-time, part-time and specially appointed justices and judges are subject to the exclusive evaluation processes of the supreme court and the special committee to be appointed by the Chief Justice . . . ."[176]

The Kansas Commission on Judicial Performance is charged with implementing the following functions: (1) "creating surveys of court users who have directly observed judges' or justices' performance or

170. ARIZ. JUD. PERF. REV. R. 2 (2006), *available at* http://azjudges.info/about/procedure.cfm.
171. *Id.* at 2(g)(1)(a) – (g)(3).
172. CAL. CONST. art. VI, § 8.
173. CONN. GEN. STAT. § 51-44a (2008).
174. *Id.*
175. HAW. SUP. CT. R. 19.1 (1996), *available at* http://www.state.hi.us/jud/ctrules/rsch.htm.
176. HAW. SUP. CT. R. 19.2 (2002), *available at* http://www.state.hi.us/jud/ctrules/rsch.htm.

interacted with" judges or justices, including attorneys, litigants, jurors or other persons the Commission deems appropriate ("the surveys shall ask those surveyed to evaluate the" judge's "*ability, integrity, impartiality, communication skills, professionalism, temperament and administrative capacity suitable to the jurisdiction and level of court*"); (2) developing "clear, measurable performance standards upon which the survey questions are based"; (3) developing dissemination plans; (4) protecting "confidentiality when the judicial performance evaluation is used only for self-improvement"; (5) making "the judicial performance evaluation results widely available when they are to be used to assist voters in evaluating the performance of judges and justices subject to retention elections"; (6) making "public recommendations regarding whether or not to retain judges or justices subject to retention elections"; (7) developing "a procedure for judges and justices to receive and respond to survey results before such results are made public"; and, (8) establishing "a mechanism to incorporate evaluation results in designing judicial education programs."[177]

A majority of the Supreme Judicial Court of Massachusetts itself, in consultation with the chief justice, is responsible for the performance evaluation program for judges in Massachusetts.[178] The program includes, but is not limited to, a questionnaire to be designed and implemented by the supreme judicial court and given to attorneys, parties, and jurors appearing before a judge so they may evaluate the judge.[179] The questionnaire "shall include, but not be limited to, questions relative to the judge's performance, demeanor, judicial management skills, legal ability, attentiveness, bias and degree of preparedness."[180] Massachusetts further provides for a similar performance evaluation system for all *civil service employees*, which would include administrative magistrates in Massachusetts' central panel.[181]

The chief justice and a majority of the New Hampshire Supreme Court, in consultation with the administrative judges (judicial branch) of the superior, district, and probate courts, are responsible for designing and implementing by court rule, a program for performance evaluation of judges.[182] The program includes a questionnaire and a self-evaluation form to be completed by the judge. The questionnaire includes questions relative to "the judge's performance, temperament and demeanor, judicial management skills, legal knowledge, attentiveness, bias and objectivity, and degree of preparedness."[183] "Upon consideration of nomina-

177. KAN. STAT. § 20-3204 (a)-(e) (2006), *amended* by 2008 Kan. Sess. Laws Ch. 145 (H.B. No. 2642).
178. MASS. GEN. LAWS ch. 211 § 26 (2008).
179. *Id.* § 26A.
180. *Id.*
181. *See id.* ch. 31 § 6A.
182. N.H. REV. STAT. § 490:32(I) (2008).
183. *Id.* § 490:32(II).

tion for another judicial appointment," a judge's performance evaluation is made available to the governor upon request.[184]

The administrative judge (a judicial branch judge with administrative duties) of a superior court is charged with evaluating each justice and marital master a minimum of once every three years.[185] The administrative judge of a district court and a probate court must evaluate judges of those courts a minimum of once every three years.[186]

The judicial evaluation process in New Hampshire consists of: (1) a "review of complaints about the judge"; (2) a review of the completed questionnaires; (3) a review of the self-evaluation completed by the judge; (4) a summary of the results of the evaluation, "which identifies any judicial performance standard that has not been met and sets forth the steps the judge" must take to improve performance; (5) a meeting between the person performing the evaluation and the judge to discuss the results of the evaluation to advise "whether the judge has met the applicable performance standards and, if not, to identify the steps the judge" must take to improve performance; and "within 30 days of the meeting," the judge "may submit a written response to the evaluation."[187]

If performance standards have not been met by a New Hampshire judge and the judge "has failed to take steps to improve the performance specified in the evaluation summary, the chief justice or the administrative judge" of the court on which the judge "serves may take steps to correct non-compliance, including administrative discipline," and "whatever other steps are necessary to ensure compliance."[188]

The judicial performance evaluation process is confidential[189] unless and until the judge "fails to meet performance standards for two consecutive" evaluations, the judge "is deemed to have waived any right to confidentiality," and the results of the evaluation are made public, "with the exception of the identity of persons furnishing information about the judge."[190]

New Jersey's central panel, the Office of Administrative Law, charges the director and chief administrative law judge with developing and implementing a program of judicial evaluation, focusing on three principal areas of judicial performance: Competence; productivity; and, demeanor.[191] The evaluations consider:

184. *Id.* §490:32(V)(b).
185. N.H. SUP. CT. Rule 56(II)(A) (2008).
186. *Id.*
187. *Id.* at 56(II)(B).
188. *Id.* at 56(II)(D)(3).
189. *Id.* at 56(IV)(A).
190. *Id.* at 56(IV)(B)(3).
191. N.J. STAT. § 52:14F-5.s (2008).

> [I]ndustry and promptness in adhering to schedules, making rulings and rendering decisions; tolerance, courtesy, patience, attentiveness, and self-control in dealing with litigants, witnesses and counsel, and in presiding over contested cases; legal skills and knowledge of the law and new legal developments; analytical talents and writing abilities; settlement skills; quantity, nature and quality of caseload disposition; and, impartiality and conscientiousness.[192]

The New Mexico Judicial Performance Evaluation Commission, in evaluating a judge's performance, may consider: (1) "an analysis of a judge's results from completed surveys"; (2) "a review of a judge's workload, conformance with judicial time standards, the number of excusals and recusals, cases pending and cases completed"; (3) "any findings and recommendations of the Judicial Standards Commission and Supreme Court on extrajudicial conduct that reflected adversely on the judiciary"; (4) surveys; (5) interviews; and, (6) "any other information deemed appropriate by the commission."[193]

The criteria for evaluation in New Mexico are:

(A) integrity and impartiality:

> (1) the judge's conduct is free from impropriety or the appearance of impropriety; (2) the judge makes findings of fact and interpretation of law without regard for *the possibility of public criticism*; (3) the judge treats all parties equally and fairly regardless of race, national or ethnic origin, religion, gender, social or economic status or disability; (4) the judge's behavior is consistent and free from the appearance of favoritism; (5) the outcome of cases is not prejudged; and, (6) the judge's actions and decisions display basic fairness and justice;

(B) knowledge and understanding of the law:

> (1) the applicable rules of procedure; (2) the rules of evidence; (3) substantive law; and, (4) the ability to understand the facts presented and apply the law to those facts;

(C) communication skills:

> (1) the sensitivity of the judge to the *impact of the judge's nonverbal communications*; (2) the courtesy and fairness displayed to all parties and participants in proceedings; (3) whether the judge's verbal communications are clear, complete and logical; and (4) whether a judge's written communications are clear, complete and logical;

192. *Id.*
193. N.M.R. PERF. EVAL. COMM. Rule 28-301(A)-(F) (2008).

(D) case management:

> (1) discharging responsibilities diligently; (2) meeting time commitments and acting as promptly and efficiently as possible in scheduling and disposition of cases; (3) considering the availability of settlement and alternative resolution processes and the cost of litigation; (4) punctuality and efficient use of time; and (5) maintenance or proper control over the courtroom.[194]

The New Mexico Commission may conduct interviews with persons who have appeared before a judge on a regular basis; observe a judge in the performance of duty in the courtroom; and evaluate statistical information on a judge.[195]

Rhode Island has a Judicial Performance Evaluation Committee, appointed by the Supreme Court, to develop and administer, under the court's supervision, "a program for the *continuing* evaluation of judicial performance."[196]

Utah has a Standing Committee on Judicial Performance Evaluation that uses "professionally recognized methods of data collection that may include surveys, onsite visits, caseload management data and personal interviews."[197]

The Supreme Court of Virginia is responsible for establishing and maintaining "a judicial performance evaluation program that will provide a self-improvement mechanism for judges and a source of information for the reelection process."[198]

194. *Id.* at 28-401(A)-(D).
195. *Id.* at 28-204 (F)-(H).
196. R.I. SUP. CT. art. VI, Rule 4.1(a) (2008).
197. UT. R. J. ADMIN RULE 2-106.05(1) (2008).
198. VA. CODE § 17.1-100 (2008).

# HOW NOT TO REFORM JUDICIAL ELECTIONS: *DAVIS*, *WHITE*, AND THE FUTURE OF JUDICIAL CAMPAIGN FINANCING

JAMES BOPP, JR.[†] & JOSIAH NEELEY[††]

## INTRODUCTION

Judicial elections are nothing new. Thirty states select some or all of their judges through elections, and the practice of electing judges has been common since the early days of the republic.[1] There are good reasons to do so. Since state court judges have a robust role in making law through the development of common law, democratic theory requires that they do so with the consent of the people through elections.[2] Elections make sure that judges are accountable to the people, rather than political elites and insiders.[3] And judicial elections also provide a means for the people to keep judges within their legitimate bounds by providing an opportunity for the people to remove judicial activists from the bench.[4]

Despite this history and the significant benefits of judicial elections, some commentators have raised concerns about the practice of judicial

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1. Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176-78 (1980) *reprinted and updated in* AM. JUDICATURE SOC'Y, JUDICIAL POLITICS: READINGS FROM JUDICATURE 44-45 (Elliot E. Slotnick ed., 2d ed. 1999), *available at* http://books.google.com/ (search "Search Books" for "Judicial Politics"; then follow "Judicial Politics: Readings from Judicature" hyperlink).

2. Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular.") (citations omitted); *see also* James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 FIRST AMENDMENT L. REV. 180, 181-82 (2007) ("[J]udicial elections are different from elections for the legislative or executive branch in a very important way because, unlike other public officials, judges have a dual role. One of the roles that state court judges share with the political branches is to make law, most notably in the development of the common law.").

3. *See* Bopp, *supra* note 2, at 185 ("If judges were given a predominant role in setting public policy, then it would deny popular sovereignty and democracy to make them independent of appropriate accountability to the people.").

4. *Id.* at 190-91 (citing instances of judges who were defeated at the polls based on judicial activism).

elections.[5] Chief among these concerns has been the way in which judicial elections are financed.[6] To some extent, objections to private fundraising by judges and judicial candidates are pedestrian. Fundraising is unpleasant and time consuming for candidates and awkward for potential contributors.[7] Other objections, such as that privately funded judicial campaigns erode public confidence in the judiciary, are, if true, much more serious.

In this article, we examine both the supposed ills of a privately financed judicial election system, as well as one possible cure: public funding of judicial elections. Part I looks at the current system of privately funded judicial campaigns. We argue that a common criticism of this system—that it leads to corruption and imperils judicial impartiality—is overblown. In Part II, we look at two methods currently used to fight alleged corruption within the privately funded system: (1) contribution limits, and (2) restrictions on personal solicitation by candidates. We argue that contribution limits are constitutional, so long as the limits are high enough to allow candidates to wage an effective campaign. We conclude that bans on personal solicitation by candidates, however, do not serve an interest in preventing corruption and are inconsistent with the Supreme Court's decision in *Republican Party of Minnesota v. White*.[8] Part III looks at public funding of judicial elections. We conclude that while public funding of judicial elections is not per se unconstitutional, many public funding schemes contain features, such as the provision of so-called "rescue funds" based on spending by a publicly funded candidate's opponent or by an independent group, as well as burdensome asymmetrical disclosure requirements needed to effectuate rescue funds, which are unconstitutional under the Supreme Court's recent decision in *Davis v. FEC*.[9]

## I. WHAT'S THE MATTER WITH CAMPAIGN CONTRIBUTIONS?

Criticism of the role of money in judicial campaigns comes in a variety of forms. Many such objections are quotidian. Candidates generally do not enjoy asking others for money, and the costs of fundraising to the candidate both in money and in time can be significant. Those solicited may feel uncomfortable turning down contribution requests. And some people may feel a general uneasiness about the level of spending

5. *E.g.*, Roy A. Schotland, Professor of Law, Georgetown University, Remarks at the Conference entitled Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice (December 1998), *in* 61 SUM. LAW & CONTEMP. PROBS. 149, 150 (1998) (arguing that judicial elections have gotten "nastier, noisier, and costlier" in recent years).

6. *See generally* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 61-80 (Matthew J. Streb ed., 2007).

7. *See generally* Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. 669 (2006).

8. 536 U.S. 765 (2002).

9. 128 S. Ct. 2759 (2008).

on political campaigns divorced from any specific objection. While these sorts of criticisms may explain some of the hostility to the idea of privately funded judicial campaigns, they hardly justify the degree of opposition that this system has endangered.

Two objections, however, are more serious. First, it is claimed that campaign contributions threaten judicial impartiality.[10] If a judge receives a contribution from a particular individual or group, it is argued, he will be more likely to rule in favor of that individual or group should they appear before him as litigants.[11] Money, then, tips the scales of justice towards certain parties and away from others not according to the merits of their claims, but according to the size of their contributions.

Corruption is a serious charge, and serious charges demand serious evidence. To date, however, evidence supporting claims of corruption based on contributions has been mixed at best.[12] Judges are human beings, and it is always possible that they may be influenced by factors other than the law and the facts of a given case.[13] Judges can be tempted to alter their decisions in order to get re-elected,[14] to receive appointment to higher office,[15] or even simply to receive praise or avoid criticism.[16]

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10. Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, *in* RUNNING FOR JUDGE, *supra* note 6, at 140, 140; *see also* Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501, 542 (2008) ("According to recent national surveys, between two-thirds and three-fourths of Americans believe that the need to raise money to conduct their campaigns influences judges' decisions."); George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1560-61 (2008) (surveying popular opinion polls in New York, Ohio, & Pennsylvania, as well as a national poll, which show registered voters believing judges influenced by campaign contributions ranging from 75 percent to 95 percent); Thomas J. Basting, Sr., *Gutter Politics and the Wisconsin Supreme Court*, WIS. LAW., May 2008, at 5 (citing a January 2008 survey in which 78 percent of Wisconsin registered voters believed that campaign funding influenced judges' decisions).

11. Brown, *supra* note 10, at 1563 ("Public perception of [state courts] as places where all citizens can receive impartial justice may falter. Extensive campaign promises and political debts may lead to prejudgment. Campaign contributions, in particular, may create a class of favored litigants."). Curiously, those who support public funding of elections do not likewise conclude that government contributions will make a judge more likely to rule in favor of the government. *See* Jessica Gall, *Living with Republican Party of Minnesota v. White: The Birth and Death of the Judicial Campaign Speech Restrictions*, 13 COMM. L. & POL'Y 97, 120 (2008) (suggesting that a candidates agreement to participate in public funding of judicial campaigns could "lessen the suspicions of ties between money and judicial behavior.").

12. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 394 (2000) (noting conflict among academic studies on the effect of contributions on candidate behavior).

13. Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1372 (7th Cir. 1994) ("Judges are human; like all humans, their outlooks are shaped by their lives' experiences. It would be unrealistic to suppose that judges do not bring to the bench those experiences and the attendant biases they may create.").

14. *See* Republican Party of Minn. v. White, 536 U.S. 765, 782 (2002) (noting that "elected judges . . . *always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench.") (emphasis in original).

15. *See* Guido Calabresi, Circuit Justice, 2d Cir., Remarks at Roundtable Discussion, Is There a Threat to Judicial Independence in the United States Today?, *in* 26 FORDHAM URB. L.J. 7, 26 (1998) ("If I were to identify the single greatest threat to judicial independence today, it would be the fact that judges want to move up.").

The danger to impartiality posed by such a judge is present under any system of judicial selection, and there is no reason to believe that campaign contributions pose a particularly strong danger in this regard.[17] To limit the danger that judges will succumb to temptation, courts have adopted various structural checks to limit the risk of injustice caused by the occasional "bad judge."[18] Ultimately, though, our judicial system presupposes that judges will take seriously the duty of their office to decide cases fairly and impartially.[19]

In addition to threatening actual impartiality, campaign contributions are said to threaten the perception of impartiality by the general public. This threat is particularly acute in the case of the judiciary because of its inherent weakness as a constitutional actor. As famously stated by Alexander Hamilton, the judiciary is the "least dangerous" branch, as it has "no influence over either the sword or the purse."[20] Because courts have neither the power to levy taxes nor command armies, the only way for their decisions to have effect is if they are widely perceived as being impartial arbiters of justice rather than mere political actors.[21]

As with charges of actual corruption, however, the evidence to support this argument is largely lacking. Polling data has consistently shown a generalized public cynicism about government institutions.[22]

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16. *See* Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 988-89 (2001) (noting a case where public criticism of a judge's decision regarding the admissibility of evidence led the judge to change his ruling).

17. Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech By Candidates for Judicial Office*, 35 UCLA L. REV. 207, 258 (1987) ("A sitting judge who is willing to manipulate his decisions in order to assure retention in office will find the opportunity to do so in either an appointive or an elective system."); *see also* Jonathan M. Hooks, *In Defense of Judicial Elections*, 68 ALA. LAW. 295, 298 (2007) (noting the error of thinking that "the elimination of elections will somehow result in the elimination of *ambition*.") (emphasis in original).

18. James Bopp, Jr. & Anita Y. Woudenberg, *An Announce Clause By Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify Themselves For Exercising Their Freedom to Speak*, 55 DRAKE L. REV. 723, 727 (2007) ("A judge who is biased in favor of a particular side in a case cannot simply rule in favor of that case. A judge must provide a legal rationale for his decision, the weaknesses of which will often become readily apparent. The law also provides for a wide-ranging system of appeals in which legal errors committed by a judge due to bias can be corrected. Many cases are also heard by multiple judges, further diluting the chance that bias from an individual judge will lead to an incorrect result.").

19. Liteky v. United States, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) ("[W]e accept the notion that the 'conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect.' The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office." (citation omitted) (quoting *In re* J.P. Linahan, Inc., 138 F.2d 650, 652 (2d Cir. 1943))); Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1372 (7th Cir. 1994) ("We expect—even demand—that judges rise above these potential biasing influences, and in most cases we presume judges do.").

20. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

21. James L. Gibson, *Nastier, Nosier, Costlier—And Better*, MILLER-MCCUNE, August 2008, at 27, *available at* http://www.miller-mccune.com/article/495 ("Because courts are weak, they require institutional legitimacy, the belief that an institution has the right to make binding decisions for a constituency and that such decisions must be complied with.").

22. *E.g.*, AMERICAN NATIONAL ELECTION STUDIES, THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR: ARE GOVERNMENT OFFICIALS CROOKED 1958-2004 (2005),

This is a good thing. Cynicism about the actions and motives of government officials can serve as a powerful check on the abuse of government power,[23] including by the judiciary.[24] And while some degree of perceived legitimacy is obviously necessary not only for the judicial but for other branches of government, experience has shown that democracy and cynicism about government institutions generally are capable of coexisting in the same society indefinitely.

The assumption that public concerns about campaign contributions translates into a lack of confidence in the judiciary is also not supported by the evidence. A 2002 poll by the American Bar Association, for example, found that 72% of respondents were at least "somewhat concerned" about whether "the impartiality of judges is compromised by the need to raise campaign money to successfully run for office."[25] Yet, the same poll found that 75% of respondents thought elected judges were more fair and impartial than appointed judges.[26] According to a recent poll, only five percent of respondents believed campaign contributions made to judges had no influence at all on decisions judges made in Minnesota state courts.[27] Nonetheless, the same poll found widespread public confidence in the courts, with 74% of respondents saying that they had "a great deal" or "some" confidence in the courts, and 76% saying that they had "a great deal" or "some" confidence in judges (higher rates than for any other category except the medical profession).[28] The courts are consistently among the highest ranked institutions in terms of public confidence.[29] And while the majority of Americans will express some

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http://electionstudies.org/nesguide/toptable/tab5a_4.htm (finding that, in 2004, 35% of respondents thought "quite a few of the people running the government are crooked," while 53% thought "not many" were crooked, and 10% said "hardly any" were crooked).

23. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (noting the "the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials."); *see also* THE FEDERALIST No. 10 (Madison), *supra* note 20, at 80 ("It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.").

24. Bridges v. California, 314 U.S. 252, 270-71 (1941) ("The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion . . . . [A]n enforced silence, however limited, solely in the name of preserving the dignify [sic] of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.").

25. HARRIS INTERACTIVE, INC., HARRIS INTERACTIVE TELEPHONE OMNIBUS SURVEY: A STUDY ABOUT JUDICIAL IMPARTIALITY, PREPARED FOR THE AMERICAN BAR ASSOCIATION 6 (August 2002) (on file with author).

26. *Id.* at 4.

27. DECISION RESOURCES LTD., JUSTICE AT STAKE STUDY, MINNESOTA STATEWIDE 5 (2008), http://www.justiceatstake.org/files/MinnesotaJusticeatStakesurvey.pdf (last visited Oct. 22, 2008). This despite the fact that Minnesota prohibited judges and judicial candidates from personally soliciting campaign contributions.

28. *Id.* at 1-2.

29. According to a 2001-2002 survey, 96% of respondents rated the job being done by courts and judges of their state as being either "excellent" or "good." JUSTICE AT STAKE CAMPAIGN, STATE JUDGES FREQUENCY QUESTIONNAIRE (Nov. 5, 2001–Jan. 2, 2002) (on file with author). A 1999 survey found that 77% of respondents had either "a great deal" or "some" confidence in the United States Supreme Court, and 75% had similar confidence in local courts. And, 79% agreed

level of concern about the potentially corrupting effect of money in elections, this does not appear to be their most pressing concern.[30]

## II. STOPPING CORRUPTION WITHIN A PRIVATELY FUNDED SYSTEM

While privately funded judicial elections may not be perfect, campaign contributions are a necessary part of the judicial election process. Campaigns cost money.[31] So long as judges are elected, funding for their campaigns is going to have to come from somewhere. As former Supreme Court Justice Sandra Day O'Connor has noted, "[u]nless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising."[32]

States have traditionally sought to combat any risk of corruption from campaign contributions by placing limits on judicial fundraising, rather than by abolishing it altogether. First, most states place limits on the size of contributions that can legally be made to a candidate by an individual or group.[33] Second, many states prohibit judicial candidates themselves from soliciting campaign contributions and require all such solicitations to be done through a committee.[34]

### *A. Contribution Limits*

A majority of states place limits on the amount of at least some forms of contributions to judicial candidates.[35] While contribution limits "implicate fundamental First Amendment interests," namely the freedoms of "political expression" and "political association,"[36] they can be constitutional, as long as there is a demonstrable relationship between the size of the contributions allowed and a realistic threat of corruption, and

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with the statement that "[j]udges are generally honest and fair in deciding cases." NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY (1999) *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicView CrtsPub.pdf.

30. Scott Rasmussen, *55% Say Media Bias Bigger Problem Than Campaign Cash*, Aug. 11, 2008, http://www.rasmussenreports.com/public_content/politics/election_20082/2008_presidential_election/55_say_media_bias_bigger_problem_than_campaign_cash (last visited Oct. 22, 2008) (reporting poll finding 55% of respondents thought media bias posed a bigger problem in politics than large campaign contributions).

31. *See* Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002) ("Campaigning for elected office necessarily entails raising campaign funds and seeking endorsements from prominent figures and groups in the community.").

32. Republican Party of Minn. v. White, 536 U.S. 765, 789-90 (2002).

33. *See* American Judicature Soc., Judicial Campaigns and Elections: Campaign Financing, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state= (last visited October 19, 2008).

34. *See id.*

35. *See id.*

36. Buckley v. Valeo, 424 U.S. 1, 23 (1976).

they are not so low as to prevent "candidates and political committees from amassing the resources necessary for effective advocacy."[37]

To the extent that large campaign contributions do pose an actual threat to judicial impartiality, reasonable contribution limits are an effective means of dealing with this threat. A judge is not likely to be swayed in favor of a particular litigant by the fact that the litigant has given him a small contribution in the past, nor by the hope of receiving a similarly sized contribution in the future.

*B. Restrictions on Personal Solicitation by Judicial Candidates*

In addition to limiting the amount of contributions, many states prohibit judicial candidates from personally soliciting campaign contributions, while allowing their campaign committee to make contribution solicitations. The extent to which this committee system actually insulates judges and judicial candidates from the supposed dangers of fundraising is unclear. Bans on personal solicitation by judicial candidates do, however, allow states to maintain the fiction that judges are not directly involved in the campaign fundraising process.

Early cases involving bans on personal solicitation by judicial candidates tended to uphold the provisions against constitutional challenges.[38] The legal landscape governing judicial elections changed dramatically, however, in 2002, when the United States Supreme Court decided *Republican Party of Minnesota v. White*,[39] involving a First Amendment challenge to a Minnesota judicial canon barring judicial candidates from announcing their views on disputed legal and political issues.[40] Previous cases had split on the question of whether a canon prohibiting judicial candidates from announcing their views was constitutional.[41] In *White*, however, the Supreme Court held that the Announce Clause violated the First Amendment.

Central to the Court's opinion in *White* was an analysis of the different possible state interests that fell under the term "judicial impartiality." As traditionally understood, judicial impartiality referred to impartiality towards parties and prohibited a judge from hearing a case when she had a bias for or against one of the litigants.[42] This interest, the Court held, was compelling and grew out of the right of due process, which would be violated if a litigant was forced to have his case heard by

37. *Id.* at 21; *see also* Randall v. Sorrell, 548 U.S. 230, 233 (2006) (finding Vermont contribution limits so low as to impede candidates' right to effective advocacy); *see generally* James Bopp, Jr & Susan Lee, *So There Are Campaign Contribution Limits That Are Too Low*, 18 STAN. L. & POL'Y REV. 266 (2007).

38. *See, e.g.*, Stretton v. Disciplinary Bd., 944 F.2d 137, 138 (3rd Cir. 1991).

39. 536 U.S. 765 (2002).

40. *Id.* at 768.

41. *Compare Buckley*, 997 F.2d at 225, *with Stretton*, 944 F.2d at 138.

42. *White*, 536 U.S. at 775-76.

a judge biased against him personally or biased in favor of his opponent in the case.[43] While *White* held that the state did have a compelling interest in preserving judicial impartiality towards parties, it concluded that the Announce Clause was "barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues."[44]

The *White* court also considered the possibility that judicial impartiality could be defined in two non-standard senses. First, the Court considered whether impartiality includes a lack of preconceptions on legal issues.[45] Some had argued that just as a judge might be biased for or against a particular party, so she might be biased for or against a particular conclusion regarding a legal issue. The Court found, however, that the state's interest in judicial impartiality did not include a lack of preconceptions on legal issues, as having a judge with no such preconceptions was neither possible nor desirable.[46]

Finally, the Court considered whether judicial impartiality included judicial open-mindedness. Open-mindedness would require of a judge "not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case."[47] Judicial open-mindedness "seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so."[48] The Supreme Court declined to state whether open-mindedness was encompassed within the state's impartiality interest, holding instead that the Announce Clause was not narrowly tailored to that interest and thus could not be justified by it in any event.[49]

*White* went on to note that to the extent judges announcing their views on disputed legal and political issues did raise impartiality concerns, those concerns were inherent in the state's decision to elect judges in the first place. Quoting Justice Marshall, the Court stated that "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."[50] The *White* Court therefore concluded that states cannot use the impartiality concerns created by

43. *Id.* at 776

44. *Id.*

45. *Id.* at 777.

46. *See id.* at 778 ("Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972)).

47. *White*, 536 U.S. at 778.

48. *Id.*

49. *Id.* ("It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.").

50. *Id.* at 788 (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

their decision to popularly elect judges to justify restricting First Amendment rights.[51]

Since *White*, federal courts have struck down a variety of state judicial canons on First Amendment grounds.[52] In particular, four federal courts—two district courts and two courts of appeals—have enjoined state judicial canons prohibiting judicial candidates from personally soliciting campaign contributions.[53]

Like the Announce Clause, a judicial canon banning personal solicitation of funds by candidates "depends wholly upon the subject matter of the speech for its invocation."[54] As such, a solicitation clause is a content-based regulation of core political speech subject to strict scrutiny.[55] And while the justification for the solicitation clause—that there is a danger a judge will be biased in favor of a litigant or attorney if he knows that she has donated money to his campaign—might seem to be addressed to preserving judicial impartiality toward parties in a way the Announce Clause was not, federal courts since *White* have held that the solicitation clause is not narrowly tailored to that interest.[56] The reason for this is simple. What raises impartiality concerns is not the solicitation of funds, but rather a judge's knowledge of the source of the contribution itself. Since judges can know, and are often legally required to know,[57] who has donated money to their campaigns and in what amount, banning judicial candidates from personally soliciting funds does nothing

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51. *See id.* at 792 (O'Connor, J., concurring) ("Minnesota has chosen to select its judges through contested popular elections . . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").

52. *See* Republican Party v. White (*White II*), 416 F.3d 738, 744 (8th Cir. 2005); Family Trust Found. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224, 226-27 (6th Cir. 2004) (order denying stay of preliminary injunction); Weaver v. Bonner, 309 F.3d 1312, 1319-20, 1322 (11th Cir. 2002); *Carey v. Wolnitzek*, 2008 WL 4602786 (E.D. Ky. Oct. 15, 2008); Bauer v. Shepard, No. 3:08-CV-196-TLS, slip op. at 20 (N.D. Ind. May 6, 2008) (preliminary injunction granted); Duwe v. Alexander, 490 F. Supp. 2d 968, 976 (W.D. Wis. 2007); Ind. Right to Life, Inc. v. Shepard, 463 F. Supp.2d 879, 890 (N.D. Ind. 2006), *rev'd on other grounds*, 507 F.3d 545 (7th Cir. 2007); Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1232 (D. Kan. 2006) (preliminary injunction granted); Alaska Right to Life v. Feldman, 380 F. Supp. 2d 1080, 1082 (D. Alaska 2005), *rev'd on other grounds*, 504 F.3d 840 (9th Cir. 2007); N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1042 (D. N.D. 2005); Family Trust Found. v. Wolnitzek, 345 F. Supp. 2d 672, 694 (E.D. Ky. 2004); Spargo v. State Comm'n on Judicial Conduct, 244 F. Supp.2d 72, 88-90 (N.D.N.Y. 2003), *vacated on other grounds*, 351 F.3d 65 (2d Cir. 2003); Smith v. Phillips, No. A-02 CV 111 JRN, 2002 U.S. Dist. LEXIS 14913, *1-3 (W.D. Tex. Aug. 6, 2002); O'Neill v. Coughlan, 511 F.3d 638, 639 (6th Cir. 2008).

53. *White II*, 416 F.3d at 765; *Weaver*, 309 F.3d at 1322; *Carey v. Wolnitzek*, No. 3:06-36-KKC, slip op. at *22 (E.D. Ky. Oct. 10, 2006); *Kan. Judicial Watch*, 440 F. Supp. 2d at 1237, *injunction modified on standing grounds by* 519 F.3d 1107 (10th Cir. 2008).

54. *White II*, 416 F.3d at 763 (citation omitted).

55. *Id.* at 763-64; *Weaver*, 309 F.3d at 1322.

56. *See* cases cited *supra* note 55.

57. *See, e.g.*, *White II*, 416 F.3d at 766 n.16 (noting that "very specific information about campaign contributions are [sic] publicly available, notably on the Internet").

to further a state's interest in preserving judicial impartiality towards parties.[58] In addition, as with the Announce Clause, any impartiality concerns raised by the personal solicitation of campaign funds are inherent in the state's decision to elect judges and cannot be used as a rationale to limit candidates' First Amendment rights.[59]

Post-*White*, two state courts have upheld solicitation clauses against constitutional challenge. *In re Dunleavy*[60] upheld Maine's solicitation clause against First Amendment challenge by potential contributors, but did not consider whether the provision violated judicial candidates' First Amendment rights. Additionally, *Dunleavy*'s holding was explicitly made contingent on the fact that judges in Maine were not elected.[61] The case is thus of limited applicability.

The Arkansas Supreme Court also recently upheld the state's solicitation clause in *Simes v. Arkansas Judicial Discipline and Disability Commission*,[62] partially on the grounds that "[a]ttorneys ought not feel pressured to support certain judicial candidates in order to represent their clients."[63] This reasoning is out of step with the *White* decision and its progeny, as it attempts to justify the solicitation clause not because of the effect such solicited contributions might have on candidates, but rather because of concern about the subjective feelings of those solicited. The state does have an interest in preventing corruption, and, therefore, could justifiably prohibit contributions that were solicited as part of a quid pro quo. Similarly, the state undoubtedly has an interest in preventing actual coercion of contributions by candidates. Whether protecting attorneys' subjective feelings of pressure is a compelling state interest sufficient to justify restricting political speech, however, is doubtful.[64]

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58. *See Weaver*, 309 F.3d at 1322-23 ("[E]ven if there is a risk that judges will be tempted to rule a particular way because of contributions or endorsements, this risk is not significantly reduced by allowing the candidate's agent to seek these contributions and endorsements on the candidate's behalf rather than the candidate seeking them himself. Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support."); *see also Carey v. Wolnitzek*, No. 3:06-36-KKC, slip op. at *18 (E.D. Ky. Oct. 10, 2006) ("Even with the prohibition against direct solicitations, however, judges are able to find out who contributed to their campaigns and the amounts they contributed. Thus, if a judge is predisposed to favoring those parties who agree to make contributions, the Solicitation Clause's prohibition against personal solicitation does not prevent such actual partiality.").

59. *See* Republican Party of Minn. v. White, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."); *see also Weaver*, 309 F.3d at 1322 ("The impartiality concerns, if any, are created by the State's decision to elect judges publicly.").

60. 838 A.2d 338 (Me. 2003).

61. *Id.* at 349 ("The Committee correctly notes an important distinction between the restrictions at issue in *White* and *Weaver* and this case. Both of those cases concerned restrictions on candidates for judicial office in states where judges are elected.").

62. 247 S.W.3d 876 (Ark. 2007).

63. *Id.* at 882.

64. *Carey v. Wolnitzek*, No. 3:06-36-KKC, slip op. at *18 (E.D. Ky. Oct. 10, 2006) ("This Court finds no compelling state interest in prohibiting speech that makes it easier for potential donors to 'just say no.'").

It should be noted that feeling pressured to contribute is in no way confined to contributions solicited by judicial candidates. A person may "feel pressured" to support a candidate for legislative or executive office. In fact, the felt coercion could arguably be greater in the case of legislative or executive office candidates because it is generally unknown prior to an election whether a judge will ever sit on a case involving a potential contributor, whereas legislators and executive officers have the authority to influence the law on whatever matters they so choose. The state's assertion of this interest only in the context of judicial elections suggests that it is insincere, or, in constitutional terms, is fatally underinclusive.[65]

Challenges to state solicitation clauses are currently pending in five states.[66] When Wisconsin amended its judicial canons in 2004, two justices dissented from the amendments relating to the solicitation clause, arguing that the comprehensive ban on solicitation by judges and judicial candidates likely violated the First Amendment.[67] And in 2006, the Nevada Supreme Court rejected a request to add a ban on personal solicitation to its state judicial code, citing First Amendment concerns. Given the emerging legal landscape post-*White*, state bans on candidate solicitation of campaign contributions cannot be considered an appropriate or effective means of safeguarding the judiciary from the purportedly corrupting effect of contributions.

## III. THE POSSIBILITY OF PUBLIC FUNDING

In the previous section, we considered two ways in which states have tried to limit any perceived negative effects of campaign contributions while keeping their system of privately funded judicial campaigns. In this section, we turn to a more radical solution to the problems of campaign contributions in judicial races: public funding of elections.[68]

Public funding would seem to address the worries about the effect of money in judicial races, while still allowing states to tap the accountability and legitimizing force that elections can bring. In 2002, the American Bar Association endorsed the concept of public funding and recommended that individual states adopt public funding schemes suited

65. *See* City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994) (noting that underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech"); *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.") (citations omitted).

66. *See Wolfson v. Brammer*, No. 08-CV-8064-FJM (D. Ariz. 2008); *Bauer v. Shepard*, No. 08-CV-196-TLS (N.D. Ind. 2008); *Wersal v. Sexton*, No. 08-CV-613-ADM-JSM (D. Minn. 2008); *Siefert v. Alexander*, No. 08-CV-126-BBC (W.D. Wis. 2008); *Yost v. Stout*, No. 06-CV-4122-JAR-KGS (D. Kan. 2006).

67. *In the Matter of the Amendment of Supreme Court Rules: SCR Chapter 60, Code of Judicial Conduct—Campaigns*, Elections, Political Activity, 2004 WI 134 (Wis. 2004)

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

to their particular state circumstances.[69] According to the report, of the "many threats to judicial independence, one of the more pervasive problems is the nature and cost of running for the bench."[70] That same year, North Carolina became the first state in the nation to provide for full public funding for all state judicial offices.[71] Since then, only New Mexico has adopted public funding for judicial races.[72] Several other states, however, are currently considering public funding proposals, many of which are modeled off of the North Carolina scheme.[73]

Public funding of elections is not per se unconstitutional.[74] States generally have broader authority when it comes to the distribution of public funds than in the case of regulation, and so long as they do not engage in viewpoint discrimination, a state may choose to give money to candidates for particular public offices, at least when voluntarily contributed by taxpayers for this purpose.[75] Simply giving money to candidates, however, is unlikely to address the concerns raised about the current system of campaign financing. Without some limit on the ability of candidates to raise and spend private funds, candidates would be able to simply add what they receive in government funds to what they can raise privately, severely disadvantaging any candidate who relied exclusively on government funding to finance their campaigns.

To avoid this result, almost all public funding schemes make candidates agree to abide by certain expenditure and contribution limits as a

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69. *See* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 38 (2002), *available at* http://www.abanet.org/judind/pdf/commissionreport4-03.pdf. The recommendations of the Commission report were approved by the ABA House of Delegates in February of 2002.

70. *Id.* at 61.

71. While Wisconsin has had public funding for state Supreme Court races since the 1970s, public funding even for those races has been limited. *See* WIS. STAT. § 11.50(3)(a)(2) (2007). The Wisconsin public funding scheme does not contain any provision for rescue funds based on opposing expenditures. For a description of how the Wisconsin scheme operates, see Charles Gardner Geyh, *Publicly Funded Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1476-77 (2001).

72. *See* N.M. STAT. ANN. § 1-19A-13(D)(2), (I) (West 2008); WIS. STAT. ANN. §§ 11.001-.70 (West 2007). Several states and localities have also adopted public funding schemes for certain elections. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 16-901.01, -940 to -961 (2008); CONN. GEN. STAT. §§ 9-600 to -674, 9-700 to -751 (2008); HAW. REV. STAT. § 11-217 to -225 (2008); ME. REV. STAT. ANN. tit. 21-A, §§ 1121-1128 (2008); N.J. STAT. ANN. § 19:44A-30 to -47 (West 2008). A proposal to adopt public funding for U.S. Senate races is currently before Congress. Fair Elections Now Act, S. 936, 110th Cong. (2007).

73. *See, e.g.*, H.B. 251, 57th Leg., 1st Reg. Sess. (Idaho 2003); H.B. 4610, 49th Gen. Assem., 2nd Reg. Sess. (Ill. 2006); S.B. 171, 98th Leg., 2007-2008 Reg. Sess. (Wis. 2007).

74. Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) ("Congress has power to regulate Presidential elections and primaries, and public financing of Presidential elections as a means to reform the electoral process was clearly a choice within the granted power . . . . Whether the chosen means appear 'bad,' 'unwise,' or 'unworkable' to us is irrelevant.") (citation omitted); Davis v. Fed. Election Comm'n, 128 S. Ct., 2759, 2772 (2008).

75. *See, e.g.*, *Buckley*, 424 U.S. at 57 n.65 ("Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.").

condition of receiving government funds.[76] The Supreme Court has held that this is constitutional so long as participation in the scheme remains voluntary.[77] To be voluntary, a public funding scheme must allow candidates the option of not participating in the system[78] and may not unconstitutionally burden the First Amendment rights of candidates who opt not to participate.[79]

A public funding scheme must also not burden the First Amendment rights of independent groups. States cannot constitutionally place limitations on the amount of independent expenditures made during a campaign.[80] Public funding schemes that do burden First Amendment rights are subject to strict scrutiny and will be deemed unconstitutional unless narrowly tailored to serve a compelling government interest.[81]

While crafting a public funding scheme that meets these requirements may seem like a simple task, in practice, constructing a public funding scheme that is both efficient and complies with the First Amendment is not easy. States generally provide funds at a level comparable to average spending in prior races. This amount, however, is often based on all races, not just competitive ones, and does not account for increased costs. This leaves the publicly funded candidate vulnerable to higher spending by privately funded candidates or independent spenders. This problem could be avoided if states were willing to provide publicly funded candidates with sufficient funds to run an effective campaign. However, few public funding schemes do this because one of the principal goals of public funding is to reduce the overall amount of campaign spending. For this reason, many schemes make additional distributions of public funds, called "rescue funds," to make up for the insufficiency of their original government allotment. The use of rescue funds, however, proves upon examination to pose insurmountable constitutional difficulties.

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76. National Conference of State Legislatures, Public Financing of Campaigns: An Overview (2008), http://www.ncsl.org/programs/legismgt/about/PubFinOverview.htm (last visited Oct. 19, 2008).

77. *Buckley*, 424 U.S. at 57 n.65 ("Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.").

78. *See* Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 38 (1st Cir. 1993) ("[V]oluntariness has proven to be an important factor in judicial ratification of government-sponsored campaign financing schemes." (citing *Buckley*, 424 U.S. at 95-96)).

79. *See* Shrink Mo. Gov't PAC v. Maupin, 71 F.3d 1422, 1425 (8th Cir. 1995) (holding that a ban on certain contributions to privately funded candidates was unconstitutional because it prevented privately funded candidates from gaining access to funding sources to which they would be entitled but for the choice to eschew public funding).

80. *See Buckley*, 424 U.S. at 46 ("[I]ndependent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."); *see also* Anderson v. Spear, 356 F.3d 651, 667 (6th Cir. 2004) ("*Buckley* drew a line in the sand, and prohibited the government from restricting a candidate's ability to make expenditures on his own behalf.").

81. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 657 (1990).

### *A. The Problem of Rescue Funds*

In order to "level the playing field" between a publicly funded candidate and her privately funded opponent, most public funding schemes attempt to tie the level of government funding to the amount of money spent in opposition to that candidate's campaign. For example, under North Carolina's public funding scheme, once a candidate qualifies for public funding, she receives an initial distribution based on the office the candidate is seeking, whether or not she is opposed, and whether the funds are to be used in a primary or a general election campaign.[82] If the publicly funded candidate faces no serious opposition, no further government funds are provided.[83] However, additional government funds are available to the candidate if the combined sum of (a) contributions from a nonparticipating opponent, (b) independent expenditures[84] made in support of that opponent, and (c) independent expenditures in opposition to the publicly funded candidate exceeds a certain trigger amount.[85] These "rescue funds"[86] are made in an "amount equal to the reported excess."[87] That is, for every dollar spent by a privately funded candidate or independent group on behalf of a privately funded candidate or in opposition to a publicly funded candidate, the publicly funded candidate receives a dollar of government contributions.[88] Thus, under the rescue funds provision, expenditures by a candidate can result in additional government contributions to that candidate's opponent, and independent expenditures made in opposition to a candidate or in support of her opponent can, likewise, result in government contributions to the opposed candidate.

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82. N.C. GEN. STAT. ANN. § 163-278.65(a)-(b) (West 2007).

83. *Id.* § 163-278.65(b)

84. An independent expenditure is defined as "an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate whose nomination or election the expenditure supports or whose opponent's nomination or election the expenditure opposes." N.C. GEN. STAT. ANN. § 163-278.6(9a) (West 2007).

85. N.C. GEN. STAT. ANN. § 163-278.67(a) (West 2007). The trigger amount is determined by statute and, in the case of a general election, is equal to the amount of the initial distribution. N.C. GEN. STAT. ANN. § 163-278.62(18) (West 2007).

86. The name given to funds distributed in this way varies depending on the public funding scheme. In North Carolina they were originally called "rescue funds," but were re-labeled "matching funds" in 2007. *See id.* § 163-278.67. Other schemes refer to them by other names. *See* Fair Elections Now Act, S. 936, 110th Cong. § 511 (2007) (providing "fair fight" funds to publicly funded candidates based on opposition spending). None of these terms is entirely accurate. "Matching funds" is too broad, as a public funding scheme can choose to give matching funds based on something other than opposing expenditures. "Rescue funds" is not a completely neutral term, but at least better conveys the conditions in which funds are granted. For lack of a better term, this article will refer to government contributions to candidates based on opposing speech as rescue funds, and to the portions of a public funding scheme providing for these rescue funds as the rescue funds provision.

87. *Id.* § 163-278.67(a).

88. *Id.* Importantly, independent expenditures in support of a publicly funded candidate or in opposition to a nonparticipating candidate are not factored into calculating the trigger amount, and no rescue funds are issued to privately funded candidates nor deducted from a publicly funded candidate's government funding based upon independent expenditures so made. *See id.*

Until recently, courts have been divided over whether First Amendment rights are burdened by public funding schemes which provide rescue funds based on spending by privately funded candidates and independent groups. The First and Fourth Circuits have found that providing government funding to candidates based on opposition speech does not burden First Amendment rights and is, therefore, constitutional,[89] while the Eighth and arguably the Ninth Circuit have found them constitutionally suspect.[90] Treatment of the issue by other federal courts has often been analytically confused, leaving the validity of rescue funds provisions open to question. A brief summary of the relevant cases follows.

1. The Lower Courts

The first federal court case to address the rescue funds issue was *Day v. Holahan*.[91] *Day* involved Minnesota's public funding scheme, which distributed government funds to publicly funded candidates based on independent expenditures made in opposition to their campaign, over a trigger amount.[92] The Eighth Circuit struck down this provision because it penalized First Amendment rights.[93] The *Day* court reasoned that independent groups would be chilled from expending money opposing a candidate if they knew that doing so would result in government funds to that candidate's campaign.[94] Accordingly, the rescue funds provision turned independent expenditures over the trigger amount into de facto contributions to an opponent's campaign and was, therefore, an impermissible burden on First Amendment rights.[95]

In *Daggett v. Commission on Governmental Ethics and Election Practices*,[96] the First Circuit upheld the rescue funds provision of Maine's public funding scheme against a constitutional challenge.[97] Maine's scheme provided rescue funds to publicly funded candidates and reduced contribution limits for privately funded candidates to between $250 and $500, depending on the office sought.[98] The court was dismissive of any adverse effect on the complaining party, noting that the scheme "in no way limits the quantity of speech . . . nor . . . threaten[s]

89. Daggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445, 472 (1st Cir. 2000); N.C. Right to Life Comm. Fund for Indep. Expenditures v. Leake, 524 F.3d 427, 437-38 (4th Cir. 2008).

90. Day v. Holahan, 34 F.3d 1356, 1360 (8th Cir. 1994); *see* Ass'n of Am. Physicians and Surgeons v. Brewer, 494 F.3d 1145, 1146 (9th Cir. 2007) (holding that the plaintiffs' complaint requesting injunction against the Arizona statute stated a cause of action).

91. 34 F.3d at 1358.

92. *See id.* at 1359.

93. *Id.* at 1361.

94. *Id.* at 1360 ("The knowledge that a candidate who one does not want to be elected will . . . receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech.").

95. *See id.* at 1360-61.

96. 205 F.3d 445 (1st Cir. 2000).

97. *Id.* at 472.

98. *Id.* at 451-52.

censure or penalty"[99] and, instead, focused on the voluntary nature of the scheme.[100]

Recently, the Fourth Circuit has followed *Daggett* and upheld the constitutionality of North Carolina's rescue funds for judicial elections.[101] *Duke* rejected *Day*'s conclusion that the rescue funds provision chilled speech, arguing instead that "North Carolina's provision of matching funds is likely to result in more, not less, speech."[102] The Fourth Circuit also held that North Carolina's public funding scheme was not coercive, in that a candidate might rationally choose not to participate in the scheme despite the advantages it provided.[103]

While *Day*, *Daggett*, and *Duke* offer conflicting analyses of the rescue funds provision, the holdings of these decisions are at least clear. The same cannot be said, unfortunately, for *Association of American Physicians and Surgeons v. Brewer*.[104] *Brewer* involved a coalition of candidates and independent organizations who brought suit challenging various aspects of Arizona's public funding scheme, including its provision for rescue funds.[105] The district court dismissed the suit, holding that the plaintiff's challenge to the rescue funds provision failed to state a claim because the provision was constitutional.[106]

On appeal, defendants argued that the case was moot, as the election at issue had long since passed.[107] The Ninth Circuit initially agreed and issued an opinion dismissing the appeal on mootness grounds.[108] Soon thereafter, however, the court withdrew its opinion when it was determined that the panel's original mootness holding was inconsistent with prior binding Ninth Circuit precedent.[109] The court then issued a third

99. *Id.* at 464.

100. *Id.* at 466-67.

101. N.C. Right to Life Comm. Fund for Indep. Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008). At the district court level, the case was styled *Jackson v. Leake*. 476 F. Supp. 2d 515 (E.D. N.C. 2006). Plaintiff Jackson, however, was voluntarily dismissed from the case on appeal, and thus the case was restyled as *N.C. Right to Life Comm. Fund for Indep. Expenditures v. Leake* in the Fourth Circuit. This, however, has led to some confusion, as on the same day that it handed down its opinion, the Fourth Circuit also handed down its opinion in the separate case of N.C. Right to Life v. Leake, 525 F.3d 274 (4th Cir. 2008). On July 24, 2008, plaintiffs' filed a petition for a writ of certiorari with the United States Supreme Court, styled *Duke v. Leake*. 77 USLW 3074 (U.S. Jul 24, 2008) (NO. 08-120). For consistency, and in order to avoid confusion, for purposes of this article the Fourth Circuit's decision on the rescue funds provision shall be referred to as *Duke v. Leake*, or simply *Duke*.

102. *Duke*, 524 F.3d at 438.

103. *Id.* at 436 ("The plaintiffs do not make coercion a central aspect of their arguments, and, indeed, we conclude that North Carolina's public financing system is not unconstitutionally coercive. The incentives to choose public funding, while not insubstantial, are rather modest in comparison to those in similar systems that have been upheld against First Amendment challenges.").

104. 363 F. Supp. 2d 1197 (D. Ariz. 2005).

105. *Id.* at 1198-99.

106. *Id.* at 1202-03.

107. Assoc. of Am. Physicians & Surgeons v. Brewer, 486 F.3d 586, 588 (9th Cir. 2007), *reh'g granted*, 494 F.3d 1145 (9th Cir. 2007), *amended by* 497 F.3d 1056 (9th Cir. 2007).

108. *Id.* at 589.

109. *Brewer*, 494 F.3d at 1146.

opinion, clarifying that it had reversed the district court's dismissal, holding that plaintiffs had stated a cause of action in their challenges to the public funding scheme, and remanding the case back to the district court.[110] By finding that plaintiffs had stated a cause of action, the court appears to have sided with *Day* in finding the public funding scheme constitutionally problematic, though the Ninth Circuit's subsequent opinion contains virtually no substantive discussion of the merits of the rescue funds challenge.[111]

While these four cases are as yet the only decisions dealing explicitly with the constitutionality of the rescue funds, several other cases also warrant further mention. First, in *Rosentiel v. Rodriguez*,[112] publicly funded candidates in Minnesota were given an initial distribution of government funds in exchange for agreeing to spending caps.[113] The publicly funded candidates were released from these caps, however, if their non-publicly funded opponents spent more than a given amount.[114] The court upheld this provision on the basis that removing the publicly funded candidate's spending caps did not burden First Amendment rights.[115]

The Sixth Circuit has also dealt with the constitutionality of other aspects of public funding schemes in two cases. *Gable v. Patton*[116] involved a Kentucky scheme where publicly funded candidate slates were allowed to raise up to $600,000 in private contributions and were given two dollars in government funding for every privately raised dollar up to that amount. Further, if a slate of candidates were to face a privately funded slate that had raised more than $1.8 million, the publicly funded candidates were released from the otherwise applicable contribution limits and could continue to receive two dollars in government funding for every dollar raised privately. Despite these very generous benefits, *Gable* found that Kentucky's public funding scheme was not coercive and so was constitutional.[117]

Kentucky's public funding scheme also contained a provision, similar to the one at issue in *Rosentiel*, that removed the applicable expenditure limits for publicly funded candidates if an opposing slate of candidates spent more than the trigger amount. While *Gable* upheld this feature of the Kentucky scheme, in *Anderson v. Spear*,[118] the Sixth Circuit struck down the definition of "contribution" that applied to Kentucky's

110. *Brewer*, 497 F.3d at 1057.
111. *Id.*
112. 101 F.3d 1544 (8th Cir. 1996).
113. *Id.* at 1546.
114. *Id.* at 1547.
115. *Id.* at 1557.
116. 142 F.3d 940 (6th Cir. 1998).
117. *Id.* at 949.
118. 356 F.3d 651 (6th Cir. 2004).

matching funds provision on the grounds that it included contributions by a candidate to his own campaign.[119] The court held that including candidate contributions when calculating the trigger amount served to deter candidates from contributing funds to their own campaign, and "[t]hus, by failing to exempt candidate contributions to their own campaigns from the trigger provision, Kentucky applies an indirect regulation on *expenditures*."[120]

2. *Davis v. FEC*

The Supreme Court's recent decision in *Davis v. FEC*[121] provides important guidance as to how to resolve this conflict among the lower courts. *Davis* involved a challenge to the so-called "Millionaire's Amendment" to the Bipartisan Campaign Reform Act of 2002 (BCRA).[122] This provision tripled the contribution limit applicable to a candidate when that candidate's opponent had "self-financed" his campaign, that is, where he contributes more than $350,000 to his own campaign.[123] Contribution limits for the candidate who had self-financed, however, were not raised. Jack Davis, a self-financed congressional candidate in New York, challenged the provision, arguing that he was deterred from contributing personal funds to his campaign by the knowledge that if he did so he would trigger the deferential contribution limits.[124]

*Davis* held that by making the trigger for the asymmetrical contribution limits turn on the amount of personal spending by Davis on his own campaign, the Millionaire's Amendment chilled and penalized Davis's First Amendment rights.[125] Under this scheme, "a candidate who wishes to [make unlimited personal expenditures had] two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits."[126] The Court endorsed the rationale of *Day* to support its conclusion that the Millionaire's Amendment burdened free speech:

> Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite § 319(a), but they must shoulder a special and potentially significant burden if they make that choice. *See Day v. Holahan*, 34 F.3d 1356, 1359-1360 (C.A.8 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits

119. *Id.* at 667.
120. *Id.*
121. 128 S. Ct. 2759 (2008).
122. *Id.* at 2767.
123. 2 U.S.C.A. § 441a-1(a)(1)(A) (2002).
124. *Davis*, 128 S. Ct. at 2767, 2770.
125. *Id.* at 2771.
126. *Id.* at 2772.

and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures).[127]

Because the Millionaire's Amendment entailed that "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics," the Court found that the provision burdened protected political speech.[128]

Having found that the Millionaire's Amendment burdened First Amendment rights, *Davis* went on to find the provision unconstitutional, as it was not narrowly tailored to a compelling government interest.[129] According to the Court, the Millionaire's Amendment was not justified by any anti-corruption interest, as "reliance on personal funds *reduces* the threat of corruption."[130] Furthermore, the *Davis* Court rejected the argument that the Millionaire's Amendment could be justified by a state interest in "fairness," "equality," or "leveling the playing field" with regard to elections.[131] Quoting a prior opinion by Justice Thomas, the Court noted that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."[132] Far from being compelling, the Court held that equality in campaign financing was not even a legitimate interest of the state.[133] A purported interest in equality justifies restricting speech that would have "ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office."[134] Finally, *Davis* held that the "resulting drag on First Amendment rights [caused by the Millionaire's Amendment] is not constitutional simply because it attaches as a

127. *Id.*

128. *Id.*

129. *Id.* (noting that the Millionaire's Amendment imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech and thus cannot stand unless it is "justified by a compelling state interest" (citing FEC v. Mass. Citizens for Life, 479 U.S. 238, 256 (1986))).

130. *Id.* at 2773.

131. *Id.*

132. *Id.* (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting)).

133. *Id.*; *see also* McConnell v. FEC, 540 U.S. 93, 227 (2003) (noting that "equal resources" or "equalizing" is "not . . . a legally cognizable right" (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986) and Buckley v. Valeo, 424 U.S. 1, 48 (1976) (per curiam)); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 705 (1990) (Kennedy, J., dissenting) (rejecting as "antithetical to the First Amendment" "the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections"); *Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

134. *Davis*, 128 S. Ct. at 2773.

consequence of a statutorily imposed choice."[135] The provision was therefore unconstitutional.[136]

*Davis* sheds new light on the constitutionality of rescue funds in several important respects. First, the Supreme Court endorsed *Day*'s conclusion that rescue funds burden First Amendment rights of independent spenders.[137] This means that *Day* was right when it struck down a rescue funds provision that granted government contributions based on speech by independent groups.[138] Second, like *Anderson*, *Davis* involved contributions made by candidates from personal funds, not independent expenditures.[139] If the law struck down in *Davis* was analogous to a rescue funds provision in *Day*, then its holding must likewise apply to rescue funds issued based on the spending by a privately funded opponent.

It should also be noted that the constitutionality of the regulation at issue in *Davis* did not turn on any calculation of the overall benefits and burdens involved in the public funding scheme. A state cannot justify imposing burdens on the speech of non-publicly funded candidates on the grounds that publicly funded candidates have voluntarily adopted other burdens, such as voluntary expenditure limits; nor are these burdens justified as a means of encouraging participation in a public funding scheme.[140]

3. Can the Rescue Funds Provision Be Saved?

Viewed through the lens of *Davis*, it is clear that the rescue funds provision burdens First Amendment rights. As in *Davis*, the rescue funds provision presents candidates with a stark choice: "abide by a limit on personal expenditures or endure the burden that is placed on that right" by the provision of rescue funds.[141] Likewise, independent groups who want to advocate against publicly funded candidates or for their privately funded opponents must either limit their expenditures, or face the prospect that their speech will result in additional funding to the candidate whose election they oppose. This choice may chill some speech by privately funded candidates, and it may lead other candidates to face a "potentially significant burden" based on their speech.[142] As a result, rescue funds must pass strict scrutiny.

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135. *Id.* at 2764.
136. *Id.* at 2765.
137. *Id.* at 2772.
138. *See* Opinion of the N.J. State Legislature Office of Legislative Servs., 1, July 21, 2008 (concluding that a proposed New Jersey bill creating a public funding scheme with rescue funds would be unconstitutional under *Davis*).
139. *Davis*, 128 S. Ct. at 2763.
140. *Id.* at 2772 ("The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice.").
141. *Id.*
142. *Id.* (citing Day v. Holahan, 34 F.3d 1356, 1359-60 (8th Cir. 1994)).

Rescue funds are sometimes justified as a means to "level the playing field" between publicly funded candidates and their privately funded opponents. After *Davis*, it is obvious that this is not a compelling government interest.[143] But rescue funds do not even have this effect, for several reasons. First, by providing rescue funds dollar for dollar over the government's original grant of funds, the publicly funded candidate will always have more money for campaign speech than her privately funded opponent. That is because neither the calculation of the trigger amount nor the calculation of the amount of rescue funds take into account the fundraising costs incurred by the privately funded candidate in raising private funds. This can readily account for a third to a half of the total funds raised.[144]

Second, in schemes like North Carolina's, if a group makes independent expenditures in support of a publicly funded candidate or opposing his privately funded opponent, this is not counted in the rescue funds calculation.[145] If, on the other hand, a group opposes the publicly funded candidate or supports his or her privately funded opponent, this triggers rescue funds.[146] Thus, the provision of rescue funds does not achieve equality even in the sense of dollars spent in support of each campaign.

Finally, rescue funds provisions do not serve an interest in "leveling the playing field" because they do not take into account the electoral advantages that come from being an incumbent. Were the rescue funds provision designed to further equality, it would take into account the advantages of holding office—an established staff, paid travel, franking privileges, media access—along with the benefits derived from having

143. *Id.* at 2773 ("The argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office."); *see also* McConnell v. FEC, 540 U.S. 93, 227 (2003) (noting that "equal resources" or "equalizing" is "not . . . a legally cognizable right" (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986) and Buckley v. Valeo, 424 U.S. 1, 48 (1976) (per curiam))); *Buckley*, 424 U.S. at 49 (suggesting that a state cannot "abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society"); *Id.* at 54 ("[An] ancillary interest in equalizing the relative financial resources of candidates competing for elective office . . . . is clearly not sufficient to justify . . . infringement of fundamental First Amendment rights.").

144. There is not even a requirement that the expenditure triggering rescue funds be adverse to the interest of the publicly funded candidate who receives the rescue funds. For example, in a three person race, money spent by Candidate A attacking Candidate B (both privately funded candidates) would result in a government contribution to Candidate C (a publicly funded candidate) even though C has benefited from the original expenditure. Likewise, funds gained via expenditures by independent groups may be used against a candidate even though, by definition, such expenditures are outside the candidates control and may not even benefit his candidacy. *Buckley*, 424 U.S. at 47 ("[I]ndependent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."). By contrast, a privately funded candidate is never eligible for rescue funds, no matter how much money is spent in opposition to his candidacy or in support of his participating opponent by independent groups.

145. *See* N.C. GEN. STAT. § 163-278.67 (2008).

146. *Id.*

run for office before. These advantages are exacerbated under public funding schemes with rescue funds, which ensures that publicly funded incumbents can always maintain a funding advantage over a non-publicly funded challenger, removing the only advantage that challenger may have.[147] The result of all this is a significant advantage to publicly funded candidates, particularly incumbents.

This raises two constitutional concerns. First, it brings into question the sincerity of the claim that the rescue funds are needed to "level the playing field." Where considerable First Amendment freedoms are at stake, a state "must demonstrate its commitment to advancing [its] interest by applying its [requirements] evenhandedly."[148] Underinclusiveness with respect to a given state interest thus belies the claim that the regulation was actually designed to serve this interest. Furthermore, government contributions are given to a publicly funded candidate based on the viewpoint of that speech, which renders them unconstitutional.[149]

Since the rescue funds cannot be justified as a way of "leveling the playing field," they must be justified by the state's interest in preventing corruption or the appearance thereof.[150] The use of rescue funds, however, is not narrowly tailored to advance this interest for two reasons. First, the state's interest in preventing corruption does not justify burdens on independent expenditures,[151] since independent spending does not give rise to the threat of corruption.[152] Second, contributions made by a candidate to his own campaign, and spending money lawfully raised by a campaign does not implicate any corruption interest.[153] The rescue funds provision is therefore not narrowly tailored to any compelling anti-corruption interest.

Finally, the rescue funds provision cannot be justified as being a necessary component in a larger public funding scheme. As *Davis* noted, the "resulting drag on First Amendment rights [caused by an election

147. *McConnell*, 540 U.S. at 249 (Scalia, J., concurring in part and dissenting in part) (noting that "[A]s everyone knows, this is an area in which evenhandedness is not fairness. If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored.").

148. Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989).

149. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 378, 381 (1992).

150. Davis v. FEC, 128 S. Ct. 2759, 2773 (2008) (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.")).

151. Buckley v. Valeo, 424 U.S. 1, 46, 53 (1976) (per curiam).

152. *Id.* at 46 ("[I]ndependent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.").

153. *Id.* at 53 ("[T]he prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds. . . . Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.").

regulation] is not constitutional simply because it attaches as a consequence of a statutorily imposed choice."[154] Public funding of elections may be viewed as desirable by a candidate for a whole host of reasons, but whatever advantages accrue from the scheme do not justify burdening core political speech.

If the rescue funds provision is so ill-fitted to a state's interests in equality or the avoidance of corruption, what interest does it actually serve? First, as indicated above, the provision serves as a form of incumbent protection. By accepting public funding, an incumbent can ensure that he will not be outspent by an opponent, thus protecting his incumbency advantage and removing one of the few serious threats to his re-election.

Second, the rescue funds provision serves the desire to reduce overall campaign spending by inducing candidates to accept public funds on more favorable terms than they could achieve through private means. Sometimes this goal is explicit. The North Carolina public funding scheme's stated purpose, for example, is "to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections . . . ."[155] But even where this purpose is not made explicit, it is implicit in the way that rescue funds operate. If reducing the corrupting influence of contributions really were the goal behind public funding, a state could achieve this goal by awarding sufficient funds for a candidate to run an effective campaign[156] without the necessity of awarding rescue funds. This would induce virtually all candidates to sign up for the scheme. Doing this, however, would entail more total spending on campaigns, not less.

Through the use of a rescue funds provision, the state can keep public funding a viable option for candidates without abandoning the scheme's purpose in reducing total spending. In effect, then, rescue funds are an attempt to rescue publicly funded candidates not from their opponents, but from the scheme itself. Needless to say, the state does not have a compelling interest in reducing the total amount spent on a cam-

154. *Davis*, 128 S. Ct. at 2772.

155. N.C. GEN. STAT. § 163-278.61 (2008).

156. In North Carolina, for example, "the base amount of funding for a contested state supreme court campaign was $216,650" in 2006. Duke v. Leake, 524 F.3d 427, 433 (4th Cir. 2008). By contrast, Roy Cooper, the winning candidate for Attorney General in 2004, raised $1,574,350 in campaign contributions. *See* National Institute on Money in State Politics, Candidate Profile for Roy Cooper, http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=67817 (last visited Oct. 19, 2008).

paign.[157] As such, the provision is unlikely to survive constitutional scrutiny.

### *B. The Problem of Disclosure*

In order for a rescue funds provision to operate effectively, the state must have accurate and up-to-date information about expenditures made by privately funded candidates and independent groups opposing publicly funded candidates. Without this information, the state's promise to rescue publicly funded candidates from the inadequacy of their public funding is meaningless. And the only practicable way to get this information is through some form of expedited disclosure.

Since the provision of rescue funds to a candidate based on opposing speech violates the First Amendment, any disclosure scheme directly tied to a rescue funds provision will likewise be unconstitutional.[158] Even if this were not so, however, the methods of disclosure typically used in a rescue funds provision would be constitutionally problematic, as they involve significant burdens on protected political speech which fall more heavily on privately funded candidates than on publicly funded ones.

#### 1. General Burdens Caused by Disclosure

While mandatory disclosure may at first blush seem innocuous, disclosure requirements have the potential to impose significant burdens on candidates and independent groups. Potential donors may face retaliation if the fact that they have contributed to a particular candidate or group becomes public knowledge. Retaliation may come in the form of social ostracism,[159] economic sanctions,[160] harassment by vengeful politicians,[161] or even violence.[162] A soldier who donates to pro-gay causes

157. *See Buckley*, 424 U.S. at 9 (holding that expenditure limits were unconstitutional because they "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached").

158. *See, e.g.*, *Davis*, 128 S. Ct. at 2775 ("The § 319(b) disclosure requirements were designed to implement the asymmetrical contribution limits provided for in § 319(a), and as discussed above, § 319(a) violates the First Amendment. In light of that holding, the burden imposed by the § 319(b) requirements cannot be justified, and it follows that they too are unconstitutional.").

159. Bradley A. Smith, *A Moderate, Modern Campaign Reform Agenda*, 12 NEXUS 3, 15 (2007) (noting that some people "would not want their contributions to the Log Cabin Republicans, an organization of gay Republicans, to be disclosed publicly").

160. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995) (noting that the desire to contribute anonymously to a political organization or campaign "may be motivated by fear of economic or official retaliation").

161. Smith, *supra* note 164, at 15 (noting that some contributors "will prefer to give anonymously in order to avoid retaliations by vengeful politicians"); *see also* Ben Smith, *Obama lawyer warns of 'reckoning' for Clinton 527 donors and staff*, POLITICO, Feb. 21, 2008, http://www.politico.com/blogs/bensmith/0208/Obama_lawyer_warns_of_reckoning_for_Clinton_527_donors_and_staff.html; Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. TIMES, Aug. 8, 2008, *available at* http://www.nytimes.com/2008/08/08/us/politics/08donate.html (detailing letter sent by group Accountable America warning donors to conservative 527 groups of exposure).

162. NAACP v. Alabama, 357 U.S. 449, 462 (1958).

may risk being discharged under the military's "Don't Ask, Don't Tell" policy.[163] A union member or corporate employee may risk ostracism or be denied advancement if he or she contributes to candidates or causes not in line with those of management.[164] Businessmen and other professionals may not want to alienate potential customers,[165] and those whose careers depend on reputation and avoiding controversy, such as doctors, ministers, or journalists, may not wish to have their political views publicly advertised.[166] The risk of retaliation is particularly acute for individuals who contribute to "unpopular or unconventional" causes and candidates.[167] And recent advances in computer technology and the availability of readily-searchable, digitized information on the Internet only exacerbate this problem.[168]

Even apart from any risk of retaliation, compelled disclosure of contributor information raises serious privacy concerns. In *Buckley*, the Supreme Court recognized that "compelled disclosure, *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[169] Legal protections for privacy have multiplied in recent years, forbidding the disclosure of personal information in a wide variety of areas. Likewise, courts have long recognized the importance of protecting privacy in the political arena and have repeatedly invalidated restrictions on anonymous political speech.[170]

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163. *See* McVeigh v. Cohen, 983 F. Supp. 215, 216-18 (D.D.C. 1998) (considering a sailor discharged for discussing his sexual orientation in an anonymous online profile).

164. Buckley v. Valeo, 424 U.S.1, 237 (1976) (per curiam) (Burger, C.J., concurring in part and dissenting in part) ("Rank-and-file union members or rising junior executives may . . . think twice before making even modest contributions to a candidate who is disfavored by the union or management hierarchy. Similarly, potential contributors may well decline to take the obvious risks entailed in making a reportable contribution to the opponent of a well-entrenched incumbent.").

165. *See* Leigh Jones, *Boycott Threatened Over Meeting Site of Association of American Law Schools*, NAT'L L.J., Aug. 5, 2008, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202423529779.

166. William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 17 (2003) ("Those who rely on trust and identification with others to do their work–such as ministers, psychotherapists, or schoolteachers–may find their roles undermined if congregants, patients, or parents know and judge their personal political activity.").

167. *Id.* at 22.

168. *Id.* at 11-12 ("In the last five years, campaign contribution disclosure suddenly joined the trend of online compilation and availability. This change in technology qualitatively transformed the nature of disclosure laws. No longer can a contributor assume that disclosed information is unlikely to be seen by anyone. The law remains the same, but its effect is entirely different." (footnotes omitted)).

169. Buckley v. Valeo, 424 U.S.1, 64 (1976) (emphasis added).

170. *See* Watchtower Bible and Tract Soc'y v. Vill. of Stratton, 536 U.S. 150, 153, 159-60, 169 (2002) (striking down ban on anonymous solicitation); Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 204 (1999) (finding that a person gathering petition signatures retains an anonymity interest); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (holding unconstitutional an Ohio law mandating disclosure for low level, individual expenditures regarding a ballot initiative); Talley v. California, 362 U.S. 60, 63-66 (1960) (striking down a California law prohibiting anonymous leafleting regarding a commercial dispute); NAACP v. Alabama, 357 U.S. 449, 466 (1958) (striking down a state law mandating disclosure of members).

Fear of retaliation and concern over privacy undoubtedly deters some potential donors from making contributions to candidates and independent groups where they know disclosure will be required. This chilling effect may be significant. In a 2007 survey, fifty-six percent of respondents objected to having their name and address posted on the Internet as a contributor, and seventy-one percent objected to having their employer's name listed.[171] Sixty percent said they would think twice about contributing if their name and address would be disclosed, and forty-nine percent said the same if their employer were reported.[172] Among the reasons listed for this reluctance were: "I would never want my employer to know who I give money to," and fear "that [disclosure] would jeopardize my job."[173] Courts have also taken judicial notice of the deterrent effect compelled disclosure can have.[174]

Compelled disclosure can also impose significant burdens on candidates and groups in terms of the time and effort needed to comply with the specified disclosure requirements. For example, *Citizens for Responsible Government State Political Action Committee v. Davidson*[175] involved a challenge to the disclosure requirements of the Colorado Fair Campaign Practices Act.[176] Under the Colorado law, independent expenditures exceeding $1,000 had to be reported to all candidates and to the Secretary of State. This notice had to be in writing and had to include: "(1) the amount of the expenditure, (2) a 'detailed description' of the use of the expenditure, and (3) the name of the candidate whom the expenditure is intended to support or oppose."[177] Violations were punishable by a "'penalty of ten dollars per day for each day that a statement or other information required to be filed . . . is not filed by the close of business on the day due.'"[178] As the *Davidson* court recognized, "[t]o require such immediate notice severely burdens First Amendment rights."[179]

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171. *See* DICK M. CARPENTER II, INST. FOR JUSTICE, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 7 (2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf.

172. *Id.*

173. *Id.* at 9.

174. Buckley v. Valeo, 424 U.S. 1, 68 (1976) (per curiam); *see also* McConnell v. FEC, 251 F. Supp. 2d 176, 227-29 (D.D.C. 2003) (noting evidence of retaliation and deterred contributions ranging from: large numbers of contributions at just below the disclosure trigger amount; to vandalism after disclosure; to non-contribution because of concerns about a group's ability to retain confidentiality; to concerns about employers, neighbors, other business entities, and others knowing of support for causes that are not popular everywhere and the results of such disclosure); AFL-CIO v. FEC, 333 F.3d 168, 176 (D.C. Cir. 2003) (noting statements by labor organizations "that releasing the names of hundreds of volunteers, members, and employees will make it more difficult for the organization to recruit future personnel").

175. 236 F.3d 1174 (10th Cir. 2000).

176. *Id.* at 1181, 1197.

177. *Id.* at 1196 (quoting COLO. REV. STAT. § 1-45-113(4) (2000)).

178. *Id.* (quoting COLO. REV. STAT. § 1-45-113(4) (2000) (alteration in original)).

179. *Id.* at 1197.

Individuals or groups who fail to meet these requirements can face serious penalties based on what amount to technical violations of the law. In 1996, for example, California imposed an $808,000 fine (the largest ever) on Russell Howard and Steve Cicero (president and treasurer) of Californians Against Corruption (CAC), a small grassroots organization that only spent $103,091 in an unsuccessful effort to oust by recall a powerful state senator whom they considered to be corrupt.[180] In the flurry of activity and with few resources, CAC had trouble keeping up with the reporting of the name, address, occupation, and employer of anyone contributing over $100.[181] The information was always requested, but contributors did not always follow up with the needed information.[182] California's Fair Political Practices Commission (FPPC) levied the maximum $2,000 per violation for each failure to provide a piece of the required information, even though the total was about eight times the total amount spent, and most of the contributors' addresses were provided on copies of the checks given to the FPPC.[183]

2. Specific Burdens Caused by Disclosure under Rescue Funds Provisions

Aside from the sorts of burdens mentioned above—which apply to most election-related disclosure—the disclosure requirements commonly imposed by a rescue funds provision also impose additional burdens. Specifically, compelled disclosure under a rescue funds provision requires the disclosure of campaign spending which exposes the privately funded candidate's campaign strategy, thus undermining her ability to engage in "*effective* advocacy" and to wage an effective campaign.[184] This is especially true where, as with most rescue funds provisions, disclosure requirements are asymmetrical, placing more stringent reporting burdens on privately funded candidates.

Under the disclosure requirements of North Carolina's scheme, for example, privately funded candidates with publicly funded opponents are required to "report total income, expenses, and obligations to the Board by facsimile machine or electronically within 24 hours after the total amount of campaign expenditures or obligations made, or funds raised or borrowed, exceeds eighty percent (80%) of the trigger for rescue funds,"

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180. Brian Doherty, *Disclosure Flaw*, REASON, Mar. 1996, *available at* http://www.reason.com/news/printer/29856.html.

181. *Id.*

182. *Id.*

183. *Id.* During the proceedings, "the FPPC explicitly stated as an aggravating factor that Howard told a newspaper reporter that 'the little guy can't participate [in politics] without running afoul of technical violations.'" Brian Doherty, *How Campaign Finance Law Hurts Participation in Politics*, REASON, Apr. 2001, *available at* http://www.reason.com/news/printer/32341.html.

184. Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam) (emphasis added). *Cf.* AFL-CIO v. FEC, 333 F.3d 168, 177-78 (D.C. Cir. 2003) (noting compelled disclosure of "confidential internal materials" violates privacy right and "seriously interferes with internal group operations and effectiveness").

and must file periodic reports thereafter according to an expedited reporting schedule set by the North Carolina Board of Elections.[185] Likewise, "any entity making independent expenditures in support of or opposition to a [publicly funded] candidate or in support of a candidate opposing a [publicly funded] candidate" is required to "report the total funds received, spent, or obligated for those expenditures . . . to the Board by facsimile machine or electronically within 24 hours after the total amount of expenditures or obligations made, or funds raised or borrowed, for the purpose of making the independent expenditures . . . exceeds five thousand dollars ($5,000)."[186] Subsequently, such groups must follow the same expedited reporting schedule as privately funded candidates. Disclosure is not required, however, for independent expenditures made in opposition to a publicly funded candidate.[187]

Electoral politics is a zero-sum game, and any benefit conferred on one candidate is by its very nature a disadvantage to his opponents. Required reporting, both as to actual and planned expenditures (obligations), can provide valuable information to an opposing candidate as to when major media buys and other readily-identifiable, big-ticket expenses are in the works, all long before they would be known under the regular reporting required of all candidates. Information on spending is strategic information that a candidate would ordinarily keep private until all candidates are equally required to disclose their activities. These ongoing, unilateral disclosures of strategic information impose a clear handicap, and also disincentives, on speech by privately funded candidates.

3. How to Deal with Disclosure

The fact that compelled disclosure imposes burdens on First Amendment rights does not mean that all disclosure requirements are unconstitutional. It does mean, however, that the "significant encroachments" on privacy and speech caused by mandatory disclosure "cannot be justified by a mere showing of some legitimate governmental interest."[188] In *Buckley*, the Supreme Court set forth a two-part test to determine the constitutionality of disclosure requirements. First, as a threshold requirement, the affected speech or activity be unambiguously campaign related.[189] Second, if the law passes this threshold requirement, a disclosure requirement "must survive exacting scrutiny."[190]

185. N.C. GEN. STAT. § 163-278.66(a), (b) (2008).
186. *Id.* § 163-278.66(a).
187. *See id.* § 163-278.66(b).
188. Davis v. FEC, 128 S. Ct. 2759, 2775 (2008) (quoting *Buckley*, 424 U.S. at 64).
189. *See* N. C. Right to Life v. Leake, 525 F.3d 274, 281 (2008) ("[A]fter *Buckley*, campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular . . . candidate.' " (quoting *Buckley*, 424 U.S. at 80) (alterations in the original)).
190. *Buckley*, 424 U.S. at 64.

a. The Unambiguously Campaign Related Threshold Requirement

*Buckley* held that disbursements for political speech may not be subjected to compelled disclosure, unless they are for communications "unambiguously related to the campaign of a particular federal candidate," to assure that "the relation of the information sought to the purposes of the Act [was not] too remote,"[191] and to ensure that the provision only "shed[s] the light of publicity on spending that is unambiguously campaign related."[192]

*Buckley* applied this unambiguously-campaign-related requirement to: (1) expenditure limitations,[193] (2) Political Action Committee (PAC) status and disclosure,[194] (3) non-PAC *disclosure* of contributions and independent expenditures,[195] and (4) contributions.[196] Because *Buckley* expressly applied this unambiguously-campaign-related requirement to the *disclosure of expenditures*,[197] it has direct application to the disclosures required to provide rescue funds.

*Buckley* employed two tests to implement this unambiguously-campaign-related requirement. First, for determining PAC status, *Buckley* endorsed the major-purpose test for "political committees."[198] "Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related*."[199] Second, to limit the speech subject to FECA to only campaign-related speech, the Court created the express-advocacy test, i.e., whether a communication contains explicit words expressly advocating the election or defeat of a clearly identified candidate.[200] This test assures that expenditures are "unambiguously related to the campaign of a particular federal candidate."[201]

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191. *Id.* at 80.
192. *Id.* at 81.
193. *Id.* at 42-44.
194. *Id.* at 79.
195. *Id.* at 79-81. "Independent expenditure" is a term of art referring to an express-advocacy communication that is not coordinated with a candidate. *See* 2 U.S.C. § 431(17) (2006).
196. *Id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, [i.e., regulating elections,] for they are connected with a candidate or his campaign.").
197. *Id.* at 80.
198. *Id.* at 79 ("To fulfill the purposes of the Act, [i.e., regulating elections,] they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."); FEC v. Mass. Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 252 n.6 (1986) (reaffirming major purpose test).
199. *Buckley*, 424 U.S. at 79 (emphasis added).
200. *Id.* at 44, 80; *MCFL*, 479 U.S. at 262 (holding that the major purpose of an organization was determined by express-advocacy "independent spending").
201. *Buckley*, 424 U.S. at 80.

The Court in *FEC v. Wisconsin Right to Life* (*WRTL II*)[202] also limited the BCRA's new "electioneering communication"[203] corporate prohibition[204] to only "*campaign* speech,"[205] when it stated its test for the extent of the prohibition: an ad may be prohibited "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[206] So *WRTL II*'s appeal-to-vote test was the application of the unambiguously-campaign-related requirement to electioneering communications, just as the express-advocacy test was the *Buckley* Court's application of the requirement to reporting independent expenditures and the major-purpose test was its application of the requirement to determination of PAC status.

The purpose of the unambiguously-campaign-related requirement—and the appeal-to-vote test applying it—is twofold. Negatively, it confines government within the pale of its constitutional authority to regulate elections.[207] Positively, it protects what *WRTL II* called "political speech,"[208] a term it equated with "genuine issue ads,"[209] or "issue advocacy,"[210] as distinguished from "campaign speech" or "express advocacy."[211] *WRTL II* explained that "[i]ssue advocacy conveys information and educates,"[212] and reaffirmed *Buckley*'s statement that, because issue advocacy and candidate advocacy often look alike, bright-line tests are required to protect political speech, or issue advocacy, from being chilled.[213] And to remove any doubt as to the necessity of speech-protective lines, *WRTL II* reiterated that "the benefit of any doubt [goes] to protecting rather than stifling speech."[214]

As explained, the disclosure requirements tied to rescue funds are often triggered by spending by the privately funded opponent or by independent expenditures of third party groups. Since such speech is cam-

202. 127 S. Ct. 2652 (2007).

203. Under BCRA, "electioneering communication" was defined as "any broadcast, cable, or satellite communication which- (I) refers to a clearly identified candidate for Federal office; (II) is made within- (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A) (2006).

204. 2 U.S.C. § 441b(a) (2000 ed., Supp. IV).

205. *WRTL II*, 127 S. Ct. at 2672 (emphasis added).

206. *Id.* at 2667.

207. Buckley v. Valeo, 424 U.S. 1, 13 (1976) (per curiam) ("The constitutional power of Congress to *regulate federal elections* is well established and is not questioned by any of the parties in this case." (footnote omitted and emphasis added)).

208. *WRTL II*, 127 S. Ct. at 2659.

209. *Id.* at 2659 (quoting McConnell v. FEC, 540 U.S. 93, 206 n.88 (2003)).

210. *Id.* at 2667.

211. *Id.* at 2659 (quoting *McConnell*, 540 U.S. at 205-206).

212. *Id.* at 2667.

213. *Id.* at 2669.

214. *Id.* at 2667; *see also id.* at 2669 n.7, 2674.

paign speech,[215] then the disclosure requirements would be unambiguously campaign related. Whether disclosure was constitutional, therefore, would depend on whether the disclosure provision passed strict scrutiny.

b. Strict Scrutiny

Since *Buckley*, the Supreme Court has been clear that election-related disclosure requirements are subject to "exacting scrutiny."[216] It has been less clear, however, in defining exactly what sort of scrutiny this "exacting scrutiny" requires. Some courts have held that exacting scrutiny is simply a synonym for strict scrutiny and that compelled disclosure based on core political speech must be narrowly tailored to a compelling government interest to be constitutional, regardless of the level of burden that disclosure placed on the exercise of First Amendment rights.[217] Other courts have applied a lesser standard of scrutiny when evaluating the constitutionality of mandatory disclosure provisions.[218]

Evidence that "exacting scrutiny" means strict scrutiny can be found in the *Buckley* decision itself. In its discussion of the disclosure requirements, for example, the *Buckley* Court expressly described "exacting scrutiny" as "[t]he strict test," and included a discussion of "least restrictive means" in its analysis,[219] a hallmark of strict scrutiny.[220] When *Buckley* turned next to consider compelled disclosure for persons making independent expenditures and certain contributions, it said that it "must apply the *same strict standard of scrutiny*" as it had just applied to the previous disclosure provision to protect the "right of associational privacy."[221] More tellingly, *Buckley* also used "exacting scrutiny" to describe the level of scrutiny given to the expenditure limits at issue in the case.[222] The Supreme Court has also explicitly linked "exacting scrutiny" with strict scrutiny in other contexts in *Buckley v. American Consti-*

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215. If, however, the disclosure requirements on independent spending went beyond express advocacy communications to require the disclosure of issue advocacy, the disclosure requirements would be unconstitutional as not being campaign related.

216. Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam).

217. *See* Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 787 (9th Cir. 2006) (noting that the "'exacting scrutiny' standard in *Buckley* was later characterized by the Court as requiring that a restriction on corporate political expenditures be 'narrowly tailored to serve a compelling state interest.'" (*quoting* Austin v. Mich. Chamber of Comm., 494 U.S. 652, 657 (1990))); AFL-CIO v. FEC, 333 F.3d 168, 176 (2003) (stating that *Buckley* "conclud[ed] that the disclosure requirements . . . survived strict scrutiny"); Cal. Pro-Life Council v. Getman, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) ("[W]e subject California's disclosure requirements to strict scrutiny."); R.I. ACLU v. Begin, 431 F. Supp. 2d 227, 235 (D.R.I. 2006) (stating that disclosure requirements "are subject to 'strict' or 'exacting' scrutiny").

218. Duke v. Leake, 524 F.3d 427, 439 (4th Cir. 2008); C & C Plywood Corp. v. Hanson, 583 F.2d 421, 425 (9th Cir.1978) (holding that disclosure regulations for express ballot measure advocacy may be enacted "without a showing of a compelling state interest").

219. *Buckley*, 424 U.S. at 68.

220. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960).

221. *Buckley*, 424 U.S. at 75 (emphasis added).

222. *Id.* at 44.

*tutional Law Foundation (Buckley II)*,[223] *McIntyre v. Ohio Elections Commission*,[224] and *First National Bank of Boston v. Bellotti*.[225]

To date, one of the best attempts to synthesize these seemingly inconsistent lines of cases is Justice Thomas's concurrence in *Buckley II*.[226] Justice Thomas begins his analysis by addressing a puzzling feature of constitutional jurisprudence, namely that political speech concerning elections is often subject to greater regulation than is non-election related speech. The answer to this puzzle lies in the state's authority to regulate elections.[227] States must hold elections, and this necessity requires regulations of the various aspects of the election process.[228] To require that every election regulation pass strict scrutiny "would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[229] Since it would not be appropriate or practicable to subject every election-related law to strict scrutiny, courts have developed a special framework for addressing the constitutionality of some sorts of election-related regulations. Under this framework, while regulations that impose significant burdens on freedom of speech and association remain subject to strict scrutiny, regulations imposing light burdens are subject to a lesser standard of review.[230] However, when an election-regulated regulation burdens core political speech, the Supreme Court has "ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech"[231] because "restrictions on core political speech

223. 525 U.S. 182, 192 n.12 (1999) ("Our decision is entirely in keeping with the 'now-settled approach' that state regulations 'impos[ing] 'severe burdens' on speech . . . [must] be narrowly tailored to serve a compelling state interest." (citation omitted)). Although the Court used strict scrutiny language, it concluded that the challenged provisions were "no more than tenuously related to the substantial interests disclosure serves," so that they "'fail exacting scrutiny.'" *Id.* at 204. (citing Am. Constitutional Law Found. v. Meyer, 120 F.3d 1092, 1105 (10th Cir. 1997)).

224. 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."); *see also id.* at 348 (referring to exacting scrutiny as "the strictest standard of review").

225. 435 U.S. 765, 786 (1978) ("[When] exacting scrutiny [is] necessitated . . . 'the State may prevail only upon showing a subordinating interest which is compelling,' 'and the burden is on the government to show the existence of such an interest.'" (citations omitted)); *but see* McConnell v. FEC, 540 U.S. 93, 196 (2003) (holding that disclosure provisions of the Bipartisan Campaign Finance Reform Act were constitutional because they served "important state interests").

226. *Buckley II*, 525 U.S. at 206 (Thomas, J., concurring).

227. *See, e.g., id.* (citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (citing U.S. CONST. art. I, § 4)).

228. *Buckley II*, 525 U.S. at 206. (Thomas, J., concurring).

229. Burdick v. Takushi, 504 U.S. 428, 433 (1992).

230. *Buckley II*, 525 U.S. at 206 (Thomas, J., concurring) ("When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review, and a State's important regulatory interests are typically enough to justify reasonable restrictions.").

231. *Id.* at 207.

so plainly impose a 'severe burden.'"[232] This analysis appears to have been adopted by the Court in *Davis*.[233]

The provision of rescue funds and the accompanying disclosure, however, are not necessary to conduct elections in the way that, say, regulations concerning voting, ballots, and candidate eligibility are. The justification for lower scrutiny of some election-related regulations—that such regulations are necessary to effectuate the state's obligation to hold fair elections—would therefore not apply to compelled disclosure under the rescue funds provisions.[234]

A word should also be said here about the use of synonyms in Supreme Court opinions, which can cause confusion or be used in an attempt to evade the required strict scrutiny. Writing is often enhanced by the use of synonyms to avoid repetition of the same term, so it is common to find synonyms in legal opinions as a stylistic device. But where, as in Supreme Court legal opinions, advocates may attempt to place heavy reliance on any variant reading, precision is preferred. Confusing synonyms are often used without any intent to change the analysis, and analytical language often changes over time.

For example, *McIntyre* used "overriding," not "compelling," to describe the required strict-scrutiny standard.[235] In *Bellotti*, the Court spoke of "exacting scrutiny" as requiring the State to "show[] a subordinating interest which is compelling," and "means 'closely drawn to avoid unnecessary abridgment . . . .'"[236] *Bellotti* also referred to "exacting scrutiny" as "critical scrutiny,"[237] and after further analysis held that "[a]ssuming, *arguendo*, that protection of shareholders is a 'compelling' interest . . . we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit appellants from speaking."[238] While *Bellotti* employed standard strict-scrutiny language by speaking of a "compelling interest," the "narrow tailoring" requirement was described with synonyms that might lead one to mistakenly believe that some intermediate standard applied—or even that the Court was speaking of the relevant-and-substantial-relation requirement that it had stated in *Buckley* in the disclosure context. From these examples, it is apparent that the use of synonyms does not alter the required level of scrutiny.

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232. *Id.* at 208 (citation omitted).

233. Davis v. FEC, 128 S. Ct. 2759, 2775 (2008) ("[T]he strength of the governmental interest [justifying disclosure] must reflect the seriousness of the actual burden on First Amendment rights.").

234. *See Burdick*, 504 U.S. at 433.

235. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

236. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) (outlining *Buckley*'s contribution-limit analysis using intermediate scrutiny)).

237. *See id.* at 786-87.

238. *Id.* at 795 (citation omitted).

4. Are There Compelling Reasons for Compelled Disclosure?

In *Buckley*, the Supreme Court found that there were three government interests sufficiently compelling to justify some form of disclosure: (1) an informational interest in allowing voters to know who was financially supporting a given candidate's campaign; (2) an anti-corruption interest in deterring both actual corruption and its appearance; and (3) an enforcement interest allowing a state to more easily detect violations of its contribution limits.[239] The third interest obviously has no application to disclosure under the rescue funds provision, as the disclosure requirements apply to independent expenditures and the campaign spending of opposing candidates, for which contribution limits do not apply.[240] The first two interests, however, warrant further comment.

a. Informational Interest

The first interest cited by *Buckley* as potentially justifying compelled disclosure was informational. Disclosure "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office."[241] Done appropriately, disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches," and can "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."[242]

Disclosure requirements associated with rescue funds provisions will generally not be narrowly tailored to this interest. As discussed above, under the disclosure requirements of North Carolina's scheme privately funded candidates with publicly funded opponents are required to "report total income, expenses, and obligations to the Board by facsimile machine or electronically within twenty-four hours after the total amount of campaign expenditures or obligations made, or funds raised or borrowed, exceeds eighty percent (80%) of the trigger for rescue funds," and must file periodic reports thereafter according to an expedited reporting schedule set by the North Carolina Board of Elections.[243] Likewise, "[a]ny entity making independent expenditures in support of or opposition to a [publicly funded] candidate or in support of a candidate oppos-

239. *Buckley*, 424 U.S. at 66-68.

240. In *McConnell*, the Supreme Court expanded the understanding of data-gathering as a compelling interest in holding that the important state interest of "gathering the data necessary to enforce more substantive electioneering restrictions" applies to "the entire range of *electioneering communications*." McConnell v. FEC, 540 U.S. 93, 196 (emphasis added). Even as broadened by *McConnell*, however, the state's interest in data-gathering has no relevance to the rescue funds provision.

241. *Buckley*, 424 U.S. at 66-67.

242. *Id.* at 67.

243. N.C. GEN. STAT. § 163-278.66(a) (2008).

ing a [publicly funded] candidate" is required to report the total funds received, spent, or obligated for those expenditures or payments to the Board by facsimile machine or electronically within 24 hours after the total amount of expenditures or obligations made, or funds raised or borrowed, for the purpose of making the independent expenditures or electioneering communications exceeds five thousand dollars ($5,000).[244]

Again, such groups must follow the same expedited reporting schedule as privately funded candidates. The disclosure requirements imposed by the rescue funds provision are also far more burdensome than would be necessary for the state to achieve legitimate informational interests.[245] Under the disclosure requirements, candidates and independent groups must report contributions, obligations, and expenditures within 24 hours. The State's interest in disclosure is served so long as disclosure is made before the election and with enough time for voters to make informed voting decisions.

The disclosure burden required by a rescue funds provision is also often unilateral. Publicly funded candidates are only required to file a few reports during the election campaign, and these reports need not be made on any sort of expedited basis.[246] Similarly, the disclosure requirements for independent expenditures differ greatly according to whether the expenditures involve a publicly funded or privately funded candidate. In North Carolina, for example, disclosure is not required under the rescue funds provision for independent expenditures made in opposition to a candidate opposing a publicly funded candidate, i.e. to independent expenditures opposing a privately funded candidate.[247] Where considerable First Amendment freedoms are at stake, a state must "demonstrate its commitment to advancing [its] interest by applying its [requirements] evenhandedly."[248] The rescue funds provision's disclosure requirements, however, do not do this.

In any event, the public will receive full information about campaign contributions and receipts in the less-restrictive quarterly and pre-election reports that both candidates must file, and in the normal independent expenditure reports that groups must file, so the special, unilateral disclosure requirements are redundant as to any public informational interest. Any asserted informational interest would be "insubstantial

244. *Id.*

245. *See* Citizens for Responsible Gov't State PAC v. Davidson, 236 F.3d 1174, 1197 (2001) ("None of the State's compelling interests in informing the electorate, preventing corruption and the appearance of corruption, or gathering data would be at all compromised by a more workable deadline.").

246. *See, e.g.*, § 163-278.66(a), (b).

247. § 163-278.66(b).

248. Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989).

because voters may identify [the relevant information] under [other] provisions."[249]

b. Anti-Corruption Interest

Compelled disclosure has also been justified as a means of deterring actual and apparent corruption.[250] Disclosure can act as a safeguard against corruption in two ways. First, the exposure that comes from disclosure "may discourage those who would use money for improper purposes either before or after the election."[251] In addition, a "public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return."[252]

The disclosure requirements provided for under typical rescue funds provisions, however, are not narrowly tailored to the state's interest in preventing actual or apparent corruption. First, the rescue funds provisions' disclosure requirements apply to independent and candidate expenditures. These expenditures pose no threat of corruption.[253] In addition to requiring disclosure based on expenditures, compelled disclosure under a rescue funds provision also typically applies once a candidate has received contributions over some set amount (usually a percentage of the trigger amount). In North Carolina, for example, disclosure is required once the total contributions by a privately funded candidate combined with the total of independent expenditures made in support of that privately funded candidate and in opposition to his publicly funded opponent reach 80% of the trigger amount.[254] Yet, if anything, the corrupting influence a contribution has is likely to decrease the more total funds a candidate has raised, as each individual contribution will make up a smaller percentage of the total. A contribution is no less likely to have a corrupting influence on candidates who do not end up raising 80% of the trigger amount than on candidates who do. Despite this fact, reporting is required for the latter, but not the former. Likewise, whether a contribution is corrupting does not depend on whether a candidate's opponent is publicly funded or privately funded. Yet disclosure is only required for privately funded candidates who face publicly funded opponents. Thus, compelled disclosure required by the rescue funds provision does not serve an anti-corruption interest.

249. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 298-99 (1981) ("It is clear, therefore, that [the challenged disclosure provision] does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights.").

250. Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam).

251. *Id.*

252. *Id.*

253. Randall v. Sorrell, 548 U.S. 230, 244 (2006) (reaffirming *Buckley*'s holding regarding the unconstitutionality of expenditure limits); *Buckley*, 424 U.S. at 47 (suggesting that independent expenditures do not pose threat of corruption).

254. N.C. GEN. STAT. § 163-278.66(a) (2008).

## IV. CONCLUSION

Concern about corruption, in the judiciary as much as in other branches of government, is a matter of great importance. One should not make the mistake, however, of equating increases in the amount of money spent on judicial campaigns with an increase in corruption. Furthermore, if states are going to adopt measures designed to combat corruption, they must take care that the proposed antidotes do not impose unconstitutional burdens on the First Amendment rights of judicial candidates or independent groups. If a state does attempt to restrict protected speech via election regulations, whether through bans on personal solicitation, rescue funds based on opposing speech, or burdensome and asymmetrical disclosure, this will only serve to deform, rather than reform, the judicial election process.

# SIX FATAL FLAWS: A COMMENT ON BOPP AND NEELEY

ROY A. SCHOTLAND†

## INTRODUCTION

Let us enter a scene that James Bopp Jr. and Josiah Neeley urge us to allow:

*In Judge J's courtroom one morning, this occurs: The judge is about to hear argument between two leading local lawyers. As the argument opens, he says: "Gentlemen, you know I'm running for reelection and you know how much I'd appreciate your support." Counsel answer, "Yes, your Honor, we certainly support you." To which the Judge replies, "Well, I haven't yet had any contribution from either of you, can I count on you?" To which each counsel responds, "You'll have my check before I leave." [Would you react to this differently if one lawyer promised $1,000 and the other said he could send only $100?] The prior afternoon, as the judge ended a jury trial with his customary in-chambers chat with the jurors, he asked them too for contributions.*

*As for Judge J's opponent: A respected local lawyer is considering running against J. She's told by friends—eager to see her on the bench because they believe she'd be a stellar judge—that she'll have to raise a substantial campaign fund. In her view, campaigning is an unpleasant hurdle but one she can tolerate, and she's confident she can put together a strong campaign committee. However, when she learns that to be effective in fund-raising she'll have to do the solicitation herself, she calls off her effort.*[1]

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1. The above scenario stems from the comment by an ex-President of the ABA shortly after the Eleventh Circuit's *Weaver* decision, invalidating the entire Canon on personal soliciting. Weaver v. Bonner, 309 F.3d 1312, 1315, 1322-23 (11th Cir. 2002), *reh'g en banc denied*, 57 F. App'x 416 (11th Cir. 2003). I asked him whether he thought lawyers would be asked for contributions before or after oral argument. He said: "Why not during?"

The scenario, to one reader of these pages, is "far-fetched." But given the sweep and absolutism of the Bopp-Neeley argument that limits on judicial candidates' personal soliciting are unconstitutional, this scenario is not merely taking their position to its logical extreme. The point of the scenario is to ask whether *any* limits on personal soliciting are constitutional. For example, the Eighth Circuit narrowly tailored the Canon, drawing a line that is at least arguably sound. Republican Party of Minn. v. White (*White II*), 416 F.3d 738, n.23 (8th Cir. 2005) (en banc). Bopp-Neeley misleadingly treat the Eighth Circuit decision as simply supporting their position. *See* James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections:* Davis, White, *and the Future of Judicial Campaign Financing*, 86 DENV. U. L. REV. 202-204, nn. 50, 51, 58 (2008).

According to Bopp-Neeley, the only negative aspects of allowing judicial candidates to *personally* solicit campaign funds are these: It is "unpleasant and time consuming for candidates and awkward for potential contributors. Other objections . . . are, *if true*, much more serious."[2] Banning personal solicitation does "allow states to maintain the fiction that judges are not directly involved in the campaign fundraising process."[3] Any bans on personal solicitation "do not serve an interest in preventing corruption" and are inconsistent with *White* and have been enjoined by four federal courts.[4] "What raises impartiality concerns is not the solicitation of funds, but rather a judge's knowledge of the source . . . . [A]ny impartiality concerns raised by the personal solicitation . . . are inherent in the state's decision to elect judges and cannot be used as a rationale to limit candidates' First Amendment rights."[5]

Allowing scenes like the ones suggested above has six fatal flaws. The flaws listed here are not in order of priority because, although all of

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Certainly some line-drawing may improve the Canon; the above scenario aims at two points: 1) To say that *no* limits are constitutional, goes too far; e.g., the reader just mentioned considers it preposterous to argue that it is unconstitutional "to prohibit solicitation in the courthouse with your robe on." 2) What line-drawing does make sense? I reject lines like these: if the soliciting is outside the courthouse the same day as the oral argument; if the soliciting is to lawyers or litigants in a pending or imminent case; if they come before that judge with any frequency or he or she is the only judge in their jurisdiction or reasonably likely to hear any case they are involved in. In short, any one-on-one or small-group soliciting by a sitting judge (or candidate for that seat) seems inescapably freighted with so much pressure, that there is undue risk to both impartiality in fact and the perception of impartiality.

Bopp-Neeley claim that "any impartiality concerns raised by the personal solicitation of campaign funds are inherent in the state's decision to elect judges." *Id.* at 204; but that assumes that judicial elections must be the same as elections for non-judicial offices, which *White* rejected explicitly (and clearly correctly, see *infra* Part I.B).

Last on this: Bopp-Neeley equate the pressure in solicitations by judicial candidates with solicitations by legislative and executive candidates. Bopp-Neeley, *supra* at 205. But a judge's decisions, reached after a constitutionally cabined process, impact directly and specifically X lawyer or litigant. In contrast, it is inherent in executive and legislative action that they almost always affect many people, and all who may be affected are free to engage with the officials in all kinds of contact, argument and support.

2. Bopp-Neeley, *supra* note 1 (emphasis added).

At the outset let me note that I agree with Mr. Bopp and Mr. Neeley on several issues. For example, on public funding (which I do not oppose but which I believe is severely oversold, distracting us from steps that will be more productive), I agree on many aspects that they list and I expect they would agree with others that I have listed. *See* Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1251, 1254-58 (2008).

Although Bopp, Neeley and I do not agree about *White* and other issues, this comment treats only the matter of soliciting campaign contributions, which has drawn little attention and is, I believe, incomparably more important than generally realized. Even on this matter, I only note here that regulation of campaign contributions is *not* subject to strict scrutiny. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 247-48 (2006) (adhering to the treatment since *Buckley*); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387-88 (2000). Even applying strict scrutiny, the Maine and Arkansas courts have upheld this Canon since *White*, and the Third Circuit and Oregon Supreme Court did so earlier. *In re* Dunleavy, 2003 ME 124, ¶ 30, 838 A.2d 338, 350 (Me. 2003); Simes v. Ark. Judicial Discipline and Disability Comm'n, 247 S.W.3d 876, 879, 884 (Ark. 2007); *see* Stretton v. Disciplinary Bd., 944 F.2d 137, 141-43 (3d Cir. 1991); *In re* Fadeley, 802 P.2d 31, 41 (Or. 1990).

3. Bopp-Neeley, *supra* note 1, at 201.

4. *Id.* at 203.

5. *Id.*

them are powerful, they would draw different priorities from different observers:

1. For generations, and in almost all states with judicial elections, judicial candidates have been barred from *personally* soliciting campaign funds.

2. All states that have chosen to have some or all of their judges face some form of election have also chosen an array of state-constitutional differences between the judges and other elective officials. We cannot ignore that array. Nor can we say that because there are judicial elections the campaign conduct cannot be regulated; an analogy is our limiting highway speed even though we have superhighways and powerful cars.

3. *White* is, to understate it, distinguishable. The lower-court decisions are, as noted more fully below, (a) far from the Bopp-Neeley position (Eighth Circuit), (b) only a *sua sponte* departure from *White* (Eleventh Circuit), (c) still on appeal (Tenth Circuit), (d) only a preliminary injunction that explicitly did not review for constitutionality (Kentucky District Court), or (e) flatly contrary to Bopp-Neeley (Arkansas Supreme Court).

4. Not only First Amendment rights are involved but also litigants' Due Process rights to an impartial judge, as well as protecting the Separation of Powers values served by preserving the differences between judges and other elective officials.

5. Not only constitutionality is at issue. We cannot ignore how no-holds-barred election campaigns will affect who will be willing to run for the bench, and for re-election. Many, probably most, of the kind of people who would be fine judges are undeniably different personalities from the kind of people who enjoy campaigns or are at least willing to get into them.

6. To allow conduct like that in the scenes described above will jeopardize public confidence in the courts to an unusually acute and demonstrable degree. Scenes like those above bring the risk, even the likelihood, that some observers will see little or no difference between contributions and bribes. Empirical studies of voters' reactions to the post-*White* reduction of limits on campaign speech show there is little concern about that change but high concern about campaign contributions.[6]

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6. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REP. 59 (2008) (Kentucky voters); James L. Gibson, *"New-Style" Judicial Campaigns and the Legitimacy of State High Courts: Results from a National Survey* (forthcoming) ("When judges express their policy views during campaigns . . . no harm is done to the institutional legitimacy of courts . . . . At the same time, the current system of campaign contributions does appear to be injurious to courts.") (manuscript at 19-20,

## I. SIX FATAL FLAWS

### *A. Personal Solicitation of Campaign Funds*

For generations, and in thirty-four of the thirty-nine states with judicial elections, judicial candidates have been barred from *personally* soliciting campaign funds; their campaign committees do the soliciting. As the Conference of Chief Justices put it in an amicus brief,

> [w]ithout this Canon, even the most highly respected judges will be forced to join a "race to the bottom" . . . . One can imagine the very dire, yet very real, consequences if the Canon is stricken. Will judges be free to solicit funds in the courthouse, before or after oral argument (or, as asks a former ABA President, "Why not during oral argument?")? Will judges be free to solicit from jurors? While new Canons surely could limit such extreme practices, the "race to the bottom" is bound to dominate.[7]

Three courts have stated the reasons for this Canon. First, the Third Circuit:

> [A]s a practical matter, so long as a state chooses to select its judges by popular election, it must condone to some extent the collection and expenditure of money for campaigns. Unquestionably, that practice invites abuses that are inconsistent with the ideals of an impartial and incorruptible judiciary. . . . There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court. Plaintiff is correct that the currently approved practices do involve the candidate deeply, albeit indirectly, in the process. Nevertheless, *we cannot say that the state may not draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate. [P]laintiff's contention that this is the most effective means for raising money only underscores the fact that solicitation in person does have an effect*—one that lends itself to the appearance of coercion or expectation of impermissible favoritism.[8]

The Oregon Supreme Court wrote this:

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on file with author), *available at* http://papers.ssm.com/sol3/papers.cfm?abstract_id=1023785 (follow "Download" hyperlink).

7. Brief of Conference of Chief Justices Amici Curiae in Support of Defendants/Appellees, at 20, 22, Republican Party of Minn. v. White, 361 F.3d 1035 (8th Cir. 2004) (No. 99-4021). This article draws upon that amicus brief as well as the CCJ's amicus brief at the Supreme Court in *White* in 2002; I co-authored both briefs.

8. Stretton v. Disciplinary Bd., 944 F.2d 137, 144-46 (3d Cir. 1991) (emphasis added). The Third Circuit was prescient in writing, "[t]here is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds . . . ." The public's strong criticism has been consistent and widespread. *See infra*, note 47 (discussing the results of many polls).

> [The Canon] protects . . . the state's interest in maintaining, not only the integrity of the judiciary, but also the appearance of that integrity. . . . The impression created when a lawyer or potential litigant, who may from time to time come before a particular judge, contributes to the campaign of that judge is always unfortunate. . . . [T]he outside observer cannot but think that the lawyer or potential litigant either expects to get special treatment from the judge or, at the least, hopes to get such treatment. It follows that, if it is at all possible to do so, the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary.[9]

And the Maine Supreme Court:

> It is exactly this activity that potentially creates a bias, or at least the appearance of bias, for or against a party to a proceeding. If a contribution is made, a judge might subsequently be accused of favoring the contributor in court. If a contribution is declined, a judge might be accused of punishing a contributor in court.[10]

All three courts essentially found the same compelling state interests: "[t]he stake of the public in a judiciary that is both honest in fact and honest in appearance . . . ."[11] The most recent decision, noted fully below, strongly affirms the same position.[12]

### *B. State Constitutional Differences for Judicial Elections*

All thirty-nine states that have chosen to have some or all of their judges face some form of election have also chosen an array of state-constitutional differences between the judges and other elective officials. We cannot ignore that array. The Supreme Court has long recognized a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics . . . ."[13] Acutely aware of that tension, the states that have chosen some form of judicial election have included in that choice an array of constitutional provisions unique to the judiciary to assure that judicial independence is protected. Most of these provisions would be unthinkable for other elected officials in the legislative and executive branches. For example, in all thirty-nine states, judges' terms are longer than any other elective officials' terms.[14] In

9. *In re* Fadeley, 802 P.2d 31, 41 (Or. 1990).

10. *In re* Dunleavy, 2003 ME 124, ¶ 31, 838 A.2d 338, 351 (Me. 2003).

11. *Stretton*, 944 F.2d at 145; *In re* Fadeley, 802 P.2d at 40; *see also In re* Dunleavy, 838 A.2d at 346-51; Morial v. Judiciary Comm'n, 565 F.2d 295, 302 (5th Cir. 1977) (calling the state's interest in preserving the integrity of the judicial system "grave and honorable").

12. Simes v. Ark. Judicial Discipline and Disability Comm'n, 247 S.W.3d 876, 881-82 (Ark. 2007).

13. Chisom v. Roemer, 501 U.S. 380, 400 (1991).

14. Except that Nebraska's Regents' terms are longer than their judges' terms. Of appellate judges facing elections, thirty-nine percent have terms of ten to fifteen years and another sixty-one percent have terms of six to eight years. Of trial judges facing elections, thirteen percent have terms of ten to fifteen years, and another sixty-eight percent have terms of six to eight years. CITIZENS FOR

almost all, only judges are subject to both impeachment and special disciplinary process. In thirty-three states, judges are the only elective state officials subject to requirements of training or experience or both (except that in ten of those, the attorney general is subject to similar requirements). In twenty-three states, only judges are subject to mandatory retirement.

This pattern of provisions shows that the choice of elections, as the Third Circuit put it, "while perhaps a decision of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly."[15] The thirty-nine states have recognized that, far from fulfilling the historic purpose in allowing for the popular election of judges, any effort to treat judicial elections like others wholly undermines the judiciary's independent role under their constitutions. The states' balanced approach to the proper structure for an elected judiciary embodies the understanding that

> the word "representative" connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense—but not in the ordinary sense. . . . [T]he judge represents the Law—which often requires him to rule against the People.[16]

Judges are subject to the array of unique provisions because the judges' jobs are so different:

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

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INDEPENDENT COURTS, UNCERTAIN JUSTICE: REPORT OF THE CITIZENS FOR INDEPENDENT COURTS TASK FORCE ON SELECTING STATE COURT JUDGES 77, 90-92, 116-17 (2000).

Other unique provisions on the judiciary: in twenty-one states, only judicial nominations go through nominating commissions; in six states, this applies even to interim appointments. Last, in eighteen states, only judges cannot run for a nonjudicial office without first resigning. For citations to examples of all these provisions, see Brief of Amici Curiae Conference of Chief Justices in Support of Respondents, at 6-7 nn.6-11, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521).

15. *Stretton*, 944 F.2d at 142.

16. *Chisom*, 501 U.S. at 410-11 (Scalia, J., dissenting).

every election; [and last, fundraising by judicial candidates is uniquely constrained].[17]

To say that when judges face elections "an election is an election"—meaning that these elections cannot be regulated differently from other elections—would be to deny the differences between judges and other elective officials, and to deny the recognition of those differences in so many constitutional provisions. It would be like saying that because we have superhighways and powerful cars, we cannot limit highway speed. Of course regulation must be narrowly tailored, but the fact that the obsolete, *never*-enforced "Announce" clause was unconstitutional does not sweep the field—as is explicit in the recent Arkansas Supreme Court decision noted last in the following review of the decisions.

### *C.* White *is Distinguishable*

*White* does not touch this Canon. "[The] solicitation clause fundamentally differs from the announce clause analyzed by the Supreme Court in *White*."[18]

Bopp, who deserves credit for his successful argument of *White*, has always read it expansively, even elastically. He argued, as a good lawyer, that the decision of the issue in *White* (the "Announce" clause's constitutionality) would not touch even the most similar Canon (the Pledge/Promise clause).[19] But ever since winning that case he has used it (in understandable advocacy but merely that) to challenge the Pledge/Promise clause, the solicitation Canon, the political-activities Canon, and others.[20]

In the first federal court decision after *White*, an Eleventh Circuit panel in *Weaver v. Bonner* invalidated the Georgia Canon—a provision that was law in thirty-four states—requiring that judicial candidates not *personally* solicit campaign contributions but instead have it done by their campaign committees.[21] *But*, the *Weaver* panel (1) acted *sua*

17. Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 716-17 (2002).

18. Simes v. Ark. Judicial Discipline and Disability Comm'n, 247 S.W.3d at 881.

19. *See* Brief for Petitioners Republican Party of Minn., at 31, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521).

20. Bopp has represented plaintiffs in more than half of the 33 post-*White* cases attacking various Canons. *E.g.*, Kan. Judicial Review v. Stout, 519 F.3d 1107, 1111 (10th Cir. 2008) (injunction vacated in part and certified in part to the Kansas Supreme Court).

21. Weaver v. Bonner, 309 F.3d 1312, 1315, 1322-23 (11th Cir. 2002), *reh'g en banc denied*, 57 F. App'x 416 (11th Cir. 2003).

How has *Weaver* fared in operation? In 2008, in Georgia's only contested statewide judicial election, an unofficial judicial campaign conduct committee succeeded in getting pledges from most judicial candidates that they will not do any personal soliciting. With seven candidates for this open seat, four signed the committee's pledge and, of the three others, one says he is doing no personal soliciting. In the three election cycles in Georgia since *Weaver*, a few candidates apparently have done personal soliciting but not actively; the only certainty is that one candidate happened to personally solicit the young lawyer who is "staff" for the committee. Apparently, after some candidates engaged in personal soliciting, their opponents did the same to meet the challenge.

*sponte*: the provision had not been challenged by plaintiff nor argued at trial or on appeal (Georgia's appeal was from a decision limiting the applicability of another Canon);[22] (2) incorrectly read *White* to require judicial elections to sound the same as legislative and executive elections, despite the *White* majority's explicit limitation to the contrary;[23] (3) simply ignored three contrary decisions, one by the Third Circuit, another after *White* by the Maine Supreme Court, and one by the Oregon Supreme Court;[24] and (4) wrongly chose strict scrutiny. That panel's *sua sponte* activism led it to sweep away the entire Canon, in contrast to the tailoring by the Eighth Circuit, noted in the next paragraph.

The next decision on which Bopp-Neeley rely—the Eighth Circuit on remand in *White*—did indeed find the solicitation Canon unconstitutional, but only *in part*. The court *upheld* the limit on personal solicitation *but* found that it must be narrowly tailored to allow a candidate's "personally signing a solicitation letter or making a blanket solicitation to a large group":

> An actual or mechanical reproduction of a candidate's signature on a contribution letter will not magically endow him or her with a power to divine, first, to whom that letter was sent, and second, whether that person contributed to the campaign or balked at the request.[25]

There is no question that the Eighth Circuit's line upholding the ban on *personal* solicitation (thus banning scenes like those that open these pages) but allowing "blanket solicitation" to large groups and also solicitation by mail (at least via mass mailings), seems reasonable, perhaps advisable—whether one agrees with it, or disagrees as I do. Like the Bopp-Neeley reading of *White*, this decision they more than stretch: they distort it.

As for two other decisions on which Bopp-Neeley rely, one, as noted earlier, is now on appeal.[26] In the other, they cite a District Court

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Gresham's Law rules again. Telephone interviews with a Georgia judge and (10/8/08) with Jeremy Berry, Co-chair, Ga. Comm. for Ethical Judicial Campaigns, in Atlanta, Ga.

22. All-out "judicial activism," which normally Bopp actively opposes. "[I]t is judicial activism that threatens judicial independence . . . . Judicial activism is at the core of the attacks on judicial independence." James Bopp Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 FIRST AMENDMENT L. REV. 180, 185, 191 (2007).

23. *Compare* White, 536 U.S. at 783, *with* Weaver, 309 F.3d at 1322-23.

24. Stretton v. Disciplinary Bd., 944 F.2d 137 (3d Cir. 1991); *In re* Dunleavy, 2003 ME 124, 838 A.2d 338 (Me. 2003); *In re* Fadeley, 802 P.2d 31 (Or. 1990).

25. *White II*, 416 F.3d 738, 765-766 (8th Cir. 2005) (en banc).

26. Kan. Judicial Review v. Stout, 519 F.3d 1107, 1111 (10th Cir. 2008) (injunction vacated in part and certified in part to the Kansas Supreme Court, which answered certified questions on other issues, No. 100, 170 (Kan. Dec. 5, 2008)).

As these pages go to press, the District Court issued another opinion, saying that it had earlier "inappropriately" enjoined the solicitation of funds provision; now for the first time considered its constitutionality, and found it constitutional. The judge ignored the narrow tailoring that the 8th Circuit had done in *White II* (*supra* note 25). Yost v. Stout, Case No.06-4122-JAR (D. Kan., Nov. 2008).

decision that was only a preliminary injunction which explicitly did not reach a constitutional decision; however, last month that court did find the Canon unconstitutional.[27]

Most recent is a 2007 Arkansas Supreme Court decision—*Simes v. Arkansas Judicial Discipline and Disability Commission*—explicitly against the Bopp-Neeley position, which they try to put aside as "out of step" with *White* and as unduly concerned about "the subjective feelings of those solicited."[28] What *Simes* says is that "[a]ttorneys ought not feel pressured to support certain judicial candidates in order to represent their clients"—which I would not characterize as mere "subjective feelings."[29] And *Simes* relies on much more:

> Allowing a judge to personally solicit or accept campaign contributions, especially from attorneys who may practice in his or her court, not only has the possibility of making a judge feel obligated to favor certain parties in a case, it inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate. Attorneys ought not feel pressured to support certain judicial candidates in order to represent their clients. In addition, the public should be protected from fearing that the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions. Thus, we take this opportunity to acknowledge that, in Arkansas, avoiding the appearance of impropriety is also a compelling state interest.
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> . . . In the instant case, the petitioner was found to have made direct, personal solicitations [including to an attorney who "appeared before the petitioner about two or three times a quarter and had cases pending in the petitioner's court at the time of the solicitation"]. . . . Contrary to the Eighth Circuit's finding . . . it is very likely in the instant case that the petitioner, or any other judge making such a personal solicitation, would have a "direct, personal, substantial, pecuniary interest in reaching a conclusion [for or] against [a particular litigant in a case]" based upon that litigant's support.

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27. Carey v. Wolnitzek, No. 3:06-36-KKC, 2008 WL 4602786, at *11 (E.D. Ky. Oct. 15, 2008).

28. Bopp-Neeley, *supra* note 1, at 204.

29. Simes v. Ark. Judicial Discipline and Disability Comm'n, 247 S.W.3d at 882. A lawyer is likely to feel pressured for several reasons: she may be concerned about being able to remain effective for her clients; she may believe the soliciting judge is unworthy of support; she may fear that the soliciting judge's opponent is the kind of person who would keep track of who contributed to whom; she may lack the funds to make a notable contribution; and/or she may well feel the personal solicitation and surrounding circumstances involve unprofessional conduct. Solicitation by a judge raises possible pressures different from any raised by solicitation for non-judicial campaigns. That is why, as *Simes* noted, the Canons not only address campaign contributions but also preclude judges "from using their office for fundraising or membership solicitation at any time." *Id.* at 883.

Even totally subjective feelings may be rational, e.g., when one does all one can to avoid contact with a person carrying a contagious disease.

> . . . Arkansas's Canon 5C(2) seeks to insulate judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns. To this end, Canon 5C(2) provides that candidates may establish campaign committees to conduct fundraising on their behalf. . . . *[T]he state is doing nothing more than seeking a balance between allowing people to elect their judges and safeguarding the process so that the integrity of the judiciary and due process will not be compromised.* For all of the above reasons, we reject the arguments presented by the petitioner and find that Canon 5C(2) of the Arkansas Code of Judicial Conduct is narrowly tailored to serve the compelling state interests.[30]

*D. Litigants' Due Process Rights to an Impartial Judge*

Not only First Amendment rights are involved but also litigants' Due Process rights to an impartial judge. And also the constitutional structure at stake in protecting the Separation-of-Powers values served by preserving the differences between judges and other elective officials.

The Due Process Clause's guarantee of impartial judges, both as a matter of fact and as a matter of perception, is a compelling state interest.[31]

As for the separation of powers: in choosing judicial elections, states have not abandoned their concern with preserving fully separated powers. The States know that if candidates for judicial office appeal for voters' support on the same basis as legislative candidates—if they answer to the same electoral majorities—the courts run the grave risk of becoming second legislatures. As electoral twins to the legislatures, courts would lose the independence—and the crucial public perception of that independence—required for them to discharge their high constitutional duty of judicial review.

*E. Elective Campaigns and the Judicial Pool*

Not only constitutionality is at issue. We cannot ignore how no-holds-barred elective campaigns will affect the pool of people willing to run for election to the bench, and for re-election.

The whole goal of efforts surrounding judicial selection is to bring to the bench people as suitable as we can find for the unique responsibilities and powers of judges. Debate about the strengths and weaknesses of different systems has drawn more ink and sweat than any other subject in American law. But the fact is—whether one applauds it (as do Bopp-

30. *Id.* at 878, 882-84 (emphasis added).

31. *See* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1069, 1074 (1996).

Neeley) or abhors it (I do not, I am an unwavering agnostic)—the overwhelming majority of state judges face some type of election.[32]

What kind of election campaign looms at the entry to the bench is a significant filter affecting who will seek a seat or seek re-election. There are differences between the average person who seeks to be a judge and the average person who chooses elective politics. Politicians like campaigns, or at least tolerate them well. Politicians are out-going personalities ready for the rough-and-tumble. Of course views will differ about "the judicial personality." In my view, the more wide-open and lively (let alone nasty) are judicial election campaigns, the more would-be judges will be hesitant or even unwilling to run for the bench or for re-election. For example: when the California Judges Association in 1983 sent its members a questionnaire about their campaign experience, one judge's reply included this: "The best lawyers are not applying for judgeships because of lack of faith in the appointment process and they do not want to engage in political campaigns in order to gain reelection."[33]

One example, even before judicial elections became "nastier, noisier and costlier:"[34] Pennsylvania's revered Judge Edmund B. Spaeth Jr. ("the kind of person a judge ought to be—a sequoia in a Philadelphia judiciary sometimes noted for its saplings"),[35]

> thinks electing judges is a bad idea, but it's not the reason that he finds the process distasteful. "The worst thing is," he says with sadness baked on his face, "is raising money." He says "money" the way a sick man says the name of his disease. . . . [H]e announced that he would not seek retention in [November] because political campaigning by judges is "fundamentally incompatible with the judicial process"—thus ending, prematurely, one of the most distinguished legal careers in Pennsylvania.[36]

That was long before *White*. Spaeth's approach, when asked how he would decide cases, was to reply, "I can only tell you that I will decide each case as conscientiously as I can."[37] Spaeth had originally been appointed to a vacancy and soon faced a contestable election for a full term

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32. *See* data *infra* note 51.

33. AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS: PART TWO 17 (1998) [hereinafter ABA TASK FORCE] (quoting Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57 app. b at 162 (1985)).

34. *See* Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1269 (2008) ("If Professor Roy Schotland had licensed his characterization of judicial races . . . when he made the statement in the 1980s, the royalties would have made him a rich man today."); *see, e.g.*, James L. Gibson, *Nastier, Noisier, Costlier—and Better*, MILLER-MCCUNE.COM, July 14, 2008, http://www.miller-mccune.com/article/495 (using the phrase in applauding the changes).

35. William Ecenbarger, *The Judge Who Wouldn't Run*, THE PA. LAW., Oct. 15, 1985, at 23.

36. *Id.*

37. *Id.*

but lost after unluckily drawing a poor ballot position; soon after, he was appointed to another vacancy, ran again, campaigned vigorously throughout the state, and won.[38]

The "judicial personality" has been studied by the presiding judge of the San Bernardino trial courts, using the "most appropriate psychometric tool" (Myers-Briggs Type Inventory, "MBTI"). Studying more than 1,300 American judges with the MBTI distinction between "extroversion" and "introversion" (differentiating between those "who tend to be concerned with the opinions of others" and those who focus "on their own thoughts and values"), the study found that about sixty percent of judges are introverts, unlike two-thirds of the adult public.[39]

> This should be no surprise, as the law, by definition, is an introvert's design. It deals with core values and principles, and resists change based on transitory shifts in the tide of popular public opinion. Moreover, the judiciary calls to service those who are willing to apply legal values and principles even when the results are highly unpopular. . . . In our society, most introverted characteristics are disfavored. This may partially explain why the public tends to entertain negative opinions about judges, believing them cold and aloof.[40]

Of course these are only "broad caricatures of judges . . . . [N]o one fits neatly into any one . . . category . . . . [V]ery few judges can be found at the extremes. All types can be excellent judges; there is no 'best' type for the judiciary."[41]

Strikingly, in a later study Kennedy found that nearly sixty percent of female judges are extroverts, in contrast to only about forty percent of male judges.[42]

Judge Kennedy's findings support the prediction—or fear!—that the kinds of unrestrained campaigns that are the norm for politicians,

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38. *See id.* at 25.

39. *See* John W. Kennedy, Jr., *Personality Type and Judicial Decision Making*, 37 JUDGES' J., Summer 1998, at 4, 5-6, 8.

40. *Id.* at 6.

41. *Id.* at 9.

One former clerk for a federal judge, who very helpfully read this article in draft, wrote this: "Frankly, the judge for whom I clerked, and for whom I have utterly immense respect as a jurist, fits the MBTI test to a 'T' (excuse the alphabet pun). Were the federal judiciary elected, I couldn't even *conceive* of the possibility of him as a candidate. That is not to say there aren't great state candidates and great state jurists in elected states.... [Y]our article made me think of this in a way that I never had previously ...."

And one of the student editors of these pages: "I found [the judicial pool argument] to be especially convincing as a more or less introverted person who has judicial aspirations—I would never put myself through an election."

42. John W. Kennedy, Jr., *Judging, Personality, and Gender: Not Just a Woman's Issue*, 36 U. TOL. L. REV. 905, 906 & n.2 (2005) (commenting on his sample, Kennedy notes, "I strongly suspect that far more than 60 percent of the male judiciary is introverted"); *see also id.* at 906 n.2 (finding one sample of appellate judges to be "a whopping 76 percent" introverts). Perhaps this difference between female and male judges is some of the reason why, in recent years, female candidates for the bench are generally deemed to have an edge over male candidates.

would—for a significant proportion of the kinds of people likely to be fine judges—be an entry *barrier* resulting in a weaker bench.

*F. Public Confidence in the Courts*

Allowing conduct like that in the scenes described at the outset will jeopardize public confidence in the courts to a destructive degree. Situations akin to those above bring the risk, even the likelihood, that "outside observers"[43] (including lawyers and litigants) will see little or no difference between contributions and bribes. As Senator Russell Long put it: "[W]hen you are talking in terms of large campaign contributions . . . the distinction between a campaign contribution and a bribe is almost a hair's line difference . . . ."[44]

How campaign funds are raised has become dramatically more important as campaign spending has soared. In the past four election cycles (2000-2006), judicial candidates "have raised over $157 million, nearly double the amount raised by candidates in the four cycles prior [1992-

43. *In re* Fadeley, 802 P.2d 31, 41 (Or. 1990).

44. Quoted by the Courts of Appeals in Buckley v. Valeo, 519 F.2d 821, 838 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976); *see also* JOHN T. NOONAN, JR., BRIBES 622-62 (1984) (writing before he went on the Ninth Circuit).

A Chief Justice sent me this comment on Senator Long's statement: "I never saw that a campaign contribution bore much relationship to a bribe. Campaign money goes to consultants, TV stations, printing companies, rent, etc. Bribes go into one's pocket."

Campaign contributions present several problems that must be separated: 1) They may "buy" the kind of action the donor seeks. How large this problem is may depend on how large is the contribution relative to the candidate's total funds, or how great is the concentration of such contributions (e.g., if a large proportion of the candidate's total funds come from people or entities who want X action). 2) They may not buy or even influence action but only support a candidate who will, if elected, take the kind of action the donor seeks with or without the donor's contribution. (This motivation is supported by "the weight of anecdotal evidence at least", according to Kyle Cheek, an academic authority, in an e-mail (on file with author) to Professor Vernon Palmer at Tulane Law School, who is the author of a relevant recent article, on Oct. 21, 2008.) That raises real problems of who reaches office but reflects upon the institution and the system, not the particular candidate. 3) A candidate may attack contributions to her opponent, depending on factors like how much is raised overall, or how large or concentrated are particular contributions, or who and where the contributions come from. Such attacks may be mere campaign moves or may point to real problems. 4) Especially with judicial candidates, given the "neutrality" that judges are supposed to bring to their job, contributions may reduce public confidence.

If judicial candidates face some form of election, they will have to raise funds. Campaign funding may raise acute problems whether or not any direct contributions are problematic. Because: even if there is public funding (as three states have for some of their appellate courts), instead of direct contributions there may be "independent" spending to support X candidate; in fact, in several of the highest-spending recent campaigns (e.g. in Illinois and West Virginia), a great deal or even almost all of the spending was "independent", not contributions.

It is unrealistic and unfair to criticize any candidate whose contributions are within legal limits (or, if there are no limits, are reasonable) and are unconcentrated, and if independent spending is not significant in that race. Campaign funds in judicial races "unquestionably [jeopardize] confidence in the courts", which increases the need for knowledgeable observers to speak and write realistically about this (quoting from Roy A. Schotland, *Judicial elections in the United States: is corruption an issue?*, *in* TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007 at 26, 29).

1998]."[45] Since 2006, the sharp escalation has continued, setting new records in many states; for example, in 2007 in a Pennsylvania contest $9.5 million was raised and in Wisconsin $2.7 million, not counting major "independent" spending.[46]

Many public opinion polls, both national and single-state over many years, consistently show that large majorities of the public "believe that campaign contributions have at least some impact on judges' decisions."[47] An interesting addition to those polls are the recent empirical studies of voters' reactions to the post-*White* reduction of limits on campaign speech. These studies found little concern about the change in campaign *speech* but high concern about campaign contributions.[48] As a Florida judge wrote shortly after the Eleventh Circuit panel wiped out Florida's limits on personal soliciting: "What sort of appearance of fairness will be fostered by a system where judges are now expected to not only go on the campaign stump, but go there with hands outstretched?"[49]

## II. FEASIBLE REFORM STEPS

This Canon, like all regulation (indeed, all law!), has strengths and weaknesses. But first, is a Canon like this "merely a band-aid" that leaves uncorrected the undeniably major problems raised by campaign contributions to judicial candidates, and by having judicial elections at all? If it were feasible to replace contestable judicial elections with another system, the matter would be very different. But despite the sharp rise in concern about judicial elections since spending started soaring in 2000, with problems compounded by the intensifying of campaigns and coarsening of campaign speech, states are not ending judicial elections. Yes of course that may change.[50] But a century of experience is relevant.

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45. *See* JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 app. at 15 (Jesse Rutledge ed., 2007), http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf.

Strikingly, the escalation in judicial campaign spending is far greater than in campaign spending generally. *See* Brandenburg & Schotland, *supra* note 2, at 1230 (providing comparative data). And, campaign spending matters in major ways even during uncontested elections. *Id.* at 1234 n.18.

46. Data compiled and forthcoming by Justice At Stake, www.justiceatstake.org.

47. Ten polls from 1997-2004 are cited by Thomas A. Gottschalk, Judicial Recusal as a Campaign Finance Reform, Appendix, a paper presented at a 2008 Conference: Our Courts and Corporate Citizenship (Sandra Day O'Connor Project on the State of the Judiciary, at Georgetown Law Center (publication forthcoming). The quotation is from the 2004 national survey by Justice at Stake. A new nationwide Harris Poll, with input from the ABA, finds that fifty-five percent of the voting-age public think elections should be used to select judges. *See* Poll finds most voters want to elect judges, MINN. LAWYER, Oct. 24, 2008, *available at* http://www.minnlawyer.com/type.cfm/Legal%20News (scroll down for link, registration required).

48. Gibson, *supra* note 6, at 60, 62-63.

49. Charles Kahn, *Will [Weaver] Leave State Judges with Their Hands Out?*, ST. PETERSBURG TIMES, Oct. 29, 2002.

50. The 2008 elections produced local successes in Greene County, Missouri and also (for interim appointments to vacancies) in two Alabama counties, joining six other Alabama counties. In Missouri, "merit" selection (often referred to as "the Missouri plan") has been in place since 1940 for their appellate judges (and some trial judges), and since 1970 and 1973 for counties totaling

First, in 2001, I wrote that despite all-out efforts since 1906 to change from roughly eighty-six percent of state judges facing contestable elections, we shifted about one percent per decade on trial judges and about three to four percent per decade on appellate judges.[51] Second, given how up-hill (to understate it) are efforts to end contestable judicial elections, that naturally attractive goal must not be allowed to distract from work on feasible steps.

For those two reasons, the most feasible reform steps are ones like (i) relying on the Canons; (ii) having appropriate limits on campaign contribution amounts (as almost all states have although lacking coverage of aggregate contributions)[52] and on disclosure (as almost all states

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about one-third of Missouri's trial judges. *See* American Judicature Society, http://www.ajs.org/selection/sel_voters.asp (last visited Nov. 11, 2008); *see also* http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=MO (last visited Nov. 11, 2008) (providing a history of reform efforts in Missouri).

Three recent statewide efforts are notable (leaving out places that don't get beyond a bill being introduced). In Minnesota in 2008, a well-organized, strong drive to end contestable elections failed when it was opposed by the trial judges. That effort may succeed in the next few years if limited to appellate judges. Such limited systems are found in five states: California, Florida, Maryland, South Dakota, and Tennessee. In New York, both the high court and intermediate appellate courts are appointive, but the intermediate appellate judges are appointed from the trial bench and when their terms are up, must run for re-election. *See* ABA TASK FORCE, *supra* note 33, at app. 2. I am among the people who believe that trial judges run greater risk of voter retaliation for unpopular decisions than do appellate judges.

In Nevada in 2007, the legislature took the first step to switch from the state's current nonpartisan elective system to a retention system for all judges. If the next legislative session approves, the change will go before the electorate in 2010. See AJS website noted above. (Without implying any prediction, note that (a) Nevada voters have twice rejected such a change, and (b) in recent years, voters in three other states have rejected, by large margins, ending contestable elections. *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO.L.J. 1077, 1081-82 (2007).)

But in Tennessee, their "merit" plan for appellate judges (which had been adopted by statute) "sunsetted", effective in early 2009. In Spring 2008, the legislature failed to extend it and so, unless the legislature acts in 2009, Tennessee will become the first jurisdiction ever to move back to contestable elections. Richard Locker, *Judicial selection system backed—Chief Justice Holder against general elections*, MEMPHIS COMMERCIAL APPEAL, Sep. 4, 2008, at B6.

51. "In 2005, a conference of thirty-eight states' chief justices, justices, judges, and others, sent to the CCJ a Call To Action that included this: 'The fact—which becomes constantly clearer and more widespread—is that whatever may be the view of a state's courts and lawyers, "Don't let them take away your vote" (to use the phrasing of ads in more than one state) has been an insuperable hurdle.'" Schotland, *supra* note 50, at 1090.

> For almost a century—starting in 1906 with a landmark speech to the ABA by Roscoe Pound—the Bar, and so much more than the Bar, has given enormous energy to getting rid of competitive elections. Back in 1900, roughly 14% of our judges did not face competitive elections. Today, after that century of major effort, we boosted that 14% to 23% of our trial judges of general jurisdiction and 47% of our appellate judges. That's a shift of 1% per decade for the trial judges, and 3-4% per decade for appellate judges. At that rate we'll end contestable elections for trial judges in only another 770 years, and for appellate judges in only another 160 years.

Roy A. Schotland, *Introduction: Personal Views*, 34 LOY. L.A. L. REV. 1361, 1366-67 (2001) (introducing Call to Action and papers from National Summit on Improving Judicial Selection) (citations omitted). Updating the data to 2004, we find little change other than a slight increase in the proportions facing contestable elections, because of the reorganization of courts in California and Oregon. *See* Schotland, *supra* note 50, at 1092.

52. *See* Roy A. Schotland, *Proposed Legislation on Judicial Election Campaign Finance*, 64 OHIO ST. L.J. 127, 128-30 (2003).

have although lacking coverage of "independent" spending); (iii) improving recusal when campaign-related connections loom large;[53] and (iv) implementing unofficial steps like having campaign conduct committees and "educating" judicial candidates.[54]

As for the strengths and weaknesses of this particular Canon:

(a) Having a committee do the soliciting does not assure that the judge or candidate is unaware of who is solicited and who contributed.[55] We should go further, as the Minnesota Canon does almost uniquely,[56] to explicitly prohibit the committee from disclosing to the candidate the names of who did or did not contribute. But even such a provision is porous. As a "distinguished Arkansas intermediate appellate judge" said:

> I go out of my way to know nothing about the contributors. I never look at the information in the official filings, I never talk with my campaign committee about who gives what, I don't have fundraisers, I really do all I can. But there I am at a bar association dinner or some event, and lawyers come up to me and in the middle of something else, eagerly tell me that they gave so-and-so to my last campaign. What more can I do?[57]

It would be cynical to believe that many judges, perhaps even most, aren't trying as hard as they can to avoid all involvement in fundraising and all information about their contributions. But it would be naïve to believe that it doesn't happen, even with some fine judges and to an extent that is troublesome—and the public surely is suspicious.[58]

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53. Deborah Goldberg, James Sample, & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 528-30 (2007); Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-*White *World*, 55 DRAKE L. REV. 691, 710-11 (2007).

54. David B. Rottman, *Conduct and Its Oversight in Judicial Elections: Can Friendly Persuasion Outperform the Power to Regulate?*, 21 GEO. J. LEGAL ETHICS 1295, 310-12 (2008).

55. A nationally respected trial judge (Judge Kevin Burke, formerly Chief Judge, Hennepin County, Minnesota) sent me this comment:

> Almost every candidate for judicial office runs the ad which lists the lawyers supporting him or her. What does the public think? That judges don't look at their own ads? Or that they don't look at the list of supporters of an opponent? Can I ask you to be on my steering committee? Yes in every state. Can I ask the steering committee to go raise money for me? Yes in every state. Should contributions be publicly disclosed? Yes! Available on line so the public can see easily where the money came from? Yes for all branches of government!!! Why then does anyone think the public is not at least going to be suspicious that a judge might not go on line and find out who helped.

56. Colorado and Utah (both with only retention elections) have similar provisions. ABA TASK FORCE, *supra* note 33, at 40 n.73.

57. *Id.*

58. A Mississippi judge reported a telling example:

> In January 1997, at one of the [Mississippi] House of Representatives' committee meetings, a judge was asked whether or not having a big contributor bring a case before the judge would give the judge cause to question the judge's own impartiality. When the judge explained that under the Code of Judicial Conduct the judge would not know who was a big contributor, there was disbelief on the part of the legislative committee mem-

(b) What of the Canon's impact on the Incumbent-versus-Challenger picture? Here, another distinction from *White,* as *Simes* noted: "Implicit in the . . . opinions in *White* is that Minnesota's announce clause, partisan-activities clause, and solicitation clauses were pro-incumbent. . . . [This] Canon . . . does not have a pro-incumbent character . . . ."[59] Limiting candidates' "requests" obviously has more impact on incumbents, whose "requests" carry more weight. As a Pennsylvania lawyer said in explaining his contribution to a local judge (to whom many local lawyers contributed "although they doubted [his] qualifications"): "What could I say? He was a sitting judge."[60]

## CONCLUSION

A Chief Justices' 2001 Symposium on Judicial Campaign Conduct and the First Amendment adopted four principles (and also recommendations), starting with "Judicial elections are different from other elections . . . ." and ending with this:

> Principle 4: Efforts to ensure that judicial campaigns remain different depend ultimately on the success of steps to assure candidate professionalism and to strengthen the norms and culture that enable judicial elections to fulfill their proper role in the balance of electoral accountability and judicial independence.
>
> The Canons, campaign conduct oversight committees, education of candidates and of the press, etc. all draw upon the deepest traditions of the role of the courts and of the bar. Political campaigning places most judicial candidates in unfamiliar situations, and involves challenging time pressures and incentives. The goal is to strengthen the norms and the culture of judicial campaigns so as to protect the ability of state courts to meet their responsibilities in our federal system and under the rule of law.[61]

Judicial elections exist to assure accountability in our pluralist democracy by putting choices to the voters. No one can be surprised that democracy is not problem-free. Nor is it any surprise that among the best answers to such problems are more active pluralism and more informed democracy. We must continue pursuing all feasible steps to assure that judicial elections bring an appropriate balance between judicial accountability and judicial independence.

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> bers that anyone would be naive enough to follow those rules . . . . The problem seems to be one of credibility or accountability . . . .

*Id.*

59. Simes v. Ark. Judicial Discipline & Disability Comm'n, 247 S.W.3d at 883 (citing *White II*, 416 F.3d 738 (8th Cir. 2005)).

60. Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 63 (1985) (citation omitted).

61. *The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 IND. L. REV. 649, 652-53 (2002).

# "*THE APPEAL*" TO THE MASSES

PENNY J. WHITE†

## INTRODUCTION

For more than a decade, dozens of legal scholars have written to decry the politicalization of state court judiciaries.[1] The decision in *Republican Party of Minnesota v. White*[2] only increased the concern and the opportunity, by creating an environment ripe for control by moneyed interests. But largely we have been talking to ourselves, sharing pages in law review symposia and meeting in law school classrooms to lament the threats to judicial independence and, occasionally, to propose reform.

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I appreciate being invited by the *Denver University Law Review* to contribute to this issue and being allowed to do so in a nontraditional format. I also want to thank several people who helped on this Essay. First, I want to thank Professor Judy Cornett who encouraged me and answered many questions; second, I want to thank Mike Okun, who provided excellent ideas and valuable internet research. I am most appreciative to Norene Napper and Patricia Graves, exceptionally talented students at the University of Tennessee College of Law, who followed every research lead I suggested and inspired me with their interest and enthusiasm, and to Chip Howorth and Mark Ensley who aided us in our work.

1. *See* Shirley S. Abrahamson, Keynote Address, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 9-10 (2003); Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 13 (2003); James J Brudney & Lawrence A. Baum, *Foreword to Symposium, Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 1, 1 (2003); Stephen B. Burbank, *What Do We Mean by "Judicial Independence?,"* 64 OHIO ST. L.J. 323, 324 (2003); Kevin S. Burke, *A Judiciary That Is as Good as Its Promise: The Best Strategy for Preserving Judicial Independence*, CT. REV., Summer 2004, at 4, 5; Kevin S. Burke, *The Tyranny of the 'Or' Is the Threat to Judicial Independence, Not Problem-Solving Courts*, CT. REV., Summer 2004, at 32, 32; Harry L. Carrico, *Call to Arms: The Need to Protect the Independence of the Judiciary*, 38 U. RICH. L. REV. 575, 576 (2004); Michael G. Collins, *Judicial Independence and the Scope of Article III—A View from the Federalist*, 38 U. RICH. L. REV. 675, 677-78 (2004); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 49-50 (2003); Lawrence G. Myers, *Judicial Independence in the Municipal Court: Preliminary Observations from Missouri*, CT. REV., Summer 2004, at 26, 26; D. Dudley Oldham & Seth S. Andersen, Commentary, *Role of the Organized Bar in Promoting an Independent and Accountable Judiciary*, 64 OHIO ST. L.J. 341, 342 (2003); Thomas R. Phillips, Keynote Address, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 138 (2003); H. Jefferson Powell, *The Three Independences*, 38 U. RICH. L. REV. 603, 603 (2004); William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 579 (2004); Jeffrey Rosinek, *Some Thoughts on the Problems of Judicial Elections*, CT. REV., Summer 2004, at 20, 20; John Russonello, *Speak to Values: How to Promote the Courts and Blunt Attacks on Judiciary*, CT. REV., Summer 2004, at 10, 10; Roy Schotland, *Resource Materials on Judicial Independence*, CT. REV., Summer 2004, at 38, 38; Rodney A. Smolla, *Chief Justice Harry L. Carrico and the Ideal of Judicial Independence*, 38 U. RICH. L. REV. 571, 571 (2004); Kenneth W. Starr, *Legislative Restraint in the Confirmation Process*, 38 U. RICH. L. REV. 597, 598 (2004).

2. 536 U.S. 765, 777-78 (2002).

After giving dozens of lectures and writing several articles on the topic of judicial independence, I, too, began to feel like a doomsday predictor, or at least like Henny Penny in the story of Chicken Little.[3] Often, I struggled when it was suggested that I should end an address on a high note, unsure whether I could, in good conscience, reach one. Because I felt that my message was stale and dispiriting, I was hesitant when *Denver University Law Review* editor Forrest Plesko asked me to contribute to this issue. Within a few weeks, as a matter of pure coincidence,[4] I listened to John Grisham's book *The Appeal*[5] during a lengthy road trip. I realized immediately that John Grisham may have done what none of us could do: through the medium of literature, he has told the story of what is happening in our state courts to a heretofore-unreached, but indispensable-to-any-solution, audience—the American public.

A detached reader's first reaction might be that *The Appeal* tells a pretty good story, but that it is *only* a story. This essay tests the reader's likely reaction by contrasting some[6] of the imaginary,[7] and perhaps outlandish, facts of Grisham's book with what is actually happening in state judicial elections. Its goal is to chronicle the present condition of state court judicial selection.

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3. The story of Chicken Little, who first alerts Henny Penny that "the sky is falling" before the two set off a flurry of panic, dates to the Jataka Tales of Buddhist Indian folklore, but was made popular in modern times by the Australian author Joseph Jacobs in his book *Henny Penny*. My previous expressions of woe about the demise of judicial independence include the following: Penny J. White, *A Matter of Perspective*, 3 FIRST AMENDMENT L. REV. 5, 7-8 (2004); Penny J. White, *If Justice is for all, who are its Constituents?*, 64 TENN. L. REV. 259, 260 (1997); Penny J. White, *"It's a Wonderful Life," or is it? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 1-2 (1996), *as reprinted in* 80 JUDICATURE 174, 174 (1997); Penny J. White, *Judging Judges: Securing Judicial Independence by use of Judicial Performance Evaluations*, 24 FORDHAM URB. L.J. 1053, 1056 (2002); Penny J. White, *Preserving the Legacy: A Tribute to Chief Justice Harry L. Carrico, one who Exalted Judicial Independence*, 38 U. RICH. L. REV. 615, 615-16 (2004); Penny J. White, *"The Good, the Bad, and the [Very, Very] Ugly" and ( its Postscript), "A Fistful of Dollars:" Musings on* White, 38 U. RICH. L. REV. 626, 627 (2004); Penny J. White, The Aftermath of *Republican Party of Minnesota v. White*, 1 (July, 14, 2007) (unpublished article, on file with the Pound Foundation).

4. The choice of *The Appeal* was not completely accidental. Judge Mary Anne Majestic, Tempe, Arizona, prompted my taking the time to listen to the book, and I thank her for that.

5. JOHN GRISHAM, THE APPEAL (2008) [hereinafter THE APPEAL].

6. Because of time constraints and page limitations, I address only a very few of the assertions in Grisham's books, having to give short shrift or totally omit many, equally interesting others, such as employing wedge issues to get out the vote in otherwise low turnout judicial races; using decoy, colorful candidates to gain public attention; developing intelligence on the personal lives of incumbents; employing scare tactics and voting tariffs to deter certain voters; and involving federal office holders with established political allies.

7. The author assures the reader in his Author's Note that "[a]ny similarity to a real person is coincidental." GRISHAM, *supra* note 5, at 357.

## I. GRISHAM, THE AUTHOR

"[O]utlandish";[8] "preposterous";[9] "hallucinatory";[10]" [s]pell-binding hyperbole";[11] "healthy dose of exaggeration and falsehood";[12] and "baloney of biased rhetoric."[13] These are but a few of the words and phrases that have been used to describe John Grisham's novels. The descriptions may well be good fits for many of Grisham's plots and characters. *The Firm's* story about Mitch McDeere—a 25-year old Harvard graduate, who stumbles into employment with a law firm that works round-the-clock for visible clients while laundering money in the back offices for the Mafia[14]—is a bit surreal. The same characterization applies to the Sullivan law firm in *A Time to Kill* as a law firm that "every lawyer detested."[15] Similarly, the depiction of Hemba and Hamilton—the "trusty lawyers" in *The Testament* who use "lobbyists for legal bribery to land fat government contracts and hide money in Swiss accounts"[16] and also use prosecutors who forsake the obligations of their office in order to align themselves for higher office[17]—is at least inordinately jaded. Moreover, Grisham's exaggerations do not end with the lawyers in his books. He writes about judges who, while incarcerated, blackmail gay men by threatening to expose their sexuality,[18] as well as judges who conspire with defense counsel to force plaintiffs to settle lawsuits.[19]

Grisham's critics claim that his writings are agitprop,[20] that he uniformly views the legal system with a "jaundiced eye"[21] always favoring the little guy,[22] and that the system he portrays is always corrupt and perverted, based on a "cynical premise."[23] Still, others see Grisham as

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8. David Germain, *Adaptation of Grisham Courtroom Thriller is "Outlandish Story,"* CANARSIE COURIER, Oct. 30, 2003, *available at* http://www.canarsiecourier.com/News/2003/1030/Arts_Entertainment/024.html.

9. *Id.*; Marilyn Stasio, *Crime*, N.Y. TIMES, Mar. 24, 1991, at BR37.

10. Review of THE FIRM, http://www.amazon.co.uk/Firm-John-Grisham/dp/0099830000 ("Hallucinatory [E]ntertainment . . . Terrifically [E]xciting. . . [G]rips and [P]ropels.") (last visited Oct. 31, 2008).

11. Review of THE APPEAL, http://www.amazon.com/gp/pdp/profile/A36LKTTFZJ3VI9 (last visited Nov. 10, 2008).

12. Interview by SlushPile.net with John Grisham, Author (Mar. 1, 2006), http://www.slushpile.net/index.php/2006/03/01/interview-john-grisham-author/.

13. Janet Maslin, Book Review, *If You Can't Win the Case, Buy the Election and Get Your Own Judge*, NY TIMES, Jan. 28, 2008.

14. *See* JOHN GRISHAM, THE FIRM (1991).

15. *See* JOHN GRISHAM, A TIME TO KILL 27 (1989).

16. *See* JOHN GRISHAM, THE TESTAMENT 265 (1999).

17. *See* JOHN GRISHAM, A TIME TO KILL 101 (1989); JOHN GRISHAM, THE CLIENT 120-21 (1993).

18. *See* JOHN GRISHAM, THE BRETHREN (2000).

19. *See* JOHN GRISHAM, THE RAINMAKER 195-97 (2000).

20. Timothy Rutten, Book Review, *Deft Social Realism and Iffy Grammar*, L.A. TIMES, Jan. 29, 2008 at E1.

21. John B. Owens, *Grisham's Legal Tales: A Moral Compass for the Young Lawyer*, 48 UCLA L. REV. 1431, 1434 (2001).

22. *Id.* at 1435-38.

23. Stasio, *supra* note 9.

"holding up a mirror to our age,"[24] painting a "sadly familiar picture,"[25] and being "deadly accurate."

## II. BACKGROUND: *THE APPEAL*

Drawing on a familiar formula, *The Appeal* includes bad rich guys and good poor guys and gals, a Faustian challenge, and an ending that brings a glimmer of hope. But is *The Appeal* just another "depressingly fascinating"[26] Grisham tale? Or does it contain elements of reality, an exposé of the effect of real world politics on state judicial systems?[27]

*The Appeal* traces a fictitious toxic tort case, *Baker v. Krane Chemical,*[28] from jury verdict until the case's conclusion in the Mississippi Supreme Court.[29] A Mississippi jury finds that Krane contaminated the groundwater in Bowmore causing the cancerous death of Jeanette Baker's husband and son and awards Mrs. Baker $41 million dollars in compensatory and punitive damages.[30] This verdict sets off a chain reaction, bankrupting Mrs. Baker's lawyers (the good guy and gal husband-and-wife law firm of Wes and Mary Grace Payton),[31] making Krane's CEO (bad guy Carl Trudeau) an even wealthier man,[32] and landing an unknown, undistinguished lawyer (foil family-value conservative Ron Fisk) on the Mississippi Supreme Court[33] in the place of an incumbent

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24. Chuck Leddy, *Grisham Provides a Shock to the System*, BOSTON GLOBE, Jan. 26, 2008, *available at* http://www.boston.com/ae/books/articles/2008/01/26/grisham_provides_a_shock_to_the_system/.

25. *Id.*

26. Peter Guttridge, *Evil Comes in Many Guises*, THE OBSERVER, Feb. 3, 2008, *available at* http://www.guardian.co.uk/books/2008/feb/03/stephenking.fiction.

27. *See* Carol Memmott, *Grisham's 'Appeal' Rules Harshly on Bought Elections*, USA TODAY, Jan. 30, 2008, *available at* http://www.usatoday.com/life/books/reviews/2008-01-28-grisham-appeal_N.htm.

28. THE APPEAL, *supra* note 5, Author's Note. Grisham describes the characters as "purely fictional"; the town, county, company, products, and chemicals as nonexistent; the justices, organizations, churches, corporations, and think tanks as not real; the campaign as a "figment of [his] imagination"; some of the laws as "butchered"; and the lawsuit as "borrowed from several actual cases" but adds that "there is a lot of truth in this story."

29. THE APPEAL, *supra* note 5.

30. *Id.* at 1-13.

31. *Id.* at 245-46. The members of the Payton firm hold hands and pray "as they had never prayed before" when they learn that the jury has reached a verdict. *Id.* at 5 ("Please, dear Lord . . . grant us a divine victory. And deliver us from humiliation, ruin, bankruptcy, and a host of other evils that a bad verdict will bring."). By contrast, Krane's lawyer awaited the verdict "reading a biography and watching the hours pass at $750 per" and "marched away without comment, without prayer." *Id.*

32. *Id.* at 352-55. In true Grisham style, a side story emerges in which Trudeau, while fighting the verdict with his government-relations consulting firm, manages to buy very low and sell very high. After acquiring almost all of Krane stock when the prices were deflated, by virtue of the news surrounding the verdict and other pending toxic tort lawsuits, Trudeau, through his lawyer mouthpieces, bolsters the stock price by rumors about settlement negotiations, and then instructs counsel to withdraw from negotiations. *Id.* at 272-89.

33. *Id.* at 105-109, 300-01.

justice (partial protagonist Sheila McCarthy, female, divorced, qualified, experienced, but naive and unsuspecting).[34]

From the very beginning, Grisham makes it clear that Krane and Trudeau are pure antagonists, bad to the core. Krane intentionally dumps toxic waste, contaminating Bowmore's ground water;[35] Trudeau uses bribes and well-placed connections to dupe the government. [36] For years, residents of Bowmore complain about suspect water, both to the factory and to the government, but are constantly reassured that it is safe.[37] When unusually high rates of cancer strike Bowmore, the Paytons—the story's absolute protagonists—are the only lawyers with the nerve to fight Krane and the stomach to acquire the debt necessary to do so,[38] thus making the large jury verdict even sweeter.

The verdict in favor of Baker enrages Trudeau, who vows to win on appeal,[39] and is aided in his effort by a friendly United States Senator who calls Trudeau to suggest that with the help of Barry Rinehart—"[a lawyer who is] extremely competent, smart, discreet, successful, and expensive," but not in the phone book,[40] and who is protagonist number two—the verdict can be "fix[ed]."[41] Rinehart, a nefarious "consultant of sorts," "specializes in elections"[42] and can assure Krane's victory on appeal if Trudeau will provide the cash to "restructure[] the Mississippi Supreme Court."[43] "For eight million [dollars]," Trudeau "can buy [him]self a supreme court justice."[44]

Trudeau would not "buy" a sitting justice outright. Instead, Rinehart would use his money to take a "not particularly friendly" incumbent justice "out of the picture."[45] Rinehart targets a moderate female justice, Sheila McCarthy, and selects as the unsuspecting protégé an inexperienced and unbaggaged[46] lawyer named Ron Fisk,[47] whose back-

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34. *Id.* at 116-20, 188-190.
35. *Id.* at 10-12, 17-18, 20-24.
36. *Id.* at 139-40.
37. *Id.* at 20-24.
38. *Id.* at 8. A side plot in Grisham's story involves the plaintiff's firm teetering on financial disaster. In the end the antagonist controls the banks too, calling the loans, and forcing the firm into almost certain bankruptcy.
39. *Id.* at 31. Within minutes of the verdict, Trudeau is assured by his lawyers that "'[i]t'll be years before a dime changes hands, if, in fact, that ever happens,'" prompting Trudeau to swear "'it will never happen. Not one dime of our hard-earned profits will ever get into the hands of those trailer park peasants.'" *Id.* at 18. Hours later, Trudeau boasted to "number 228 on the *Forbes* list of the 400 richest Americans," "'[w]e'll never pay a dime.'" *Id.* at 31.
40. *Id.* at 68.
41. *Id.* at 68-69.
42. *Id.* at 68, 81-82.
43. *Id.* at 84.
44. *Id.* at 85.
45. *Id.* at 83.
46. *Id.* at 106. "The Fisks were squeaky-clean. There was nothing to dig up in the heat of a nasty campaign."
47. *Id.* at 105.

ground is conducive to the pro-business and socially conservative campaign that Rinehart calculates will win the election.[48] After meetings with politicians and special interest groups, Fisk, unknowingly at first,[49] becomes the face of the operation "to convert Sheila McCarthy from the sensible moderate she was into the raging liberal [the opposition] needed her to be."[50]

As plaintiffs' lawyers descend on Bowmore to ride the coattails of the *Baker* victory, and the Paytons struggle to avoid bankruptcy while litigating the appeal, Rinehart's company takes full advantage of the plodding appellate timeline and the emotional barometers of conservative special interest groups.[51] Rinehart wrangles and masks massive contributions from business and special interests using shadow groups to funnel illegal campaign funds.[52] Having coerced politicians and government officials with a mixture of duplicity and bribery to gain a financial and political advantage, Rinehart then employs wedge issues to both distract and ignite voters. He enlists a diversion candidate to stoke the death penalty debate, manufactures a gay marriage crisis in rural Mississippi, and overwhelms the public with a barrage of advertisements that distort McCarthy's moderate record.[53] What begins with Fisk's "soft ads"[54] quickly evolves into a "blitzkrieg campaign,"[55] accusing McCarthy of

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> Young white male, one marriage, three children, reasonably handsome, reasonably well dressed, conservative, devout Baptist, Ole Miss law school, no ethical glitches in the law career, not a hint of criminal trouble beyond a speeding ticket, no affiliation with any trial lawyer group, no controversial cases, no experience whatsoever on the bench.
>
> There was no reason anyone outside of Brookhaven would ever have heard the name of Ron Fisk, and that was exactly what made him their ideal candidate. They picked Fisk because he was just old enough to cross their low threshold of legal experience, but still young enough to have ambitions.

48. *Id.* at 107. "Judicial Vision," Rinehart's organizational façade has as its "sole purpose" the election of "quality people to the appellate courts." *Id.* Quality people are:

> . . . conservative, business oriented, temperate, highly moral, intelligent, and ambitious young judges who can literally . . . change the judicial landscape of this country. . . . [including] protect[ing] the rights of the unborn, restrict[ing] the cultural garbage that is consumed by . . . children, honor[ing] the sanctity of marriage, keep[ing] homosexuals out of [the] classrooms, fight[ing] off the gun-control advocates, seal[ing] our borders, and protect[ing] the true American way of life.

*Id.*

49. *See id.*

50. *Id.* at 190.

51. *See id.* at 208-09. For good measure, the group plants two gay men in Jackson, Mississippi, who try to marry, and then file a lawsuit when they are denied a license. Their appeal meanders alongside of the *Baker* appeal in the Mississippi courts. *Id.*

52. *Id.* at 213.

53. *Id.* at 222-24.

54. *Id.* at 190. The soft ads featured plays to patriotism and family heritage and featured family values such as hard work and the pursuit of the truth. *Id.* They included "friendly stuff . . . Rotary Club, Boy Scouts." *Id.* at 111.

55. *Id.* at 110. Rinehart's operative describes a blitzkrieg campaign as: "basically an ambush. Right now Judge McCarthy has no idea she has an opponent . . . . She has six thousand bucks in her campaign account . . . . [W]e'll wait until the last minute to announce your candidacy . . . . She will be overwhelmed from the first day." *Id.* at 110-11 (internal quotation marks omitted).

being "soft on crime[, s]oft on gays[, s]oft on guns[, a]gainst the death penalty."[56]

Taken largely by surprise, Justice McCarthy struggles to assemble her own campaign with few resources. She garners the support of the struggling plaintiffs' bar, which enables Rinehart to foster the stereotypical business versus trial lawyers debate over consumer protection and frivolous lawsuits. In the end, McCarthy loses and Fisk is elected[57] just in time to hear the *Baker* appeal and make good on his campaign platform of limiting liability and reversing punitive damages awards.[58] The dead and dying in Bowmore receive nothing, and Krane stock "roar[s] to life," as Trudeau "sip[s] Cristal champagne, smoke[s] Cuban cigars," and celebrates the realization of his vow that "[n]ot one dime . . . would ever be handed over to those ignorant people and their slimy lawyers."[59]

Through constant inference and occasional explicit expression, Grisham uses the setting, plot, and characters to push a frightening theme: state appellate judges and ultimately the courts on which they serve are manipulated and controlled by moneyed special interest groups.[60] From start to finish, Grisham asserts what some might consider fanciful facts to enhance the story: special interest groups and wealthy businesses target sitting judges for removal; they select inexperienced, pliable greenhorns to run for judicial office and spend millions of dollars from unrevealed sources getting them elected; they run rank campaigns demonizing incumbent judges and creating expectations of how the challenger will rule, to which the new judge succumbs once in office. Widespread voter apathy and poor citizen erudition simplify the take-over while complicating the targeted judge's ability to respond and react.

The truly disturbing nature of Grisham's plot as well as the vile nature of the characters leaves one to contemplate to what extent the story is simply artifice at work. Has Grisham spun another entertaining tale which is pure fiction, or has he used the story as a medium to warn against a frightening reality?

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56. *Id.* at 111.

57. *Id.* at 301.

58. *Id.* at 347. Grisham prolongs the inevitable, pausing for Fisk's son to suffer a catastrophic injury caused by a "defectively designed and unreasonably dangerous" aluminum baseball bat and exacerbated by a sloppy emergency room doctor. *Id.* at 328-29, 340-41. Fisk has to confront the Ron Fisk he has become, a man who "can't sue" (despite his doctor's indictment that the emergency room doctor committed "gross negligence") because to do so would "make a mockery" out of himself. *Id.* at 341. Despite his "true feelings," described as "changing," Fisk votes to reverse the *Baker* verdict rather than "betray those who had elected him." *Id.* at 347.

59. *Id.* at 350-51.

60. In his Author's Notes, Grisham describes the theme more benignly: "[a]s long as private money is allowed in judicial elections we will see competing interests fight for seats on the bench." *Id.* at 357, 358.

## III. REALITY OR PURE FICTION: TESTING SOME ASSERTIONS IN *THE APPEAL*

### *A. Targeting Sitting Justices for Removal: Reality or Pure Fiction?*

#### 1. Targeting Sitting Justices

> Rinehart to Trudeau: *"We do campaigns. . . . When our clients need help, we target a supreme court justice who is not particularly friendly, and we take him, or her, out of the picture."* [61]
>
> Senator to Fisk: *"This gal, McCarthy, . . . [has] never been on board. . . . She's too liberal, plus, between us boys, she just ain't cut out for the black robe."*[62]
>
> Rinehart's Agent to Fisk: *"Sitting judges make tough decisions. . . . They leave trails, records that opponents can use against them."*[63]

Test the assertion that appellate judges are targeted for removal on sitting Justice Carol Hunstein of Georgia, or former Justices Louis Butler of Wisconsin, Warren McGraw of West Virginia, or Chuck McRae of Mississippi. They likely will all agree that the assertion is not fictitious but a common reality. Justice Hunstein was a veteran judge of twenty-two years,[64] with fourteen years on the Georgia Supreme Court when she was targeted for removal by, among others, the American Justice Partnership.[65] She won the venomous contested race,[66] her first ever, in

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61. *Id.* at 82-83.

62. *Id.* at 133.

63. *Id.* at 109.

64. Judge Hunstein served as judge of the Dekalb County Superior Court from 1984 until she was appointed by Georgia Governor Zell Miller to the Georgia Supreme Court in 1992. She was challenged in 2006 by Michael Wiggins, an attorney for the Department of Homeland Security who "moved from Washington to Atlanta in May, just a month before qualifying." Bret Bell, *Hunstein: Can They Buy a Judgeship?*, SAVANNAH NOW, Oct. 24, 2006, *available at* http://www.savannah-now.com/node/164280/print.

65. American Justice Partnership is a collaboration of organizations that join to accomplish state legal reform. *See* http://www.americanjusticepartnership.org/ (last visited Oct. 31, 2008):

> In Georgia, millions were spent on TV ads in one of the most negative judicial campaigns in American history. The Safety and Prosperity Coalition, an interest group that received the majority of its funding from the American Justice Partnership, an arm of the National Association of Manufacturers, reported raising over $1.8 million in an effort to defeat Justice Carol Hunstein.

*Voter Rejection of Political Tampering Doesn't Quell Special Interests in '06 Judicial Elections*, MONEY AND POLITICS, Nov. 8, 2006, *available at* http://www.joycefdn.org/Programs/MoneyPolitics/NewsDetails.aspx?NewsId=125.

66. Both candidates aired ads leveling personal attacks. An advertisement aired by the Safety and Prosperity Coalition said: "Carol Hunstein . . . voted to throw out evidence that convicted a cocaine trafficker . . . . [she] even ignored extensive case law and overruled a jury to free a savage rapist." Hunstein's campaign ad attacking her opponent claimed that "Mike Wiggins was sued by his own mother for taking her money. He sued his only sister. She said he threatened to kill her while she was eight months pregnant." MONEY AND POLITICS, *supra* note 65. The ad won a "Pollie," the Oscar for political ads. JIM GALLOWAY, *About those other Oscars: Hunstein ad gets a*

which she was challenged by a man whom she described as the opposition's thirty-fifth choice to run against her.[67]

Justice Louis B. Butler, Jr. was the first and only African-American justice on the Wisconsin Supreme Court.[68] Justice Butler had twelve years of judicial experience, sitting as a city judge, circuit judge, and supreme court justice,[69] when he was targeted by special interests and "phony issue ad groups"[70] as an activist, liberal judge who used loopholes to favor criminal defendants.[71] While those who financed the removal of Justice Butler were likely motivated by concerns over tort cases,[72] they used false accusations about rulings in criminal cases to ignite and provoke the voters.[73] One such television advertisement was described by the independent, bipartisan Wisconsin Judicial Campaign Integrity Committee[74] as "offensive" and "race-baiting"[75]—reminiscent of the Willie Horton ads used in the 1988 presidential campaign.[76]

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*Pollie*, THE ATLANTA JOURNAL-CONSTITUTION, Feb. 27, 2007, *available at* http://www.ajc.com/metro/content/shared-blogs/ajc/politicalinsider/entries/2007/02/27/about_those_other_oscars_hunst.html.

67. Bell, *supra* note 64.

68. The Wisconsin Supreme Court has seven justices, all of whom are elected to ten-year terms in state-wide nonpartisan elections. *See* Wisconsin Court System, http://www.wicourts.gov/about/judges/supreme/index.htm (last visited Oct. 31, 2008).

69. Justice Butler's biography, http://www.wicourts.gov/about/judges/supreme/retired/butler.htm (last visited Oct. 31, 2008).

70. The phony ad groups were uncovered by Fact Check.org and the Wisconsin Democracy Campaign. *See Judgment Day in Wisconsin*, FACT CHECK, Mar. 7, 2008, http://www.factcheck.org/judicial-campaigns/judgment_day_in_wisconsin.html; Viveca Novak, *Wisconsin Judgment Day, the Sequel*, FAST CHECK, Mar. 21, 2008, http://www.factcheck.org/elections-2008/wisconsin_judgment_day_the_sequel.html); *Hijacking Justice 2008 Issue Ads in the 2008 Supreme Court Campaign*, Feb. 22, 2008, http://www.wisdc.org/hijackjustice08issueads.php; *Nasty Supreme Court Race Cost Record $6 Million*, July 22, 2008, http://www.wisdc.org/pr072208.php.

71. Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. TIMES, May 25, 2008; Dee Hall, *Supreme Court Debate is Bitter*, *available at* http://www.nytimes.com/2008/05/25/us/25exception.html.

The New York Times described the race as between a "small-town trial judge with thin credentials" and "a graduate of the University of Wisconsin law school who served for 12 years as a judge in Milwaukee courts." *Id.* at 72. The Wall Street Journal described the election as a "bar brawl" and Justice Butler as "one of the court's most liberal members." *Wisconsin Bar Brawl*, THE WALL STREET JOURNAL, Mar. 24, 2008, *available at* http://online.wsj.com/article/SB120631561392258183.html?mod=opinion_main_review_and_outlooks [hereinafter *Brawl*].

72. The Wisconsin Supreme Court, after Justice Butler's joinder, was described as having "dismantled the state's tort reform law, eliminating caps on noneconomic damages in medical malpractice rulings," and accepting "collective liability for manufacturers in cases involving lead paint." *Brawl*, *supra* note 71.

73. Novak, *supra* note 70.

74. For a general discussion of judicial campaign oversight committees, *see* William Fortune & Penny J. White, *Judicial Campaign Oversight Committees' Complaint Handling in 2006 Elections: Survey and Recommendations*, 91 JUDICATURE 232 (Mar./Apr. 2008). The Wisconsin Judicial Campaign Integrity Committee is a bipartisan seven-member task force created by the Wisconsin State Bar following the 2007 Supreme Court elections for the purpose of monitoring Supreme Court races. The committee educated voters, sought pledges from candidates, monitored campaign advertising and activities, and reviewed materials to ascertain compliance with the Code of Judicial Conduct. *See* Judicial Campaigns and Selections, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_oversight.cfm?state= (last visited Oct. 31, 2008).

2. Targeting Judges Who are Easy to Label

Groups are strategic in choosing which judges to target, often choosing judges who are easy to label, not based on their true judicial philosophies, but based on commonly held stereotypes about race and gender. Labeling a judge as an "activist,"[77] a "liberal" or as "soft on crime" is a favorite ploy utilized by those who wish to remove an incumbent. The branding manipulates the public to act out of fear or safety concerns in a way that wealthy corporations, whining about insurance rates or jury verdicts, do not.[78] For example, the campaign against Justice Butler in Wisconsin emphasized that he was a minority. Advertisements juxtaposed his picture against pictures of minority defendants.[79] Detractors[80] nicknamed him "Loophole Louis"[81] and criticized him for "putting criminals back on the street"[82] and jeopardizing cases based on "technicalities," notwithstanding his moderate voting record.

Similarly, the forces that opposed Justice Carol Hunstein in Georgia chose to target a female justice rather than any one of the three male incumbents who were also on the ballot,[83] even though her record "was more conservative than her other colleagues."[84] Aware that some might question the motivation for running against the sole woman on the ballot,

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75. Novak, *supra* note 70; Brennan Center for Justice, *Buying Time – 2008: Wisconsin Analysis*, May, 12, 2008, http://www.brennancenter.org/content/resource/buying_time_2008_wisconsin;

76. The Willie Horton ad, used in the Bush-Dukakis campaign. http://www.youtube.com/watch?v=EC9j6Wfdq3o (last visited Oct. 31, 2008).

77. The recurring use of the label "activist judge" may have been the brainchild of Karl Rove's early judicial campaigns in Texas and Alabama. Whatever its origins, it has stuck and is the kiss of death to a judicial candidate.

> The term 'activist judges' motivates all sorts of people for very different reasons. If you're a religious conservative . . . it means judges who established abortion rights or who interpret Massachusetts's equal-protection clause as applying to gays. If you're a business conservative, it means those who allow exorbitant jury awards. And in [the south] especially, the term conjures up those who forced integration.

Joshua Green, *Karl Rove in a Corner*, THE ATLANTIC (Nov. 2004).

78. The United States Chamber of Commerce targets judges by evaluating the rulings that the judges have made on the high court and "grading them for positive or negative impact on the state's economy. Then the chamber's Institute for Legal Reform, whose board members include chiefs of major corporate donors to the judge-ousting campaign, recommend which judges to target." Robert Lenzer & Matthew Miller, *Buying Justice*, FORBES 64 (July 21, 2003).

79. Liptak, *supra* note 71.

80. Some reports say that Justice Butler characterized the nickname as "affectionate."

81. Debra Cassens Weiss, *Wisconsin Justice Dubbed 'Loophole Louis' in TV Ads*, ABA JOURNAL 2008, *available at* http://www.abajournal.com/news/Wisconsin_justice_dubbed_loophole_louis_in_tv_ads/; television ad referring to Justice Butler as "Loophole Louis", www.youtube.com/watch?v=mM9CEGPZX2A.

82. A television advertisement claimed that "Louis Butler *worked to put criminals on the street.* Like Reuben Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child." Novak, *supra* note 70.

83. *See* SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS (2006): HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS—AND HOW AMERICANS ARE FIGHTING BACK, http://www.justiceatstake.org/files /NewPoliticsofJudicialElections2006.pdf.

84. Nina Totenberg, *Report: Spending on Judicial Elections 2006*, Oct. 4, 2008, www.npr.org/templates/story/story.php?storyId=10253213. In contentious criminal cases, Justice Hunstein had agreed with the prosecution 39% more often than the court in its entirety. *Id.*

a supporter suggested that the campaign needed a better answer than that the Justice "was a one-legged Jewish female from DeKalb County with a lot of money in the bank and Zell [Miller] as her campaign chair."[85] During Justice Hunstein's campaign, United States Attorney General John Ashcroft[86] recorded an automated telephone call endorsing Hunstein's opponent saying, "[h]e will protect us from terrorists and criminals," and disparaging her as a "liberal incumbent activist judge who will stop at nothing to win." [87]

It is not just the special interests groups who use branding to simplify—and often misstate—the records of judicial candidates. The candidates do so as well, even when they are fully cognizant of the misinformation. Often the candidates compete to drown out one another's law and order mantra. In 2004, both candidates for the Illinois Supreme Court were sitting judges, presumably aware of the complexities of judicial decision making. Yet both isolated frightening facts from selected cases and used them to label their opponent as soft on crime. According to Maag supporters, Judge Karmeier was "lenient" because he "gave probation to kidnappers who tortured and nearly beat a ninety-two-year-old grandmother to death." Karmeier supporters countered that Judge Maag overturned the conviction of a "man who sexually assaulted a six-year-old girl."[88]

3. Targeting Judges With a Judicial Paper Trail

To succeed, it is also important to target a sitting judge who has produced a body of work, a paper trail of judicial opinions that can be misrepresented, oversimplified, and criticized. Explanations of nuanced judicial opinions are no competition for simple "tough on crime" rhetoric in a "world of 'thirty-second ads and snappy sound bites.'"[89] While the Hortonesque ad used against Justice Butler actually referred to a case he had handled as a public defender,[90] not as a justice, his critics also used

85. Bell, *supra* note 64.

86. In *The Appeal*, Senator Rudd, affectionately known as "the King," tells Fisk, "I don't get involved in local races . . . . However, this race is too important . . . . I've made some powerful friends in this business, and they will be happy to support your campaign. Just takes a phone call from me . . . . My folks can put together a lot of money. Plus, I know the people in the trenches. The governor, the legislators, the mayors." THE APPEAL, *supra* note 5, at 131-32.

87. SAMPLE ET AL., *supra* note 83.

88. DEBORAH GOLDBERG, ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS (2004): HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A "TIPPING POINT" – AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL 10 (Jesse Rutledge ed., 2005) *available at* http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf.

89. THE APPEAL, *supra* note 5, at 262.

90. The apparent source for the claim was the case of *State v. Mitchell,* a case that Butler handled when assigned as a public defender. Butler's client, Reuben Mitchell, was not released, although Butler won his appeal based on the introduction of evidence in violation of the rape-shield statute. State v. Mitchell, No. 86-0879-CR, 1987 WL 267164 at *2-3 (Wis. Ct. App. April 23, 1987). The state successfully appealed the case to the Wisconsin Supreme Court, who found that the error was harmless and reinstated the conviction. State v. Mitchell, 424 N.W.2d 698, 707 (Wis. 1998).

cases from his judicial "trail" to complete the liberal brand. These ads were also arguably inaccurate.[91]

Opponents also used a judicial trail to defeat Justice Warren McGraw, a former Chief Justice and member of West Virginia's highest court, the Supreme Court of Appeals. Brent Benjamin, whose campaign was largely funded by a special interest organization's two and half million dollar donation,[92] tagged McGraw as an "activist judge who mollycoddles criminals and endangers the welfare of children."[93] The organization complained that McGraw had joined a *per curiam* opinion which required a lower court to grant probation to a convicted sex offender in order to enable him to participate in a proposed rehabilitation plan.[94]

4. Masking the Real Bull's Eye: Targeting Judges Who are "Not Business Friendly"

As demonstrated by the political forces in Wisconsin, West Virginia, Washington, and Illinois (to name but a few), the visible platform of choice of law and order is generally used to mask the opponent's real agenda—tort reform. Occasionally, however, opponents will use both messages as was the case with Mississippi's Justice C.P. (Chuck) McRae. Justice McRae was targeted and removed from the Mississippi Supreme Court after eleven years of service by pro-business forces.[95]

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91. An ad sponsored by Wisconsin Manufacturers & Commerce claimed that Justice Butler focused on "needless technicalities" and "nearly allowed a murderer to go free." Wisconsin Judgment Day, the Sequel, *supra* note 70. The case so described was *State v. Jensen*, in which Justice Butler concurred in part and dissented in part. State v. Jensen 727 N.W.2d 518, 537 (Wis. 2007) (Butler, J., concurring in part, dissenting in part). The issue on which Justice Butler dissented was an issue left uncertain by recent United States Supreme Court decisions involving the Sixth Amendment right to confrontation. Ironically, the Supreme Court granted certiorari in a case raising the issue a few months after the *Jensen* decision and decided the matter in June 2008. *See* Giles v. California, 128 S.Ct. 2678, 2693 (2008).

92. The organization, known as "And For the Sake of the Kids," donated $2.5 million dollars to Justice Benjamin's campaign, which was provided by Don Blankenship, CEO of Massey Energy, and "one of West Virginia's most powerful businessmen." Len Boselovic, *Are Campaign Contributors Buying Justice?*, PITTSBURG POST-GAZETTE, Sept. 21, 2008 at A1. Blankenship intermittently claimed that his generosity was either fueled by the desire to do the right thing, Carol Morello, *Political Ads Aired in D.C.Target W.Va. Audience*, WASH. POST, Nov. 1, 2004 at B01, or by economics. Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 4, 2004 at § 1.

93. Morello, *supra* note 92, at B01.

94. *Id.*; *see also* State v. Arbaugh, 595 S.E.2d 289, 294 (W. Va. 2004) (per curiam). The defendant, Tony Arbaugh, described by the *per curiam* majority as having lived a "long and painful life" and having "endured a long history of sexual assault at the hands of two of his adult male family members," had been placed on probation. *Id.* at 290-91. After a circuit court found that he had violated the probation by the use of drugs and alcohol, Arbaugh was sentenced to prison. The Supreme Court of Appeals reversed and ordered the lower court to allow Arbaugh to participate in an award-winning private rehabilitation program, Youth Services Systems, organized in conjunction with the Catholic Church. *Id.* at 291- 93. "Considering Mr. Arbaugh's tender age and extreme victimization, we cannot, we will not, surrender any opportunity to salvage his life and to turn him into a productive member of society." *Id.* at 294.

95. Justice Jess Dickinson, who defeated Justice McRae, received $1.2 million from doctors and small business owners and another $1 million from Mississippians for Economic Progress, a

Justice McRae was a former president of the Mississippi Trial Lawyers Association, who prided himself as being the court's defender of the "have-nots against the haves."[96] Although the forces against him were primarily business groups interested in electing judges with a sympathetic ear to insurance, health care, and big business, they also utilized ads that preyed upon the public's fear of crime.[97] Pro-business interests likewise used dual messages in Wisconsin where Justice Butler and four of his supreme court colleagues were credited with making Wisconsin a "mecca for the trial bar"[98] and in West Virginia where Justice McGraw was seen as hurting the state's business climate: "[w]ithout a change in the Supreme Court, businesses w[ould] continue to avoid West Virginia."[99]

Similar tactics were used against Chief Justice Gerry Alexander in Washington. In a six-day period, a single group spent $357,000 on an advertisement featuring a mother whose young son was killed by a murderer released from prison as a result of a court ruling.[100] The group funding the advertisement was "Americans Tired of Lawsuit Abuse," based in Alexandria, Virginia, and organized to limit liability lawsuits. During the campaign, the group's spokesperson confirmed that it targeted the Chief Justice hoping to achieve tort reform but ran the advertisement for its likely effect despite its complete irrelevance to the group's agenda.[101]

Efforts to hide the agenda by manipulating or mixing the message have not always been the chosen course in judicial campaigns. When Karl Rove staged the first all-out judicial battle in Texas,[102] he created a

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local group funded by the United States Chamber of Commerce. Justice McRae received $700,000, mostly from trial lawyers. Lenzer & Miller, *supra* note 78, at 64.

96. *Id.*

97. In the closing weeks of the campaign against Justice McRae, the Law Enforcement Alliance of American, an associate of the National Rifle Association, ran ads suggesting that Justice McRae was lenient on child predators, having voted to reverse the conviction of a defendant convicted of molesting a three-year old. Justice McRae responded with equally acerbic ads, claiming that his opponent had been sued for striking a customer with a liquor bottle and for not paying his bills and that he wished to retain the Confederate flag. *Id.*

98. *Wisconsin Bar Brawl*, *supra* note 71.

99. Liptak, *supra* note 92, at § 1 (quote attributed to Don Blankenship, primary donor to the organization that bankrolled Justice Benjamin's successful campaign against Justice McGraw).

100. Richard Roesier, *Supreme Cash Flows*, SPOKESMAN REVIEW, Sept. 13, 2006 *available at* www.spokesmanreview.com/tools/story_breakingnews_pf.asp?ID=7365.

101. *Id.*

102. Although the battle was ostensibly for the seats on the court, Rove's real interest was in eliminating the power of Texas Democrats. As Sam Gwynne, Executive Editor of *Texas Monthly*, would explain years later:

> So it became this giant pitched battle, because it wasn't necessarily about the kind of verdicts and the ease with which someone might get a verdict for the plaintiff, but it was also about the back end, which was the financing of the entire Democratic Party. . . . It's a battle for the soul of Texas politics because it's a battle for the money,the lifeline money of Democrats, which is now drying up . . . .

Interview with Sam Gwynne, Executive Editor, Texas Monthly (Jan. 8, 2005), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/architect/interviews/gwynne.html [hereinafter Interview with Gwynne].

"formula . . . for winning judicial races [that] involved demonizing Democrats as pawns of the plaintiffs' bar and stoking populist resentment with tales of outrageous verdicts."[103] As one Texas lobbyist observed, reflecting on Rove's winning formula years later: "[h]e knew intuitively, . . . that you had to have, as Mark Twain says, 'a devil for the crusade.'. . . [Y]ou had to demonize somebody."[104] In Texas, the demons were members of the Texas Supreme Court whose stoking was done by the plaintiff's bar.

Because the Texas Supreme Court does not hear criminal cases, the platform challenging incumbent justices could not have as its centerpiece the emotional issues of law and order. But the state was perceived as one of the most plaintiff-friendly venues in the country,[105] with the court largely controlled by trial lawyers.[106] Business leaders believed that this reputation thwarted economic growth in the state.[107] The Texas Medical Association also resented the court for its record in medical liability cases, contending that it caused escalating malpractice rates.[108] Under Rove's leadership, the business and medical communities and the state Republican Party refined and redefined a "neglected issue—tort reform."[109]

Judicial races were traditionally "low salience events, with low public interest, very low free media coverage, and, as a result, low voter turnout."[110] In addition, because judicial races are "down ballot" and often of little interest to the public, significant voter falloff occurs.[111]

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103. Green, *supra* note 77.

104. Interview with Kim Ross, Lobbyist, Texas Medical Association, in *Tort Reform in Texas: Rove's Genius at Work*, http://www.pbs.org/wgbh/pages/frontline/shows/architect/texas/tort.html (last visited Nov. 1, 2008) [hereinafter Interview with Ross]. Ross continued that "in this case it was central casting. [The Supreme Court justices] were doing it to themselves . . . . And it just so happened, because that was that era when the trial lawyers were a very convenient device for us to use to begin to educate voters in terms of a philosophical shift." *Id.*

105. *See* Interview with Tom Phillips, Chief Justice (1988-2004), Texas Supreme Court, in *Tort Reform in Texas: Rove's Genius at Work*, http://www.pbs.org/wgbh/pages/frontline/shows/architect/texas/tort.html (last visited Nov. 1, 2008) [hereinafter Interview with Phillips]. According to former Texas Chief Justice Tom Phillips, "Texas's very lax venue laws . . . allowed a disproportionate number of cases to be tried in areas of the state that had no real connection with the dispute, but were areas where juries were known to be liable to give a very large award if their sympathies could be properly invoked." *Id.*

106. *See* Interview with Gwynne, *supra* note 102; *see also* Interview with Phillips, *supra* note 106 (stating that the "widespread feeling in Texas . . . [was] that the trial lawyers were too powerful within the legislature").

107. *See* Interview with Gwynne, *supra* note 102.

108. *See* John Jack, *Corporate financed campaigns . . . Government by the rich, for the rich?*, (April 2000), *available at* www.afn.org/~iguana/archives/2000_04/20000402.html.

109. *See* Interview with Phillips, *supra* note 105.

110. George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1580 (Apr. 2008) (quoting Richard Briffault, *Judicial Campaign Codes after* Republican Party of Minnesota v. White, 153 U. PA. L. REV. 181, 196 (2004).

111. *See* Mathew Manweller, *Examining Decreasing Rates of Voter Falloff in California and Oregon*, 36 STATE AND LOCAL GOVERNMENT REVIEW 59 (Fall 2004), *available at* http://www.cviog.uga.edu/slgr/2004/1d.pdf (explaining that voter falloff is the "difference between

When Rove and company undertook the first comprehensive defeat of incumbent supreme court justices in Texas, voter fall-off in some judicial races ran as high as thirty percent.[112] Their task was to interest more of the public in the judicial selection process. They did so by branding the trial lawyers as dishonest co-conspirators, flagrantly "buying" justice in the State of Texas.[113] Framing the issue in this way connected the public with the coalition, a connection that would have been unlikely had the emphasis been on the financial complaints of wealthy doctors and business professionals.[114] The merger worked. The campaign—Clean Slate '88[115]—resulted in the election of five justices, viewed as more friendly to the coalition's interests.

From those early state-court races until today, the American Tort Reform Association (ATRA) has been a prime player in the state court reshaping project. The organization lists its goal as "bringing greater fairness, predictability, and efficiency to the civil justice system."[116] It monitors venues that it calls "judicial hell holes," based primarily on court decisions in cases involving asbestos exposure, medical malpractice, and automobile liability, and then issues annual reports.[117] Based upon its findings, it decides which judges to target for removal. As one business leader explained, "We don't pick our opponents lightly when we make selections of people to target for replacement on the bench.

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how many people go to the polls and how many people actually vote on a specific candidate or issue."). In other words, a number of voters go to the polls, but do not vote all the way down the ballot, meaning that they do not vote on judges' races. Hon. Charles K. Wiggins, *The Washington State Supreme Court Elections of 2006: Factors at Work and Lessons Learned*, 46 JUDGES' JOURNAL 5 (Winter 2007), *available at* http://www.abanet.org/jd/publications/jjournal/2007winter/winter07.pdf.

112. *See* Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79 (Sept./Oct. 1999). These figures apply to retention races, but uncontested elections would have similar falloff.

113. *See* Interview with Bill Miller, Texas political consultant, in *Tort Reform in Texas: Rove's Genius at Work*, http://www.pbs.org/wgbh/pages/frontline/shows/architect/texas/tort.html (last visited Nov. 1, 2008) (identifying the "breakthrough moment" as the airing of *60 Minutes'* "Justice for Sale" in 1987, which revealed that Texas Supreme Court justices took hundreds of thousands of dollars in campaign donations from lawyers appearing before them).

Ironically, a decade later, in a follow-up program entitled "Payola Justice," *60 Minutes* concluded that justices continued to take large amounts of money from those with cases before the court, but that the source of the donations had shifted to corporations and defense law firms, rather than plaintiff attorneys, prompting the *Austin American-Statesman* to editorialize that "[j]ustice is still for sale, but with new buyers." Editorial, *Justice is still for sale, but with new buyers*, AUSTIN AMERICAN-STATESMAN (Nov. 3, 1998), *available at* www.tpj.org/payola/editorial1.html.

114. *See* Interview with Ross, *supra* note 104.

115. *See* Jack, *supra* note 108. The political action committee for the Texas Medical Association, TEXPAC, used a video campaign to inform the public. TEXPAC distributed videos detailing stories of huge verdicts against doctors, prompting members of the medical profession to contribute to the campaign.

116. The website of the organization, which lists its mission, may be viewed at http://www.atra.org/about/ (last visited Nov. 1, 2008).

117. The "Judicial Hell Holes" reports may be viewed at www.atra.org/reports/hellholes/. Some lament that jurisdictions that were previously labeled tort "hell holes" are now consumer hell holes. *See Exxon decision may re-emerge in court contest*, HUNTSVILLE TIMES (June 29, 2008) (quoting Alabama state Democratic party chair Joe Turnham), *available at* http://www.al.com/news/huntsvilletimes/index.ssf?/base/news/1214731002124261.xml&coll=1.

The primary way to make a selection is tracking all decisions the [court has made] and determin[ing] how each of the judges ha[s] voted on the merits of those cases."[118] Thus, not only does targeting exist, but its proponents regard it as rather scientific.

### B. *Campaigns Funded by Millions of Dollars Provided by Unknown and Camouflaged Special Interest Groups: Reality or Pure Fiction?*

#### 1. Whose Money?

Trudeau to Rinehart: *"Who are your clients?"*[119]

Rinehart: *"I can't give you the names, but they're all on your side of the street. Big companies in energy, insurance, pharmaceuticals, chemicals, timber, all types of manufacturers, plus doctors, hospitals, nursing homes, banks. We raise tons of money and hire the people on the ground to run aggressive campaigns."*[120]

If the real message is sometimes masked in judicial elections, the real messenger is often completely hidden. Notwithstanding AMTRA's leadership role in "reshaping" state courts, it is rarely out front in those efforts. More usually, AMTRA and several other recognizable organizations filter their support through other groups, groups with warm, benevolent, and sometimes, intelligent-sounding or patriotic names[121] like West Virginia's "For the Sake of the Kids"; Wisconsin's "Citizens to Defend the Constitution" and the "Coalition for America's Families"; Georgia's Safety and Prosperity Coalition; Ohio's "Partnership for Ohio's Future"; and Washington's "It's Time for a Change."

The four most expensive supreme court races in history—three in Alabama and one in Illinois—and the recent $8 million race in Wisconsin, as well as many others, are notable not only for the amount spent but also for the source of their funds and the manner in which the funds were spent. While lawyers historically were the major contributors in judicial races, donating about ten percent more than business as late as 2000, by 2006 business interests donated twice as much as lawyers.[122] In addition, special interest groups spent millions more on information or issue advertising. These expenditures, which are not funneled through a candidate's campaign, are not reflected on the campaign disclosure state-

118. *See* Jack, *supra* note 108 (quoting Ginger Sawyer, Louisiana Association of Business and Industry).

119. THE APPEAL, *supra* note 5, at 83.

120. *Id.*

121. The front organization in THE APPEAL was "Lawsuit Victims for Truth." *Id.* at 222.

122. SAMPLE ET AL., *supra* note 83, at 18.

ment.[123] In 2005-06, for example, eighty-four percent of total expenditures in judicial races came from special interests groups.[124]

These interest groups, not candidates or political parties, supplied the funds for the greatest increase in expenditure among judicial candidates—television advertising. Most of the advertising reflects the organizational agenda on the issues of tort reform, crime control, and family values.[125] In the 2006 judicial campaigns, business groups funded more than ninety percent of all special interest television advertising.[126] In the state of Washington, business interests paid for *all* of the television advertising.[127] And, Louisiana has just become the "latest state to set a record for TV spending on a Supreme Court race."[128]

While the infusion of money and the dominance of television advertising in judicial elections is disturbing, the stealth tactics of the donors is alarming. The groups use innocuous names to camouflage their identities and mask their sources. They manipulate disclosure requirements by securing larger contributions at the end of the election cycle,[129] thereby avoiding reporting them until after the election. And they often escape reporting requirements altogether by not using "magic words" like "elect" or "defeat" in their advertisements.[130]

In the Georgia contest between Justice Carol Hunstein and candidate Michael Wiggins, outside interest groups spent more than $4 million.[131] The Safety and Prosperity Coalition in Georgia was the highest

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123. *See generally* RACHEL WEISS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES 3 (2005), http://www.followthemoney.org/press/Reports/200508251.pdf; PUBLIC CITIZEN CONGRESS WATCH, THE NEW STEALTH PACS: TRACKING 501(C) NON-PROFIT GROUPS ACTIVE IN ELECTIONS 11 (2004), http://www.stealthpacs.org/documents/StealthPACs.pdf.

124. SAMPLE ET AL., *supra* note 83, at 18.

125. DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 5, 13 (2000), http://*www.justiceatstake.org/files/JASMoneyReport.pdf*. In 2000, more than $10 million was spent on more than 22,000 television airings. *Id.* at 5.

126. SAMPLE ET AL., *supra* note 83, at 7.

127. *Id.* at 12. During the 2006 Washington Supreme Court race between Chief Justice Gerry Alexander and challenger John Groen, a record 1,081 advertisements ran, all of which were paid for by three special interests groups. The challenger's supporters spent four times as much on airtime as did Chief Justice Alexander, who won the race. *Id.* at 13.

128. Press Release, Brennan Center For Justice, Buying Time – LA Smashes Records, AL Ad Wars Go Negative (Oct. 9, 2008), *available at* http://www.brennancenter.org/content/resource/buying_time_la_smashes_records_al_ad_wars_go_negative/.

129. Most campaign reporting laws require that a final disclosure form be filed after the election, enabling groups to avoid being identified until after the election. In THE APPEAL, Rinehart "knew the trial lawyers would scrutinize the contributors in the hope that out-of-state money was pouring in from big business interests . . . . He was confident he would raise huge sums of money from out of state, but these donations would pour in at the chosen moment, late in the campaign when the state's benign reporting laws protected it from being an issue." THE APPEAL, *supra* note 5, at 213.

130. GOLDBERG ET AL., *supra* note 125, at 18 (providing "[M]any interest groups have invested huge sums in judicial elections [but] avoided disclosing their finances.").

131. SAMPLE ET AL., *supra* note 83, at 22.

spending special interest group in judicial elections in the country in 2006, contributing $1.3 million to the Wiggins campaign.[132] The Coalition funneled its money through an out-of-state group, headquartered in Michigan, and arranged for most of the money to arrive just weeks before the November election.[133] Justice Hunstein also raised an enormous amount of money, becoming the first judicial candidate in Georgia to surpass $1 million in fund-raising.[134]

In Wisconsin and Washington, groups headquartered in Virginia weighed in, making major contributions to challengers who sought to unseat incumbent justices. A Virginia-based business coalition known as the "Coalition for America's Families" reportedly spent more than $1 million to unseat Wisconsin Justice Louis Butler.[135] Another Virginia group, "Americans Tired of Lawsuit Abuse,"[136] combined with "Citizens to Uphold the Constitution"[137] and "It's Time for a Change"[138] to spend more than $2.5 million in 2006 Washington Supreme Court races.[139] Two other groups, "Constitutional Law PAC" and "FairPAC," forged ahead independent of the candidates in favor of or against targeted candidates.[140]

Perhaps the champion silent partner in the effort to restructure state courts is the United States Chamber of Commerce. Targeting judges in Texas, Michigan, Illinois, Ohio, Mississippi, Alabama, West Virginia, Georgia, Wisconsin, Washington, and other states, some say that the

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132. *Id.* at 11.

133. *Id.* at 22.

134. Justice Hunstein is reported to have raised $1.38 million despite Georgia's $5000 individual contribution limitation. *Id.* at 17.

135. Wisconsin Democracy Campaign, *Hijacking Justice 2008: Issue Ads in the 2008 Supreme Court* Campaign, Feb. 22, 2008, http://wisdc.org/hijackjustice08issueads.php. The Coalition for America's Families lists its address as Middleton, Wisconsin, and its goal as "continuing the fight to lower the tax burden and increase the decision-making power of the American Family." Coalition for America's Families, http://www.coalition4families.com/About_Us.aspx (last visited Nov. 1, 2008). The issues it seeks to address are taxes, right to life, right to bear arms, and school choice. Coalition for America's Families, http://www.coalition4families.com/Home.aspx (last visited Nov. 1, 2008) (follow "Issues" hyperlink).

136. In 2006, the two largest donors to Americans Tired of Lawsuit Abuse were the American Tort Reform Association and the American Justice Partnership. Together they gave almost $890,000. *See* Ctr. for Responsive Politics, *Americans Tired of Lawsuit Abuse: Top Contributors, 2006 Cycle*, http://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2006&ein=203371803 (last visited Nov. 1, 2008).

137. According to a Seattle newspaper, Citizens to Uphold the Constitution is supported by labor, environmental groups, trial lawyers and other organizations. Andrew Garber, *State Supreme Court Contests Spark "Fundraising Arms Race,"* SEATTLE TIMES, Sept. 14, 2006, *available at* http://community.seattletimes.nwsource.com/archive/?date=20060914&slug=supreme14m.

138. According to the blog from the Spokesman Review, "It's Time for a Change" is a PAC backed by the Washington Building Industry. Posting of Rich to Eye on Olympia, http://www.spokesmanreview.com/blogs/olympia/archive.asp?postID=4008 (Sept. 13, 2006).

139. SAMPLE ET AL., *supra* note 83, at 21.

140. Ralph Thomas, *Interest Groups Targeting State Supreme Court Races*, SEATTLE TIMES, May 23, 2006, at B1, *available at* http://community.seattletimes.nwsource.com/archive/?date=20060523&slug=court23m.

Chamber operates under the strategy that it's cheaper to buy a state supreme court than an entire state legislature.[141] The Chamber and its supporters respond that they are merely righting a system that had become obscenely one-sided after years of trial-lawyer control.[142]

In less than three-quarters of a decade,[143] the Chamber of Commerce has infused hundreds of millions of dollars into state court races.[144] Even assuming that "turn about is fair play," the Chamber's furtiveness is problematic. The Chamber often masks contributions and avoids disclosure by characterizing its efforts as "informational" rather than as candidate support.[145] The Chamber also sabotages unsuspecting candidates by pumping thousands of out-of-state dollars into cover organizations, who then enlarge the campaign's coffers in the final days of the campaign, creating a blitzkrieg.[146] When, for example, the Chamber decided to target Justice Chuck McRae of Mississippi, they channeled a million dollars through various local groups;[147] in other cases, channeling also occurred, using ally political action committees. Moreover, it is commonplace for the Chamber to funnel donations through its tax-exempt unit, the Institute for Legal Reform,[148] thus giving most of the contributing corporations a hefty tax deduction.[149]

2. How Much Money?

Fisk: "*What makes you think I can beat her?*"[150]

Rinehart's Agent to Fisk: "*Because we have the money . . . . Unlimited. We partner with some powerful people.*"[151]

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141. *See* Jesse M. Reiter, *The Purchasing of our State Supreme Courts: How Goliath is Beating David in Courtrooms Across America*, July 19, 2007, http://www.buzzflash.com/articles/contributors/1172.

142. Lenzer & Miller, *supra* note 78, at 67.

143. The genesis of the "war on the judges" is said to have been a meeting between Chamber President Thomas Donohue and Home Depot founder Bernard Marcus in 2000. *Id.* at 70.

144. *Id.* at 65. The article refers to the Chamber's involvement as a "secret war" with its "prime objective: to vote out judges supported by trial lawyers, labor unions and the Democratic Party and install new judges sympathetic to insurance companies, multinational corporations and the Republican Party." *Id.* at 64-65.

145. Lenzer & Miller, *supra* note 78, at 67.

146. I borrow this term directly from Grisham, but he is not the only one to use it to describe judicial campaigns. *See* THE APPEAL, *supra* note 5, at 109; *see also* Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 82 (Summer 1998).

147. Lenzer & Miller, *supra* note 78, at 64.

148. The Institute for Legal Reform is forthright about its mission, stating, "The U.S. Chamber Institute for Legal Reform (ILR) is a national campaign, representing the nation's business community, with the critical mission of making America's legal system simpler, fairer and faster for everyone." About ILR, www.instituteforlegalreform.com/about/index.cfm (last visited Nov. 1, 2008). The Institute further states that, "Founded by the U.S. Chamber of Commerce in 1998 to address the country's litigation explosion, ILR is the only national legal reform advocate to approach reform comprehensively by not only working to change the legal culture, but also to change the legislators and judges that create that culture." *Id.*

149. Lenzer & Miller, *supra* note 78, at 70.

150. THE APPEAL, *supra* note 5, at 108.

Fisk: *"How much will this cost?"*[152]

Rinehart's Agent to Fisk: *"Three million bucks."*[153]

Fisk: *"And you can raise that much money?"*[154]

Rinehart's Agent to Fisk: *"[We] already [have] the commitments. And if we need more, we'll get more."*[155]

Raising and spending money to get elected to the bench is nothing new. But a study of the three election cycles before 2000 showed that around one-third of the candidates for judicial office raised no funds at all.[156] Even among those who did raise money, the amounts raised and expended were relatively low in comparison to today's standards. What was of interest to observers about the year 2000—a year pegged as the "watershed year for big money, special interest pressure, and TV advertising in state supreme court campaigns"[157]—was the dramatic increase in the amount of money spent in supreme court races. The more than $45 million raised and expended by supreme court candidates represented a sixty-one percent increase over the amount raised in 1998 and a one hundred percent increase over amounts raised in 1994.[158] All combined, candidates for supreme court seats have raised over $157 million since 1999, with $46.8 million raised in the 2004-05 cycle and $34.4 million raised in the 2005-06 cycle.[159]

If 2000 was a watershed year for the expenditure of money in state supreme court elections, it was nonetheless the tip of the iceberg in comparison to the sums spent since then. Aggregate candidate fundraising records were broken in forty percent of the states with supreme court races in 2004.[160] It was also the year of the single most expensive judicial race in United States history, the $9.3 million contest in Illinois between Illinois Court of Appeals Judge Gordon Maag and Circuit Judge Lloyd Karmeier.[161] This figure almost doubled the previous record for a state judicial election.[162] Moreover, the election was not even state-wide,

151. *Id.* at 109.
152. *Id.* at 111.
153. *Id.*
154. *Id.*
155. *Id.*
156. GOLDBERG ET AL., *supra* note 125, at 8 fig. 2.
157. *Id.* at 7.
158. *Id.* at 4.
159. SAMPLE ET AL., *supra* note 83, at 15 & n.10. The lesser amount in 2005-06 reflects the number of contested elections in that year, 27 as compared to 33 contested elections in 2004-05. *Id.*
160. GOLDBERG ET AL, *supra* note 88, at 13.
161. *Torts and Courts*, THE ECONOMIST, Apr. 12, 2008, at 36.
162. Brennan Center for Justice, Avery v. State Farm Automobile Ins. Co., (Feb. 3, 2006), http://www.brennancenter.org/content/resource/avery_v_state_farm_automobile_ins_co/.

involving instead thirty-seven southern Illinois counties.[163] Special interest spending for the race pitted pro-business and Republican organizations against trial lawyers, labor groups, and Democratic organizations.[164] In the end, Justice Karmeier raised slightly more than Judge Maag,[165] and won the election.[166]

The campaign to become Alabama's Chief Justice in 2006 was the second most expensive judicial race in U.S. history, with a total of $8.2 million raised between the primary and general campaigns.[167] As in Illinois, the judicial election battle was a war between business interests and the chamber of commerce and trial lawyers, characterized as "not exactly evenly matched opponents,"[168] with the business community being positioned to outspend the trial lawyers two to one.[169] In addition to attracting big business dollars, Alabama also attracts pure partisan dollars as one of the few states with partisan appellate elections.[170] This may help to explain Alabama's status as the home of three of the four most expensive judicial campaigns in history.[171]

The spending levels set by candidates in Illinois and Alabama were not surpassed, but they are within the sights of judicial candidates in many other states, including Wisconsin, West Virginia, Georgia, Wash-

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163. Geri L. Dreiling, *Supreme Fight*, ILL. TIMES, May 27, 2004, *available at* http://www.illinoistimes.com/gyrobase/Content?oid=oid%3A3205.

164. JAMES SAMPLE ET AL., BRENNAN CENTER FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 21 fig. 5 (2008).

165. The total reported contributions to Justice Karmeier's "Citizens for Karmeier" campaign were $4,802,869, while the total reported contributions to Judge Maag's "Maag for Justice" campaign were $4,580,588. The Maag contributions are detailed at Illinois Campaign for Political Reform, Maag, Gordon (2003-2004 Cycle), http://www.ilcampaign.org/sunshine/icpr/icpr_filer.aspx?cycle=2003-2004&id=8508 (last visited Nov. 1, 2008). The Karmeier contributions are detailed at Illinois Campaign for Political Reform, Karmeier, Lloyd (2003-2004 Cycle), http://www.ilcampaign.org/sunshine/icpr/icpr_filer.aspx?cycle=2003-2004&id=8502 (last visited Nov. 1, 2008).

166. When Fisk asks "[w]hat makes you think I can [win]?" the real response is "[b]ecause we have the money." THE APPEAL, *supra* note 5, at 108-09. While testing that assertion is beyond the scope of this Essay, a few observations should be made. "[T]he correlation between strong fundraising and electoral success persists. In 2003-2004, 35 out of 43 high court races were won by the top fundraisers, a success rate of 81 percent. This figure represents an increase from 80 percent in 2001-2002, and 71 percent in 1999-2000." GOLDBERG ET AL., *supra* note 88, at 16 & n.20. The percentage declined in 2006, with 17 of 25 top fund raisers winning the election. Some predict that this may indicate a "voter backlash against big-money, heavy-handed court campaigns," though acknowledging that it is too soon to tell if it is a trend or a "blip." SAMPLE ET AL., *supra* note 83, at 24 & n.17.

167. SAMPLE ET AL., *supra* note 83, at 5.

168. Scott Horton, *The Best Justice Money Can Buy*, HARPER'S, Dec. 13, 2007, *available at* http://harpers.org/archive/2007/12/hbc-90001908.

169. SAMPLE ET AL., *supra* note 83, at 18 fig. 11.

170. *Id.* at 6; *see also* THE AMERICAN JUDICATURE SOCIETY REPORT ON JUDICIAL SELECTION IN STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2007), www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf (reporting that eight states have partisan elections for judges on the state's highest court: Alabama, Illinois, Louisiana, Michigan, Ohio, Pennsylvania, Texas, West Virginia).

171. SAMPLE ET AL., *supra* note 83, at 15.

ington, Louisiana, and Ohio. In the 2008 campaign fueled by tort reform interests, two candidates for the Wisconsin Supreme Court jointly raised about $1 million, but spent $5 million,[172] most of which was provided by "outside special interest groups that secretly raised and spent most of that money on negative ads about the candidates."[173] In West Virginia in 2004, the challenger, and now Justice, Brent Benjamin raised and spent far in excess of Justice Warren McGraw. Justice Benjamin received $2.4 million from one donor and $745 thousand from another.[174] Georgia Supreme Court Justice Carol Hunstein began with a $125 thousand war chest, but managed to extend that amount to $1.38 million to defeat challenger Michael Wiggins, who received $1.75 million from one donor, the Safety and Prosperity Coalition.[175] The Washington numbers were lower: approximately $1 million in a 2004 supreme court race[176] and more than $4 million in 2006.[177]

As 2008 draws to a close, Louisiana is on target to have its most expensive supreme court election in a decade.[178] Candidates and special interest groups combined to spend more than $5.9 million through the third quarter of the year;[179] a significant upsurge in spending was occurring as the campaign headed into the final weeks.[180] Twenty-eight seats on fourteen supreme courts remain open, with elections in November 2008. Through November, candidates in those races had raised nearly $30 million dollars.[181]

All contested judicial elections require incumbent judges to spend time raising money and campaigning during election years. In some

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172. Liptak, *supra* note 71, at A1.

173. Wisconsin Democracy Campaign, Nasty Supreme Court Race Cost Record $6 Million: Candidates Were Outspent $4 to $1 by Outside Special Interests (July 22, 2008), http://www.wisdc.org/pr072208.php. Among the contributors were Club for Growth Wisconsin; Coalition for America's Families, a Virginia-based coalition of businesses and non-profit groups; the Greater Wisconsin Committee, a Milwaukee-based group; and the Wisconsin Manufacturers & Commerce, the state's largest business organization. *Id.*

174. GOLDBERG ET AL., *supra* note 88, at 4 n.6. Don Blankenship, CEO of Massey Energy, donated the larger amount through an organization known as "For the Sake of the Kids" which filtered the money to the Benjamin campaign. The smaller amount was donated by an organization called "Doctors for Justice." *Id.*

175. SAMPLE ET AL., *supra* note 83, at 20.

176. Thomas, *supra* note 140, at B1.

177. Kate Riley, *Cleaning Up Judicial Elections*, THE SEATTLE TIMES, Nov. 14, 2006, at B6, *available at* http://seattletimes.nwsource.com/html/opinion/2003422757_riley14.html.

178. Brennan Ctr. for Justice, Louisiana, Alabama, Ohio Lead TV Spending Surge in State Supreme Court Races, www.brennancenter.org/content/resource/buying_time_la_al_oh_lead_spending_surge/ (last visited Nov. 1, 2008).

179. Brennan Center for Justice, Buying Time: Special Interests and Supreme Court Elections, www.brennancenter.org/content/resource/buying_time_special_interests_conspicuously_absent_from_supreme_court_elect/ (last visited Nov. 1, 2008).

180. Spending increased from $178,600 to $316,000 from the second to third week in September 2008. *Id.*

181. 2008 Supreme Court Elections: More Money, More Nastiness, Nov. 5, 2008, http://www.justiceatstake.org/contentViewer.asp?breadcrumb=5,55,1104 (last visited Nov. 11, 2008).

states, judges must run in both primary and general elections increasing the amount of time and money that the judge must expend. The need to campaign and to raise large amounts of money interferes with the judge's ability to perform the duties of office and affects a judge's and, consequently, a court's, productivity during election season. But campaign demands may also result in a war-chest phenomenon. In order to ward off potential contenders, judges may feel the need to raise funds continuously, thereby decreasing their productivity well beyond election year. For example, in 2006, two incumbent justices in Michigan raised a combined $1 million despite what was described as "token opposition."[182] An Illinois Supreme Court justice raised more than $1.7 million before she realized she would not have opposition.[183]

### C. *Campaigns Funded for the Purpose of "Restructuring the Court" and Justices Fulfilling Commitments Once Elected: Reality or Pure Fiction?*

> Fisk to Rinehart's' Agent: *"I want to know why these people are willing to pony up three million bucks to support someone they've never heard of."*[184]
>
> Rinehart's Agent: *"These are people who are demanding change, and they are willing to pay for it."* [185]
>
> *"We will expect a commitment to limit liability in civil litigation."*[186]
>
> "Justice Fisk wrestled with the case. . . . [H]e had great sympathy for the child, but would not allow his emotions to become a factor. On the other hand, he had been elected on a platform of limiting liability. . . . When a case involved a substantial verdict, the insurance companies could now relax."[187]

When a well-financed judge is elected on a well-defined platform, what do the financial backers expect? The answer to that loaded question depends on who is asked and under what circumstances. When the public is asked, nine out of ten respond that special interest groups are mobilizing courts to promote their own agendas, and eight out of ten judges agree.[188] But special interest groups who spend thousands each election cycle vow to be interested only in assuring a balanced and fair

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182. SAMPLE ET AL., *supra* note 83, at 20.

183. Michael Higgins, *Burke to Return Most of War Chest to Donors Unopposed in Primary, Justice Will Empty Coffers*, CHI. TRIB., Jan. 21, 2008, at 1, *available at* http://archives.chicagotribune.com/2008/jan/21/news/chi-burke_21jan21.

184. THE APPEAL, *supra* note 5, at 152.

185. *Id.*

186. *Id.* at 112.

187. *Id.* at 313.

188. Alexander Wohl, *The Judge on the Stump*, AM. PROSPECT, Aug. 12, 2002, *available at* http://www.prospect.org/cs/articles?article=judge_on_the_stump.

state court system. For example, the Institute for Legal Reform, the political arm of the United States Chamber of Commerce, lists its mission as "making America's legal system simpler, fairer and faster for everyone."[189] To this end, it routinely invests millions of dollars to replace judges who are not (and who have not been objectively identified as) obscure, unfair, or inefficient.

Like a teacher when students meet expectations, the groups cannot conceal their exhilaration with (and approval of) the results. They loudly applaud every decision that advances the group's agenda, even when their pupils behave in ways that are inimical to model judicial behavior.[190] The American Tort Reform Association, for example, boasts on its webpage, "besides naming two new Judicial Hellholes this year, the biggest headline may be the fact that Madison County, Illinois is no longer a Hellhole [since] courts there have undertaken several positive reforms which justify moving the county this year to the report's 'Watch List.'"[191] A fair translation of ATRA's message is this: we received a high return on our investment; the judges we installed did just what we expected them to do, notwithstanding the questionable conduct of their initiates.[192] Thus, the short answer about the special interests' expectations is that they expect results. And if anecdotal evidence has any value, they appear to realize their expectations.

When a Wisconsin Supreme Court justice whose campaign had been bankrolled by Wisconsin's largest business organization authored the opinion in a case which the organization financed, the financiers praised the decision.[193] Though they characterized it as a "major victory

189. Institute for Legal Reform, www.instituteforlegalreform.org/about/index.cfm/ (last visited Nov. 1, 2008).

190. The Wisconsin State Judicial Commission filed an ethics complaint against Justice Michael Gableman who defeated Justice Louis Butler in the spring. The complaint alleges that Gableman knowingly leveled false charges against Butler in an advertisement that claimed that Butler had "worked to put criminals on the street." Patrick Marley & Steven Walters, *Judicial Commission Says Gableman Ad was Deceiving*, MILWAUKEE J. SENTINEL, Oct. 8, 2008, *available at* http://www.jsonline.com/news/statepolitics/32440994.html. The ad concerned a case that Butler handled as a public defender, not a judge. Butler initially won on appeal, but the Wisconsin Supreme Court found that any error in the case was harmless. The defendant served his entire sentence. FactCheck.org, Wisconsin Judgment Day, the Sequel, http://www.factcheck.org/elections-2008/wisconsin_judgment_day_the_sequel.html (last visited Nov. 1, 2008).

191. American Tort Reform Foundation, Report Names New Judicial Hellholes, http://www.atra.org/newsroom/releases.php?id=8202 (last visited Nov. 1, 2008). The report adds "The #1 Judicial Hellhole from 2002 to 2004 dropped to the #4 position in 2005, and then into 'purgatory' at #6 last year. Continued progress in restoring judicial fairness led by Chief Judge Ann Callis and Judge Daniel Stack, combined with substantial drops in the filing of class action, asbestos and large claims, has led ATRF to move Madison County onto the Watch List." AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES (2007), http://www.atra.org/reports/hellholes/report.pdf.

192. *See* "Citizens for Karmeier" *supra* note 165.

193. Wisconsin Manufacturers & Commerce, WMC Hails Supreme Court Ruling in Menasha Corp. Tax Case (July 11, 2008), http://www.wmc.org/display.cfm?ID=1854.

for all taxpayers," the taxpayer beneficiaries of the $350 million were Wisconsin businesses.[194]

Wisconsin Manufacturers & Commerce, the state's largest business lobby, spent more than $2 million to help Justice Anne Ziegler win an open seat on the Wisconsin Supreme Court. After winning, Justice Ziegler was poised to hear a case which could result in $350 million in tax refunds to Wisconsin businesses, a case that Wisconsin Manufacturers & Commerce had helped to finance.[195] Despite public outcry about the case, Justice Ziegler not only refused to recuse herself, but also authored the majority opinion in the 4-3 case which found in favor of the businesses.[196]

The refusal to recuse was but one in a long line of cases indicative of Justice Ziegler's troubling interpretation of the role of a judge. As a circuit judge, Ziegler ruled in two dozen cases involving a bank on which her husband was a paid member of the board of directors.[197] The state's ethics rule clearly prohibited judges from hearing cases involving businesses if the judge's spouse was a director of that business.[198] But Justice Ziegler sat on twenty-four such cases and ruled for the bank twenty-one times.[199]

While no one but Justice Ziegler could say with certainty whether her rulings were influenced by campaign contributions or family relations, her refusal to step aside in these cases, while quite satisfying to her contributors, gives the public a jaundiced view of the bench, which further confuses the already muddled understanding of the role of the courts. While the agenda-laden Wisconsin Manufacturers & Commerce "hailed" the decision, Wisconsin newspapers called for Justice Ziegler's resignation.[200] The calls for the Justice's resignation poignantly disclose

194. *Id.* The case concerned the purchase of $5 million custom software, an unlikely purchase for the average taxpayer. Wis. Dep't Revenue v. Menasha Corp., 745 N.W.2d 95, 103 (Wis. 2008).

195. Patrick Marley, *Ziegler Faces Conflict Questions*, MILWAUKEE JOURNAL SENTINEL, Mar. 5, 2007, at B1 *available at* www.jsonline.com/story/index.aspx?id=573250.

196. Wis. Dep't of Revenue v. Menasha Corp., 754 N.W.2d 95, 126 (Wis. 2008). Justice Louis Butler, who was defeated by another candidate promoted by Wisconsin Manufacturers & Commerce, joined the dissent in the case. *Id.* at 147 (Butler, J., dissenting). The issue of Butler's recusal was also raised because an attorney on his campaign finance committee represented Menasha Corporation and contributed to Butler's campaign. Editorial, *Step aside in this case*, MILWAUKEE JOURNAL SENTINEL, Nov. 28, 2007, at A12, *available at* www.jsonline.com/story/index.aspx?id=691180.

197. Marley, *supra* note 195, at B1. Although Justice Ziegler's opponent raised this conflict of interest during the Supreme Court campaign in 2007, Ziegler won the election. Soon afterwards, however, the Judicial Commission investigated the complaint, the first-ever investigation of a sitting justice, and recommended a public reprimand. Steven Walters & Patrick Marley, *Panel Recommends Ziegler Reprimand*, MILWAUKEE JOURNAL SENTINEL, Sept. 7, 2007, at A1, *available at* www.jsonline.com/story/index.aspx?id=658384.

198. Marley, *supra* note 195, at B1.

199. *Id. See* Editorial *supra* note 196.

200. Editorial, *Ziegler Should Quit the Bench*, THE CAPITAL TIMES, Nov. 30, 2007, at A8.

that the harm from her conduct extends far beyond the individual decision or the judge:

> To try to pretend that Ziegler is not doing severe damage to the reputation of the state's highest court, and more broadly to the rule of law, is at this point untenable to anyone who has sworn a solemn oath to "support the Constitution of the United States and the Constitution of the state of Wisconsin" and to "faithfully and impartially discharge the duties of office."[201]

The explosion of special interest money in judicial campaigns has amplified this disturbing trend of judges hearing cases that involve their campaign contributors. Wisconsin's Justice Ziegler, unfortunately, is but one example. It is likely more than coincidence that two other glaring examples involve sitting justices whose multimillion dollar campaigns were financed by special interests groups with clear judicial agendas.

The justices in the other two examples both refused to disqualify themselves in cases involving their most generous donors; their conduct led litigants to beseech the United States Supreme Court to intervene and address whether participation in a principal financial supporter's case violates due process of law.[202]

Illinois Supreme Court Justice Lloyd Karmeier prevailed in the most expensive, and by some accounts the most bitter,[203] supreme court race in history in 2004. Included in his $4.8 million in contributions was $1.35 million in donations from State Farm Mutual Automobile Insurance Company, its lawyers, its affiliates, and its affiliates' lawyers.[204] In 1999, plaintiffs had secured a monumental $1.05 billion verdict against State Farm.[205] State Farm appealed, but the judgment was affirmed by a unanimous Illinois Court of Appeals in 2001. In late 2002, the Illinois Supreme Court granted the plaintiffs' permission to appeal. The court held oral argument in May 2003, at a time when Justice Karmeier was not a member of the court. The case remained pending during and after the election. When it became apparent that newly-elected Justice Karmeier intended to participate in the decision, plaintiffs moved for his

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201. *Id.*

202. Petition for Writ of Certiorari at i, Caperton v. A.T. Massey Coal Co., Inc., No. 08-22 (July 2, 2008), 2008 WL 2676568 [hereinafter *Caperton Writ*]. Petition for Writ of Certiorari at i, Avery v. State Farm Mut. Auto Ins. Co., 547 U.S. 1003 (2006) (No. 05-842), 2005 WL 3662258 [hereinafter *Avery Writ*].

203. The election was described by the *St. Louis Post Dispatch* as an "ugly, dispiriting, destructive, misleading, money-drenched race." Editorial, *Buying Justice*, ST. LOUIS DISPATCH, Nov. 5, 2004, at B6.

204. *Avery Writ*, *supra* note 202, at 6.

205. The case against State Farm was a nation-wide class action involving two claims, one alleging breach of contract and one alleging consumer fraud. The contract claims were tried by a jury, while the judge tried the consumer fraud claims in a bifurcated seven-week trial. The jury awarded in excess of $450 million dollars in contract damages. Once punitive damages and damages for disgorgement and consumer fraud were included the verdict exceeded $1 billion. *Id.* at 4.

recusal noting that "perhaps through oversight" the justice had failed to disqualify himself.[206] State Farm opposed the motion.[207]

Twenty-seven months after oral argument, in August 2005,[208] the Illinois Supreme Court reversed the verdict against State Farm, with Justice Karmeier agreeing and casting the deciding vote on the breach of contract claim.[209] The extraordinary timeline of the case added to its rankness. The Illinois Supreme Court issued its decision in the *State Farm* case months beyond the acceptable, though voluntary,[210] time period for opinion preparation as established by the American Bar Association's Standards Relating to Appellate Courts.[211] Delay in any case adversely affects the litigants; it may also have a detrimental effect on the public's perception of the courts. But when the delay is inordinate—more than two years from argument to decision—and when it appears to be purposeful, its potential harm is multiplied. [212]

Yet neither the delay nor its potential harm reduced the cheers of the United States Chamber of Commerce. They celebrated the decision as a significant victory in favor of the business community and against class actions.[213] Others were not so elated, warning that the judge's poor judgment had dramatic widespread ramifications:

> [T]he juxtaposition of gigantic campaign contributions and favorable judgments for contributors creates a haze of suspicion over the highest court in Illinois. . . . Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will case doubt over every vote he casts in a business case. This shakes public respect for the courts and the law—which is a foundation of our democracy.[214]

Plaintiffs in *State Farm* unsuccessfully urged the United States Supreme Court to determine whether Justice Karmeier's failure to recuse

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206. *Id.* at 6.

207. *Id.* at 9.

208. SAMPLE ET AL., *supra* note 164, at 22 (discussing case timeline).

209. *Id.*

210. *See* National Center for State Courts, Case Processing Time Standards, www.ncsconline.org/cpts/cptsState.asp (last visited Nov. 1, 2008).

211. Standard 3.52 sets forth that 90% of all cases in a state court of last resort should be concluded within a year of oral argument. STANDARDS RELATING TO APPELLATE COURTS, § 3.52, (ABA Comm'n on Standards of Judicial Admin. 1994); STANDARDS RELATING TO APPELLATE DELAY REDUCTION, §§ 3.52-.55, (ABA Judicial Admin. Div. 1988).

212. Standard 2.4 of the *Appellate Court Performance Standards and Measures* requires that appellate courts resolve cases expeditiously. APPELLATE COURT PERFORMANCE STANDARDS AND MEASURES, Standard 2.4, (Nat'l Ctr. for State Cts. & App. Ct. Performance Standards Comm'n. 1999), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/appellate&CISOPTR=56.

213. Business Wire, *Chamber Hails Illinois Supreme Court Decision on State Farm*, Aug. 18, 2005, http://findarticles.com/p/articles/mi_m0EIN/is_2005_August_18/ai_n14926963.

214. Editorial, *Illinois Judges: Buying Justice?*, ST. LOUIS POST DISPATCH, Dec. 20, 2005, at B8.

himself violated their due process right to a fair and impartial tribunal.[215] Had the Court weighed in, states might have avoided a similar incident, which is equally disturbing and has unfolded in West Virginia. Like Justices Ziegler and Karmeier, Justice Brent Benjamin was involved in a well-funded, rancorous campaign for the state supreme court. He successfully unseated an incumbent justice with the financial backing of Don Blankenship, the CEO of Massey Energy and one of West Virginia's business elite.[216] All totaled, Benjamin received $3 million in contributions from Blankenship and the PACs. This amount constituted over sixty percent of Benjamin's total campaign finances.[217]

Blankenship's company, Massey Energy, was embroiled in lengthy litigation with Hugh Caperton, the owner of a coal production company in West Virginia.[218] In 2002, a lower court in West Virginia ordered Massey Energy to pay $50 million for tortuous interference with Caperton's business as well as for fraudulent misrepresentation and concealment.[219] In 2004, as the case lay dormant, Brent Benjamin was elected to the West Virginia Supreme Court of Appeals.

In October 2006, Massey Energy sought review in the West Virginia Supreme Court of Appeals. Prior to Massey's filing, the plaintiff requested Justice Benjamin to recuse himself. Justice Benjamin declined. The court granted review and then reversed the $50 million verdict against Massey Energy.[220] Two justices dissented and characterized the majority decision as a "result-driven" effort.[221]

While the plaintiff's petition for rehearing was pending, photographs surfaced of Don Blankenship together with Chief Justice Elliot Maynard, a member of the court's majority, at a vacation spot on the French Rivera.[222] In the subsequent furor, the court agreed to rehear the appeal. While the Chief Justice denied impropriety, he recused himself

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215. The issue presented in the petition for certiorari was whether a judge may "receive more than $1 million in direct and indirect campaign contributions from a party and its supporters, while the party's case is pending, [and] cast the deciding vote in that party's favor consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Avery Writ*, *supra* note 202, at i.

216. Blankenship donated $1.7 million to Justice Benjamin's campaign through the organization "For the Sake of the Kids." Len Boselovic, *Are Campaign Contributors Buying Justice?*, PITTSBURG POST-GAZETTE, Sept. 21, 2008, at A1.

217. Liptak, *supra* note 92, at 11.

218. *Caperton Writ*, *supra* note 202, at 8.

219. *Id.* at 5.

220. Caperton v. A.T. Massey Coal Co., 2008 W. Va. LEXIS 22, 135 (W. Va. Apr. 3, 2008). The reversal was based on a forum selection clause in a contractual agreement to which neither Massey Energy nor Caperton were parties and despite the fact that the verdict rendered against Massey was on tort, not contract grounds. *Id.* at 42.

221. *Id.* at 137.

222. Ian Urbina, *West Virginia's Top Judge Loses His Re-election Bid*, N.Y. TIMES, May 15, 2008, at A25, *available at* www.nytimes.com/2008/05/15/us/15judge.html?_r=1&scp=1&sq=west%20virginia's%20top%20judge%20loses%20his%20re-election%20bid&st=cse&oref=slogin.

from further proceedings in the case as did Justice Larry Starcher, one of the two dissenting justices, who had been vocal in his opposition to Blankenship's financial entanglement with the court.[223]

Justice Starcher was candid about the effect of campaign contributions on the case's outcome. In a blunt opinion, he issued an invitation to Justice Benjamin to join him in recusing.

> I repeat—the pernicious effects of Mr. Blankenship's bestowal of his personal wealth and friendship have created a cancer in the affairs of this Court. And I have seen that cancer grow and grow . . . . At this point, I believe that my stepping aside in the instant case might be a step in treating that cancer—but only if others as well rise to the challenge. If they do not then I shudder to think of the cynicism and disgust that lawyers, judges and citizens of this wonderful State will feel about our judicial system.
>
> And I reiterate that unless another justice also steps aside in this case, my replacement on the Court will be selected by the justice whose campaign was supported by something close to $4,000,000 from monies that came from one side of the case.[224]

Justice Benjamin declined Justice Starcher's invitation as well as the suggestions of state-wide media.[225] Because he stood next in line to serve as Chief Justice under West Virginia's rotational plan, Benjamin also appointed the two replacement judges to sit in the place of the recused justices.[226] In April of 2008, four years after the original hearing, the court reheard the case and once again reversed by a 3-2 margin, with Justice Benjamin joining the majority.

The United States Supreme Court was again invited to determine whether due process requires the recusal of a judge who received large campaign contributions from a party or an attorney:[227] This time, the Court has accepted the invitation, granting the Petition for Certiorari on November 14, 2008.[228] The Petition stresses the importance of the issue:

> In light of the increasing prominent role of money in judicial elections and the public perception of impropriety that such campaign

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223. *Id.*

224. Notice of Voluntary Disqualification of the Hon. Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, A.T. Massey Coal Co., Inc. v. Caperton, No. 33350 (Feb. 15, 2008) (*reprinted in* SAMPLE ET AL., *supra* note 164, at 19).

225. Editorial, *Bravo*, CHARLESTON GAZETTE, Feb. 16, 2008, at 4A, *available at* http://wvgazette.com/Opinion/Editorials/200802150735.

226. Boselovic, *supra* note 215, at A1.

227. *Caperton Writ*, *supra* note 202, at 8. The issue presented for review in the Petition is "whether Justice Benjamin's failure to recuse himself from participating in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment." *Id.*

228. Caperton v. A.T. Massey Coal Co., No. 33350, 2008 WL 918444 (W. Va. Apr. 3, 2008), *cert. granted*, 77 U.S.L.W. 3051 (U.S. Nov. 14, 2008) (No. 08-22).

> contributions tend to generate, this Court should clarify the circumstances in which due process requires the recusal of a judge who benefited from the campaign expenditures of a party or an attorney.[229]

Perhaps, in addressing the issue, the Court will consider the weight of empirical evidence indicating that judicial voting records track campaign contributions. Studies conducted in Ohio show that Ohio justices vote with their contributors seventy-five percent of the time,[230] while similar studies in Louisiana show a contributor-decision ratio of sixty-five percent.[231] While it may be impossible to scientifically validate cause and effect, when asked, judges candidly admit that a causal relationship exists. More than a quarter of state court judges believe that campaign contributions have an influence on judges' decisions.[232] Some surprisingly state the simple truth: "everyone interested in contributing has very specific interests."[233] "It's pretty hard in big-money races not to take care of your friends."[234]

The public overwhelmingly agrees. Although most Americans continue to express a belief that "[i]n spite of its problems, the American justice system is still the 'best in the world,'"[235] only thirty percent expressed a high level of confidence in the overall justice system.[236] The public's lack of confidence is generated by the influence of money in judicial elections. Since the beginning of this decade, Americans have

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229. *Caperton Writ*, supra note 202, at 27.

230. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Ruling*, N.Y. TIMES, Oct. 1, 2006, at A1, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=print. Justice Terrence O'Donnell's concurrence with his contributors was reported as 91% of the time.

231. Adam Liptak, *Looking Anew at Campaign Case and Elected Judges*, N.Y. TIMES, Jan. 29, 2008, at A14, *available at* http://www.nytimes.com/2008/01/29/us/29bar.html?sq=Liptak&st=nyt&scp=2&adxnnlx=1201619026-XtMkjm/3pEJv8ra4bwZ6oA&pagewanted=print. Two of the Louisiana justices voted with their contributors 80% of the time. A recent Texas study claims that six of the current Texas Supreme Court justices took two-thirds of their campaign contributions from lawyers and litigants who appeared before them. Press Release, Texans for Public Justice, Uncovering Massive Campaign Conflicts, TPJ Calls for Halt to "Payola Justice" (Oct. 7, 2008), *available at* http://www.tpj.org/reports/courtroomcontributions/pressrelease.pdf. Others claim the study is the product of trial lawyer rhetoric. *See* Press Release, Texans for Lawsuit Reform, Texans for Public Funded by Trial Lawyers (Nov. 2, 2006), *available at* http://www.tortreform.com/node/369/print.

232. While 26% of state court judges say that campaign contributions have some influence on decisions, 72% believe they have at least "some influence." Memorandum from Greenberg Quinlan Rosner Research, Inc. & American Viewpoint to Justice at Stake Campaign 1 (Feb. 14, 2002), *available at* http://gqrr.com/articles/1617/1410_JAS_report.pdf.

233. Liptak & Roberts, *supra* note 230, at A1 (quoting Justice Paul Pfeifer as saying, "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race."). Justice Pfeifer previously served in the Ohio Senate and House of Representatives, running in five non-judicial elections. *See* www.sconet.state.oh.us/Justices/pfeifer/default.asp.

234. Liptak & Roberts, *supra* note 230, at A1 (quoting retired Chief Justice Richard Neeley, who also said, "It's very hard not to dance with the one who brung you.").

235. American Bar Association, Perceptions of the U.S. Justice System 58 (1998), *available at* www.abanet.org/media/perception/perceptions.pdf.

236. *Id.* at 50.

expressed increasing concern about the effect of campaign contributions on judicial decision-making.[237] More than three-fourths of voters believe that campaign contributions have an influence on judges' decisions.[238] To almost seventy percent of that number, that "influence" results in contributors receiving favorable treatment in the courts.[239]

## CONCLUSION: TESTING SOLUTIONS

Scientific validation of the effect that campaign contributions and special interest agendas have on judicial decision making is unnecessary to conclude that state courts systems face real danger. The emerging setting is a court system seen as providing justice for some but rarely for all; the plot is an effort to hijack the courts. As the justice system is increasingly perceived as unfair, favoring the wealthy, controlled by special interests, and being influenced by contributions, it will cease to be a viable method of dispute resolution.

When the United States Supreme Court upheld the right of a candidate for judicial office to announce views on contested legal or political issues in *Republican Party of Minnesota v. White*,[240] the Court maintained there was a difference between announcements, which are constitutionally protected, and promises, pledges, and commitments, which arguably are not.[241] But that difference—unlike Grisham's assertions tested in this essay—is in reality pure fiction, much more the sophistry of Supreme Court analysis than reflective of human cognition. When a judicial campaign is focused on issues of limiting liability and tort reform, for example, the public does not separate the information into discrete categories of "announcements" and "commitments." Rather, the public accepts and processes the information as defining the candidate's platform and signifying the candidate's future judicial behavior.

In addition to perpetuating a misunderstood role of the courts, there are other byproducts of the new setting for state judicial elections. Campaigning and fundraising, even on a small scale, take time away from judicial duties, time when judges could be issuing opinions consistent with reasonable appellate deadlines. Even judges who are not on the ballot or who have little or no opposition feel mounting pressure to establish a war chest in order to deter potential challengers. Moreover, even

237. Memorandum from Greenberg Quinlan, *supra* note 230, at 1.

238. *Id.* The numbers are significantly higher in Texas with 83% of the public, 79% of lawyers, and 50% of the justices believing that campaign contributions "significantly influence decisions." John Jack, *Corporate financed campaigns . . . Government by the rich, for the rich?* (April 2000), *available at www.afn.org/~iguana/archives/2000_04/20000402.*

239. Memorandum from Greenberg Quinlan, *supra* note 232, at 1. Surveys in individual states have yielded similar results. *See generally* Liptak & Roberts, *supra* note 230; Liptak, *supra* note 231; Memorandum from Coleen Danos, National Center for State Courts, Judicial Elections and Judicial Independence Concerns: Stepping Up to the Plate (Nov. 10, 1998), *available at* http://www.ncsconline.org/WC/Publications/KIS_JudInd_S98-1305_Pub.pdf.

240. Republican Party of Minnesota v. White, 536 U.S. 765, 796 (2002).

241. *Id.* at 770.

judges who are not targeted will be tempted to check their opinions—or to temper them—in order to not disagree with the current bandwagon issues.

Once a new appellate judge is elected, the judge and the court must undergo a transition. Even experienced lawyers likely will be ill-equipped to manage the unique demands of appellate judging—not merely researching and writing, but *collaborating* on appellate opinions. Courts with frequent turnover are less productive not only because of the steep learning curve for a new judge,[242] but also because of the inevitable shift in group dynamics.[243] In addition, because appellate judging is a collaborative function, the absence of even one judge, who is meeting with fundraisers or on the stump, affects the overall productivity of the court.

Judges who have faced hard-fought election battles may become cynical and resentful; they may be forced to serve with judges who campaigned against them, reducing collegiality and creating artificial divides.[244] Finally, upheaval in a court's composition may result in instability in the law, which in turn affects the willingness to rely on precedent and overall confidence in government.

Because John Grisham writes for profit, his chosen setting for *The Appeal* did not publicly finance judicial elections; nor did it impose limitations or rigorous reporting requirements on campaign contributors. Justice Fisk was neither governed by a mandatory recusal provision nor subject to transparent and public disciplinary proceedings for sitting on a case in which he had made a campaign commitment. All of those possi-

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242. A case in point is Alabama, the state with a frequent turn-over on its supreme court. Between 1998 and 2008, twenty different justices have served on Alabama's nine-member supreme court. The issue of productivity surfaced in a 2006 race for the position of chief justice. Incumbent Chief Justice Drayton Nabers accused Justice Tom Parker, who was vying for the position, of being unqualified to hold the position. In support of his claim, Nabers revealed that Parker had authored only one opinion in his first year on the bench. During the same time period, Chief Justice Parker had authored twenty-four opinions. Two other justices who had joined the court with Parker in 2004 had authored thirty-eight and twenty-eight opinions respectively during the same time period. Justice Parker blamed his lack of productivity on the fact that he had not served as a judge before, which classically begs the question. Dana Beyerle, *New Justice Parker Slower than Colleagues*, TUSCALOOSA NEWS, Apr. 24, 2006, *available at* http://www.tuscaloosanews.com/article/20060424/NEWS/604240329.

243. Justice Shirley Abrahamson, Chief of the Wisconsin Supreme Court since 1996 says that "[e]very time you get a new justice; it's a new court in terms of how you work together." Bill Lueders, *Under Fire*, MILWAUKEE MAGAZINE, Dec. 1, 2005, *available at* www.milwaukeemagazine.com/currentIssue/full_feature_story.asp?NewMessageID=13177. Even with consistent leadership, interpersonal squabbles can interfere with a court's productivity. The members of the Wisconsin Supreme Court were described in the late 1980s as "claw[ing] at each other . . . . They are more preoccupied with one another than the law." In 1999, four justices accused Chief Justice Abrahamson of abusing her authority and publicly supported a contender for her position. *Id.*

244. In Wisconsin, Chief Justice Abrahamson threatened to sue four other justices, referred to by the Wisconsin media as the "Gang of Four" when the four took steps to diminish the Chief Justice's constitutional powers. *Id.*

ble reforms, untested in Grisham's fiction, might make a difference in reality. Public finance, campaign finance, and disclosure reform would alter the financier's lethal weapon—money. Mandatory recusal provisions, stringent disciplinary standards, and transparent disciplinary proceedings would cower even the most blatant violator.

All or some of those reform efforts might make a difference, but the only certain solution is an appeal to the masses. Through public pressure and backlash, the public can send a message to judges who accept large contributions, campaign on issue-oriented platforms, use and endorse misleading and injudicious advertisements, and refuse recusal in obvious conflict of interest situations that such conduct by a judge will not be tolerated. In many ways, Grisham's books—much more real that fiction—could begin the much-needed process of appealing to the public to save the courts.

# *LÓPEZ TORRES*: A LOST OPPORTUNITY FOR JUDICIAL REFORM

## INTRODUCTION

In 1921, as a reaction to a system viewed as corrupt and ineffective, the New York Legislature moved from a primary system for selecting trial court judge nominees to a convention system.[1] This convention system, unique among the fifty states, has come under heavy attack during the past decade.[2] Ironically, many of the same faults critics identified in the primary system a century ago are now relevant to the convention system.[3] In *New York State Board of Elections v. López Torres*,[4] the Supreme Court held that the New York system is constitutional. The Court declined to extend First Amendment protection to judicial candidates who faced substantial burdens because of the inherent flaws in the New York convention system. By doing so, the Court passed by an opportunity to ensure that New York judges are not beholden to special-interest groups or backroom politicians.

As this Comment portrays, the Court's narrow characterization of New York's judicial convention system belies the reality of a system where political parties have become the de facto appointers of judges.[5] The convention system makes it virtually impossible for individuals not backed by their party's leaders to gain their party's nomination.[6] While an individual can appear on the ballot as an independent candidate after satisfying certain requirements, the reality of New York's one-party rule makes such an effort pointless.[7] "[T]he general election is little more than ceremony" for those individuals whose names appear next to the dominant political party on the ballot.[8] For these reasons, the convention

1. López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 172 (2d. Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).

2. *See, e.g.*, Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 791-97 (2004) (stating that New York has been the epicenter for a movement calling for reforms to judicial selection processes).

3. *See López Torres*, 462 F.3d at 171-72.

4. 128 S. Ct. 791, 801 (2008).

5. The Judicial Selection Task Force, *Recommendations on the Selection of Judges and the Improvement of the Judicial Selection System in New York State*, 62 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 89, 98-99 (2007) [hereinafter *Task Force*].

6. *See, e.g.*, Norman L. Greene, *What Makes a Good Appointive System for the Selection of State Court Judges: The Vision of the Symposium*, 34 FORDHAM URB. L.J. 35, 43-46 (2007) (detailing the significant obstacles faced by individuals not backed by their parties).

7. *López Torres*, 462 F.3d at 193-94.

8. *Id.* at 178.

system places an undue burden on these individuals and, in light of past Supreme Court decisions, is inconsistent with the First Amendment.[9]

Part I of this Comment details the basis for a constitutional challenge against a candidate-selection process and explains how New York's convention system operates. Part II summarizes the Court's opinion in *López Torres*, including the facts, procedural history, and opinions. Part III explores two topics: (1) the flaws of the Court's narrow portrayal of the New York convention system; and (2) alternatives to the convention system including the encouraging effects such alternatives would have. This Comment concludes that the Court's holding in *López Torres* was flawed due to the Court's unwillingness to examine the practical effects of the New York convention system.

## I. BACKGROUND

### A. *Constitutional Challenges to State Imposed Candidate-Selection Processes*

Under the First Amendment, a political party is free to choose any candidate-selection process that will, in its view, produce the best nominee.[10] However, these rights are limited when the State gives the party a role in the election process.[11] One such role the State gives a party is the privilege of having their candidates' names appear on the general election ballot with a party endorsement.[12] By extending this right, "the State acquires a legitimate governmental interest in assuring the fairness of the party's nominating process."[13] This interest gives the State the prescriptive power to set the candidate-selection process for all such parties.[14] However, the selection process that the State dictates is subject to First Amendment limitations.[15]

In *California Democratic Party v. Jones*,[16] the Supreme Court invalidated California's blanket primary system, which allowed citizens to vote in any party primary, regardless of their current party affiliation. The Court reasoned that the blanket primary violated the First Amendment by allowing non-party members to determine a party's nominee.[17]

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9. *See* Christopher S. Elmendorf, *N.Y. State Bd. of Elections v. Torres: Is the Right to Vote a Constitutional Constraint on Partisan Nominating Conventions?*, 6 ELECTION L.J. 399, 403-11 (2007) (discussing the burdens created by New York's convention scheme and the possible models to evaluate the severity of those burdens).

10. N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 797 (2008).

11. *Id.*

12. *Id.* at 797-98.

13. In addition, a party's conduct may become state action that violates the Fifteenth Amendment. *Id.* at 798.

14. *See id.*

15. *Id.*

16. 530 U.S. 567, 586 (2000).

17. *Id.* (stating that the blanket primary system placed a severe and unnecessary burden on the rights of political association).

The Supreme Court has also invalidated state imposed selection processes for being unduly burdensome or exclusionary on candidates.[18] In particular, the Court has determined that candidates must have a reasonable opportunity to appear on the general election ballot.[19]

*B. New York's Judicial Candidate-Selection Process*

In New York, the State's trial court of general jurisdiction is the Supreme Court of New York.[20] Each of the State's twelve judicial districts elects Supreme Court Justices to fourteen-year terms.[21] The current method for selecting Supreme Court Justices follows a convention system first set forth in 1921.[22]

New York's convention system consists of a three-part process for electing Supreme Court Justices.[23] First, the State holds a primary election during which registered party voters select judicial delegates.[24] Next, these delegates attend a convention where they select their party's nominees.[25] The chosen nominees automatically appear on the general election ballot with their party affiliation next to their names.[26] Finally, the State holds a general election during which the voting public in each judicial district chooses its justices.[27]

Only political parties that received 50,000 or more votes in the most recent election for governor can make judicial nominations.[28] Judicial candidates who fail to gain their party's nomination, or whose party does not meet the 50,000-vote threshold, can gain access to the general election ballot by submitting required nominating petitions.[29] However, these independent candidates' names appear on the ballot with no party affiliation.[30]

18. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 804-06 (1983) (holding that an Ohio statute requiring an unreasonably early filing deadline was unconstitutional).
19. *See id.* at 801.
20. *See* N.Y. CONST. art. VI, § 7.
21. N.Y. CONST. art. VI, § 6 (a)-(c) (stating that N.Y. is divided into eleven judicial districts, with the ability to add more, and that the terms of the justices shall be fourteen years); N.Y. JUD. LAW § 140 (McKinney 2005) (stating that there are twelve judicial districts).
22. N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 796 (2008).
23. *See* N.Y. ELEC. LAW §§ 6-106, -124, -158, 8-100(1)(c) (McKinney 2007).
24. *Id.* §§ 6-106, -124.
25. *Id.* §§ 6-106, -124, -158.
26. *Id.* § 7-104(5)(a).
27. *Id.* § 8-100(1)(c).
28. *Id.* § 1-104(3).
29. *Id.* §§ 6-138, -142(2).
30. *See id.* § 7-116(2).

## II. *NEW YORK STATE BOARD OF ELECTIONS V. LÓPEZ TORRES*

### *A. Facts*

Petitioner Margarita López Torres won the Brooklyn Civil Court Judge election in 1992.[31] Subsequently, members of the Kings County Democratic Committee, who backed López Torres' nomination, directed López Torres to hire a person of their choosing for her court attorney.[32] After López Torres refused, Clarence Norman, the committee chair, informed López Torres that she would never become a Supreme Court Justice.[33] In 1995, another committee official, Vito Lopez, informed López Torres that if she hired his daughter as her court attorney, Lopez would ensure López Torres' nomination for an upcoming Supreme Court vacancy.[34] López Torres refused to fire her current court attorney and turned Lopez down.[35] From that point forward, López Torres received no support from the committee for a Supreme Court nomination.[36]

The lack of support from her party's leaders made it virtually impossible for López Torres to succeed in her pursuit of a Supreme Court nomination.[37] In 1997, López Torres attempted to secure her party's nomination for the Supreme Court in her judicial district.[38] Naively, López Torres thought she could petition for a nomination at her party's convention.[39] However, López Torres found that without the support of her party's leaders, such as Norman and Lopez, not a single delegate would propose her for nomination.[40] López Torres tried several times over the next seven years to gain her party's nomination.[41] Each time, because of her past conflicts with Norman and López, her attempt to gain her party's nomination failed.[42]

### *B. Procedural History*

The Second Circuit affirmed the district court's holding that the New York convention system for judicial nominations was unconstitu-

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31. López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 178 (2d Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).

32. López Torres contacted a former employer of the applicant and received a less then favorable assessment. *Id.* at 179.

33. Norman told López Torres that she "did not understand the way it works." He went on to state that someday López Torres would want to become a Supreme Court Justice and the party leaders would "not forget this." Quite bluntly, Norman stated that without the committee's support, López Torres' Supreme Court nomination "will not happen." *Id.*

34. *Id.*

35. *Id.*

36. *See id.* at 179-81.

37. *See id.*

38. N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 797 (2008).

39. López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 179 (2d Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).

40. *Id.*

41. *See id.* at 180.

42. *See id.* at 180-81.

tional.[43] The Second Circuit found that the system effectively transformed the process of electing justices into a scheme of de facto appointment by party leaders.[44] In making its determination, the court rejected the state's argument that First Amendment protections only apply to direct primaries as opposed to the indirect primaries New York employs.[45] The court went on to state that the First Amendment not only grants candidates access to a nominating process, but also affords a realistic opportunity to participate in the process.[46] Participation must be free from severe and unnecessary burdens.[47] The court also noted that exclusion from a nominating process does not necessarily have to be categorical in nature, but can result from the aggregation of otherwise valid election regulations.[48]

In holding the New York system unconstitutional, the Second Circuit found the system imposed severe burdens on candidates and was exclusionary in nature.[49] The court also held that an alternate means of access to the general election, namely access as an independent candidate, does not automatically render the system constitutional.[50]

### *C. Majority Opinion*

The U.S. Supreme Court granted certiorari to consider whether the New York convention system violates the First Amendment rights of prospective party candidates.[51] In a unanimous opinion written by Justice Scalia, the Supreme Court reversed the Second Circuit's decision.[52] The Court held that New York is free to use a convention system for selecting candidates and the First Amendment does not compel New York to use a different system.[53] The Court made three findings in determining that New York's judicial candidate-selection process is constitutional.[54]

First, the Court found the requirements the convention system imposed upon candidates reasonable.[55] Specifically, the requirement that a candidate collect five hundred valid party signatures from his or her dis-

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43. *See id.* at 208.
44. *Id.* at 200.
45. *Id.* at 186 ("[C]onstitutional protection attaches to all integral phases of the nominating process, regardless of whether the nomination is conferred directly by public ballot or indirectly by the votes of elected party officials.").
46. *Id.* at 187.
47. *Id.*
48. *Id.* ("Further, while categorical race and sex-based exclusions undoubtedly violate the associational rights of voters and candidates, exclusions that result from a *complex of otherwise facially valid regulations* also may offend the First Amendment.") (emphasis added).
49. *See id.* at 195-201, 208.
50. *Id.* at 194-95.
51. N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 795 (2008).
52. *Id.* at 794, 801.
53. *See id.* at 801.
54. *See id.* at 798-801.
55. *Id.* at 798.

trict within a thirty-seven day timeframe was well within the scope of requirements the Court had previously upheld.[56] While prior Supreme Court decisions analyzing the reasonableness of primary election requirements involved the right to vote,[57] the Court noted that the same principles are applicable to the right to run.[58]

Second, the Court found the Constitution does not require that candidates receive a "fair shot" at securing their party's nomination.[59] Although the Court recognized that the party leadership effectively determined the nominees, it refused to look beyond the bare requirements to "the manner in which political actors function under those requirements."[60] Relying on an institutional-competency argument, the Court noted that determining what constitutes a fair shot is better left to the legislature and is an inappropriate constitutional question for judges.[61]

Third, the Court rejected the argument that the convention system was unconstitutional based upon the pervasiveness of New York judicial districts with one-party rule.[62] The Court focused only on the requirements to gain access to the general election ballot as an independent candidate, and found these requirements reasonable.[63] Any measures to make the general election more competitive, beyond reasonable access to the general ballot, were not constitutionally required.[64] The Court noted that one-party entrenchment had never been a basis for interfering with a candidate-selection process.[65]

### *D. Concurring Opinions*

Justice Stevens's short concurring opinion, in which Justice Souter joined, stressed that the Court's opinion is not an endorsement of New York's candidate-selection process.[66] Quoting Thurgood Marshall, Justice Stevens noted that "[t]he Constitution does not prohibit legislatures from enacting stupid laws."[67]

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56. *Id.* at 798-99 (stating that the requirement for a five hundred signature petition in a thirty-seven day period is "entirely reasonable").

57. *See* Kusper v. Pontikes, 414 U.S. 51, 52, 61 (1973) (holding an Illinois election law that prevented some individuals from voting in their party's primary was unconstitutional); Rosario v. Rockefeller, 410 U.S. 752, 756, 762 (1973) (holding a New York election law placing temporal enrollment requirements on individuals to vote in a party's primary was constitutional).

58. N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 798 (2008).

59. *Id.* at 799.

60. *Id.*

61. *Id.*

62. *Id.* at 800.

63. *See id.* at 798, 800.

64. *Id.* at 800.

65. *Id.* at 800-01 (stating that the First Amendment "does not call on the federal courts to manage the market by preventing too many buyers from settling upon a single product").

66. *Id.* at 801 (Stevens, J., concurring).

67. *Id.* (citation omitted).

Justice Kennedy's concurring opinion, in which Justice Breyer joined in part, is notable in that it comments on New York's use of elections to select judges.[68] Justice Kennedy noted that judicial elections require candidates to conduct campaigns and raise funds, which leaves the candidates open to influence by special-interest groups and political parties.[69] Justice Kennedy questioned whether this process was consistent with the desire for judicial independence and excellence.[70] He concluded, however, that as flawed as the New York system might be, the present suit did not permit the Court to intervene on constitutional grounds.[71]

## III. ANALYSIS

In its opinion for *López Torres*, the Court focused only on the bare requirements set forth by New York election law, thereby narrowly portraying the effects of the convention system on judicial candidates and the voting public. Specifically, the system places an undue burden on candidates seeking a nomination, effectively excluding them from both the nomination process and general election. As such, the Court incorrectly determined that the New York convention system was constitutional under the First Amendment. In doing so, the Court passed by an opportunity to compel New York to adopt an alternative candidate-selection process that protects First Amendment rights. This alternative could have far-reaching, positive effects on New York's judicial system.

### *A. The Flaws in the Court's Narrow Portrayal of the New York System*

By focusing only on the bare requirements set forth in New York election law, the Court did not consider the practical effects these requirements have on judicial candidates and the voting public. However, past Supreme Court decisions have taken the practical effects of election requirements into consideration, and based upon those effects, held state election laws unconstitutional.[72]

By narrowly portraying the New York convention system, the Court failed to address several significant, unconstitutional effects of the system. Specifically, the Court erred in three ways: (1) it failed to address properly the aggregate effect of the requirements and the burden these requirements place upon candidates; (2) it ignored the exclusionary effect of New York's convention system on judicial candidates; and (3) it

68. *Id.* at 801, 803 (Kennedy, J., concurring).

69. *Id.* at 803.

70. *Id.* (stating that a selection process that is open to manipulation, criticism, and serious abuse is unfair to the concept of judicial independence).

71. *See id.*

72. *See* Bullock v. Carter, 405 U.S. 134, 149 (1972) (holding that a Texas filing fee was unconstitutional because of the fee's effect on candidates); *see also* Williams v. Rhodes, 393 U.S. 23, 24 (1968) (holding that an Ohio election law was unconstitutional because of the law's effect on new political parties).

did not give sufficient weight to the convention system's effect on the independence and quality of New York Supreme Court Justices.

1. Significant Burden Placed on Individuals Seeking a Nomination

During the primary election phase of the New York convention system, candidates not backed by their party face obstacles so burdensome that success is virtually impossible.[73] Judicial candidates themselves do not take part in the primary elections.[74] Instead, "rank-and-file party members elect judicial delegates" who attend the party's convention and select the party's nominees.[75] Consequently, a judicial candidate must assemble a slate of delegates to run on his or her behalf, trusting these delegates will nominate him or her at the convention.[76]

Each judicial district within New York is comprised of between nine and twenty-four assembly districts.[77] Small subgroups of potential delegates run against each other in each assembly district.[78] In effect, the primary election consists of a series of contests between groups of delegates within each assembly district.[79]

To appear on the primary ballot, each delegate is required to gather five hundred valid signatures from party members residing in his or her particular assembly district within a thirty-seven day period.[80] Because signatures are often challenged, delegates "must realistically gather between 1000 and 1500 signatures to gain a primary ballot position."[81] Therefore, depending on the number of assembly districts in his or her judicial district, a judicial candidate is responsible for between 9,000 and 24,000 signatures to ensure his or her slate of delegates appears on the primary ballot.[82] Additionally, the primary ballot does not indicate the judicial candidate with whom each delegate is associated.[83] This has the effect of requiring judicial candidates to mount a separate voter education campaign for each assembly district.[84]

The aggregate effect of these requirements places a significant burden on candidates lacking support from their political party, even for

73. *See* López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 172-75 (2d. Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).
74. *Id.* at 172.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* (citing N.Y. ELEC. LAW § 6-124 (McKinney 2007)).
79. *Id.*
80. N.Y. ELEC. LAW §§ 6-134(4), 136(2)(i) (McKinney 2007).
81. *López Torres*, 462 F.3d at 173 (stating that because each party member can sign only one petition, signatures are routinely and successfully challenged under the one-petition signature rule).
82. *Id.*
83. *Id.*
84. *See id.* (stating that the candidate must inform the primary electorate in each assembly district of which delegates are pledged to him or her).

those who possess significant public support.[85] However, candidates who are backed by their local party leadership "easily navigate the primary system with the benefit of the party's pre-existing apparatus."[86] Because of the burden placed upon candidates not backed by their party, the vast majority of primary elections are uncontested.[87] Thus, the majority of party-backed delegates run unopposed, are simply deemed elected, and do not even appear on the primary ballot.[88]

In past decisions, the Supreme Court has looked at the aggregate effect of election requirements in determining constitutionality. For example, in *Williams v. Rhodes*, the Court looked at the totality of the effect of Ohio's election laws in determining whether the requirements were unconstitutionally burdensome on political parties seeking to appear on the state ballot.[89] To appear on the state ballot, Ohio election law required new political parties to collect a large number of signatures, file earlier than existing parties, and conduct a primary election that conformed to detailed and rigorous standards.[90] The Court noted that the laws made it virtually impossible for some political parties, regardless of how much popular support they had, to appear successfully on the state ballot.[91] In holding that the Ohio election laws were unconstitutional, the Court considered the aggregate effect of the requirements, rather than considering each bare requirement on its own.[92]

The New York system places a similar unconstitutional burden on candidates not backed by their party. López Torres enjoyed popular support from the public, but lacked her party's support. As evidenced by her lack of success, and the lack of success of many other candidates not backed by their party,[93] the burden on these individuals is impossibly high.[94] The New York system has the practical effect of requiring candidates to collect up to 24,000 signatures in thirty-seven days and hold a separate voter education campaign in up to twenty-four assembly districts.[95] Taken together, the effects of these requirements make seeking a nomination impractical without the institutional support of a candidate's party. Thus, the New York system places an unconstitutional burden on candidates not backed by their parties.

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85. *See id.* at 174-75.
86. *Id.* at 175.
87. *See id.* (stating that between 1999 and 2002, four counties did not field a single contested delegate race).
88. *Id.* ("This kind of invisible, automatic 'election' is the norm rather than the exception.").
89. *See* Williams v. Rhodes, 393 U.S. 23, 30 (1968).
90. *See id.* at 27.
91. *Id.* at 24.
92. *See id.* at 38.
93. *See López Torres*, 462 F.3d at 174.
94. *See id.*
95. *Id.* at 197.

2. Exclusionary Effect of the Requirements on Judicial Candidates

In *López Torres*, the Court determined that the requirements for a delegate to get on the primary ballot were not exclusionary.[96] By not considering the practical effects of the New York system, the Court ignored its exclusionary nature. Just as it has when considering the burden election requirements place on candidates, the Supreme Court has also taken the practical effects of election requirements into consideration when analyzing whether the requirements are exclusionary.

In *Bullock v. Carter*, the Court analyzed the constitutionality of a Texas filing fee for primary elections.[97] Instead of simply examining the specific dollar amount required by Texas law, the Court looked at the effect the fee had on particular candidates.[98] The Court noted that candidates lacking both personal wealth and affluent background are in every practical sense precluded from seeking their party's nomination.[99] As such, the Court held that the fee was exclusionary.[100] Additionally, the fee had the effect of substantially limiting the voters' choices during the primary election.[101]

In practice, the New York election scheme has a similar exclusionary effect. As detailed above,[102] the lack of support of their party's leaders essentially excludes candidates from their party's nomination process. Just as the filing fee in *Bullock* had the practical effect of excluding candidates lacking particular resources, the New York scheme has the practical effect of excluding candidates who refuse to play the game with their political party.

The exclusionary nature of the New York system goes beyond just the primary election. Once the party delegates are determined, the nominating convention takes place. No debate or competition takes place at the nominating convention.[103] The vast majority of nominations are by unanimous voice vote.[104] Because the vast majority of nominations are uncontested, many delegates choose not to attend the nominating convention.[105] Consequently, delegate absentee rates have been as high as

96. *See* N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 798 (2008).
97. Bullock v. Carter, 405 U.S. 134, 135 (1972).
98. *See id.* at 143.
99. *Id.*
100. *See id.* at 143-44 (stating that the Texas scheme had a real and appreciable *impact* on particular candidates) (emphasis added).
101. *See id.* at 149.
102. *See supra* notes 73-88, 93-95 and accompanying text.
103. López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 178 (2d Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).
104. *Id.* (stating that between 1990 and 2002, over ninety-six percent of nominations went uncontested).
105. *Id.* ("Not only were the conventions devoid of debate and competition, they were fleeting. Over a 12-year span, conventions statewide averaged a mere 55 minutes in length. In 1996, the Second Judicial District's convention lasted 11 minutes but yielded eight nominations.").

sixty-nine percent.[106] Candidates whose slate of delegates was unsuccessful at the primary election have no chance of securing the nomination independently at the convention.[107]

Candidates nominated at the convention appear on the general election ballot with their party designation.[108] For those candidates associated with the majority political party, the general election is "little more than ceremony" due to one-party rule in most judicial districts.[109] During a twelve-year period ending in 2002, in eight of the state's twelve judicial districts, almost half of the Supreme Court Justice elections were uncontested.[110] In the Sixth Judicial District during this period, the uncontested rate was ninety-one percent.[111]

When the Court examined whether the general election was exclusionary, it looked only at the requirement to gain access to the general election ballot as an independent candidate, not at the practical effect of trying to do so.[112] The Court stated that a candidate's interests are protected as long as the candidate has "an adequate opportunity to appear on the general-election ballot."[113] The Court did not address the domino effect the New York system has on candidates not backed by their parties. In reality, candidates not backed by their party are not able to secure a nomination and thus cannot appear on the general election ballot with their party designation.[114] Without a party designation, candidates cannot win the general election.[115] In effect, the system excludes certain types of candidates during the general election, just as it does during the primary and convention phases, by making success impossible.

The Court has also expressed concern over the exclusionary effects of requirements when they "limit the field of candidates from which voters can choose."[116] In examining these effects, the Court has stated, "it is essential to examine in a realistic light the extent and nature of their impact on voters."[117] While the New York system may not directly limit the field of candidates in the general election, it does effectively limit the field of candidates during the nominating convention.[118] Thus, the sys-

106. *Id.*
107. *See id.* at 176-77.
108. *See* N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 802 (2008) (Kennedy, J., concurring).
109. *López Torres*, 462 F.3d at 178.
110. *Id.*
111. *Id.*
112. *See López Torres*, 128 S. Ct. at 800.
113. *Id.*
114. *See supra* notes 73-88, 93-95, 108 and accompanying text.
115. *See supra* notes 108-11 and accompanying text.
116. Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972) stating that restrictions that limit voters' choices are of a primary concern).
117. Bullock v. Carter, 405 U.S. 134, 143 (1972).
118. *See supra* notes 82-88, 94-95 and accompanying text.

tem has an appreciable impact on voters by limiting the general ballot to candidates that each party has sanctified.

3. The Effect on the Independence and Quality of New York Supreme Court Justices

The New York system also has a negative effect on the independence and quality of New York Supreme Court Justices.[119] While these negative effects alone may be insufficient to deem the New York system unconstitutional, they warrant consideration with regard to the overall effect of the system on the public.[120] Because the Court did not consider the practical effects of the New York system, it failed to give any weight to these judicial independence and quality concerns.

As detailed above,[121] the New York convention system results in party leaders effectively determining who will become a Supreme Court Justice. As noted by the Commission to Promote Public Confidence in Judicial Elections,[122] the system "vests almost total control in the hands of local political leaders . . . ."[123] The Task Force on Judicial Diversity[124] further noted that because of one-party rule, "most often this nomination is tantamount to election."[125]

Knowing success is impossible without their party leaders, candidates feel the need to be responsive to their party in order to obtain and retain their positions.[126] This increased level of political pressure affects a judge's decisions and thus judicial independence.[127] After all, judicial independence can only exist if there is immunity from outside political pressures in the resolution of individual cases.[128] López Torres was denied a nomination because she refused to hire a particular law clerk. Likely, political parties will make further demands once individuals get on the bench.

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119. *See* Zeidman, *supra* note 2, at 803-29.

120. *See* Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1046 (2007) (stating that if elections "introduce random volatility and noise into the selection or retention of judges, they are certainly a bad thing.").

121. *See supra* note 5 and accompanying text.

122. New York State's Chief Judge Judith S. Kaye created the Commission to Promote Public Confidence in Judicial Elections in 2003. The New York State Commission to Promote Public Confidence in Judicial Elections, http://law.fordham.edu/commission/judicialelections/main.ihtml (last visited October 30, 2008). The Commission was charged with determining how to better improve voter participation in the judicial election process. The Commission included judges, academics, public servants, and private practitioners. López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 172-76 (2d. Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).

123. *López Torres*, 462 F.3d at 181.

124. Created by Governor Mario Cuomo in 1991 to study minority representation in the New York judiciary. *Id.*

125. *Id.*

126. *See* Zeidman, *supra* note 2, at 826-27.

127. *Id.* at 825.

128. Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate*, 39 U. TOL. L. REV. 551, 559-60 (2008).

Additionally, otherwise qualified candidates may choose not to pursue a judgeship because they are not politically savvy or are unwilling to play the political game.[129] This affects the overall quality of Supreme Court Justices since the "qualities of a [politically savvy] campaigner may be very different from those of a good judge."[130]

*B. Alternative Judicial Candidate-Selection Processes*

Although the Court did not force New York to change its convention system, change nevertheless seems likely.[131] There are a number of alternative candidate-selection processes available should New York abandon the current system. While none of the alternatives address all of the concerns with judicial selection, two alternatives are a marked improvement over New York's current system. If New York opts to maintain judicial elections, the current convention system could be reformed. If judicial elections are deserted, a commission-based appointive system may be the best alternative.

1. Reformed Convention System

Although the New York convention system is flawed, it does not need to be completely abandoned. If New York is determined to continue electing Supreme Court Justices, reforms could be made to the current convention system to address the concerns outlined above. These reforms, however, should be limited. For example, there would be several problems with moving from the current system to a primary-only election model. A primary election would force candidates to raise large sums of money and conduct campaigns, just as the convention system does.[132] In fact, the costs and burdens of running a district-wide primary campaign would likely be "more daunting" than under the convention system.[133]

Keeping these concerns in mind, the Judicial Selection Task Force[134] has proposed reforms to the current convention system.[135] While the Task Force prefers a commission-based appointment system, it recognizes that reforms may be needed before the New York State Constitution can be amended.[136] The Task Force's proposal consists of several changes to the current system.

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129. Zeidman, *supra* note 2, at 826.

130. *Id.*

131. *See, e.g.*, Greene, *supra* note 6, at 41-47 (explaining the political climate in New York after the district court and Second Circuit decisions); *see also* Zeidman, *supra* note 2, at 829-31.

132. *Task Force*, *supra* note 5, at 108.

133. *Id.*

134. The Judicial Selection Task Force was created by the Association of the Bar of the City of New York in March of 2006. The Task Force's mission was to make recommendations on improving the judicial selection system in New York State. *Id.* at 91.

135. *Id.* at 107-16.

136. *Id.* at 107.

First, each judicial district would be divided up into judicial convention districts, for the purpose of nominating justices.[137] These convention districts would be grouped into eight geographic regions.[138] Within each region, a judicial qualification commission (JQC) would be established.[139]

JQCs would consist of twenty-one members.[140] These members would include executive, legislative and judicial government representatives, as well as a mix of community members from inside and outside the legal profession.[141] JQC members would be limited to serving on the committee for no more than three consecutive years.[142]

Potential judicial candidates would be required to submit their qualifications to the JQC.[143] The JQC would then determine the three most qualified candidates for the first vacancy.[144] The next two most qualified candidates would then be recommended for each additional vacancy.[145] However, if an incumbent were to seek reelection, and the JQC determined that the incumbent was highly qualified, he or she would be the JQC's only recommendation for the vacancy.[146]

Delegates to each party's convention would still be selected by a primary election.[147] However, the signature requirement to appear on the primary ballot would be decreased.[148] More importantly, delegates would be allowed to identify the candidate they have pledged to nominate, thereby removing the need for candidates to run multiple voter education campaigns.[149]

Prior to both the primary and general election, the JQC would publish a judicial voters' guide, complete with biographical information on each candidate who submitted his or her qualifications.[150] The guide would also include the JQC's recommendations for each judicial vacancy.[151] The Task Force notes that these reforms retain several flaws of

137. *Id.* at 112 (stating that each judicial convention district would consist of two or three assembly districts).

138. *Id.*

139. JQCs would not be limited to reviewing the qualifications of only Supreme Court Justices. They would also review candidates for District and City Courts, the Civil Court of the City of New York, the Surrogate and County Courts, and the Family Court outside of the City of New York. *Id.*

140. *Id.*

141. *Id.* (stating that each JQC should broadly represent the community within its region, including race, ethnicity, gender, religion, and sexual orientation as diversity factors).

142. *Id.* at 113.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 113-14.

148. *Id.* at 114 (stating that delegates would need two hundred signatures at most).

149. *Id.*

150. *Id.* at 114-15.

151. *Id.* (stating that the guide would indicate in each candidate's biographical entry whether the candidate was rated most qualified, highly qualified, or unqualified).

the current system.[152] However, the Task Force recognizes that a commission-based appointive system, which would require an amendment to the New York State Constitution, could take time to implement.[153] As such, reforms to the current system could alleviate some of the concerns in a more timely fashion.

2. Moving Away from Judicial Elections

a. The Concern with Judicial Elections

As pointed out by Justice Kennedy in his concurring opinion, "the Framers did not provide for election of federal judges, [but] most states have made the opposite choice, at least to some extent."[154] While states have the authority to hold elections for state judges, there are many concerns in relation to judicial elections.[155] The most common concerns involve the reality of what candidates must do to win judicial elections.[156] This includes the costs and combative nature of elections, as well as the concern that judges will decide cases based upon what is popular, and not based upon the law and facts.[157]

In addition, there is an expectation among the public that judges should be as independent and impartial as possible.[158] However, the "need to raise campaign funds, among other things, threatens the appearance (or fact) of impartiality."[159] Independence also suffers when political leaders control elections, which is an occurrence New York's convention system facilitates. These elective systems elevate party favorites and value party loyalty over the quality of the candidate.[160] The need for

152. *Id.* at 109-11 (stating that even under the reformed system candidates would still face burdens and costs).

153. *Id.* at 111.

154. N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring).

155. *See* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 269 (2008) (stating that competitive judicial elections undermine the capacity of state courts to safeguard nonjudicial elections and public values); Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2204-05 (2006) (describing several concerns including the possibility that elected judges are more likely to be biased against out-of-state residents). *But see* Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 667 (2006) (arguing that the appointive system for federal appellate judges conveys to the public "the notion that the Judiciary is yet another political branch of government, a kind of stepchild of the other two branches . . . and when the Judiciary is perceived as a stepchild of the political branches of government, the separation of the three branches of government is impaired.").

156. *See* Pozen, *supra* note 155, at 267-68, 278.

157. *See id.* at 277 (stating that elected judges will tend to be more sensitive to popular opinion); Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1081 (2007) ("Judicial elections have become nastier, nosier, and costlier.").

158. *See López Torres*, 128 S. Ct. at 803 (Kennedy, J., concurring).

159. Greene, *supra* note 6, at 38. *See also* Marilyn S. Kite, *Wyoming's Judicial Selection Process: Is it Getting the Job Done?*, 34 FORDHAM URB. L.J. 203, 203 (2007) ("Public perception of political influence on the judiciary, whether through money or political affiliation, undermines the citizenry's confidence in the integrity of the system.").

160. Greene, *supra* note 6, at 38.

an independent judiciary cannot be overstated. Such a concern has long been a part of politics in the United States.[161]

Many of these concerns have been validated. A report prepared by Professor Steven Zeidman,[162] which compared the relative quality of appointed and elected judges in New York, found that elected judges "far surpass their appointed colleagues in incidents of judicial discipline."[163] In addition, Professor Zeidman found that elections result in a less diverse judiciary.[164]

b. Commission-Based Appointments

In reaction to these concerns, several groups have advocated that New York move away from judicial elections to commission-based appointments.[165] The groups suggest that commission-based appointments would remove political considerations from judicial selection as much as possible and increase the quality of state judges.[166] The groups advocate the formation of commissions, consisting of government and community members, which would make merit-based recommendations for judicial appointments.[167]

For example, the Judicial Selection Task Force suggests that New York create JQCs, similar to the ones discussed above, which would make recommendations to the Governor for state judicial appointments.[168]

During a symposium held at Fordham Law School in 2006, participants made several suggestions for commission-based appointments.[169] Participants stressed that the commissions should be as diverse as possi-

161. *See* THE FEDERALIST NO. 78, at 527 (Alexander Hamilton) (Jacob E. Cook ed., 1961) (stating that the independent spirit of judges is essential to the faithful performance of their duties).

162. Steven Zeidman is an Associate Professor at CUNY School of Law. Zeidman, *supra* note 2, at 836 n.a1.

163. *Id.* at 809. *But see* Michael E. DeBow, *State Judicial Selection: Once More Unto the Breach*, 9 ENGAGE 128, 128 (2008), *available at* http://www.fed-soc.org/publications/pubID.696/pub_detail.asp (follow "State Judicial Selection: Once More Unto the Breach" hyperlink) ("There is a large body of social science research on state supreme courts and it shows that there is no real, observable difference between the judges chosen in merit selection states, and those chosen in other states.").

164. Zeidman, *supra* note 2, at 817 (stating that when examined on a statewide basis, elections produce a disproportionally white judiciary).

165. *See, e.g.*, Greene, *supra* note 6, at 41 (stating that the best permanent solution would be to move away from judicial elections to a merit-based appointment system); Task Force, *supra* note 5, at 93 ("[T]he Task Force firmly reiterates the Association's long-standing position in favor of a commission-based appointive system.").

166. *See* Zeidman, *supra* note 2, at 834; Mark S. Cady & Jess R. Phelps, *Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J.L. & PUB. POL'Y 343, 345 (2008).

167. *See* Zeidman, *supra* note 2, at 831-32.

168. Task Force, *supra* note 5, at 103-08.

169. The symposium's purpose was to guide the reform of judicial selection processes. Participants included political scientists, lawyers, law professors, and judges from various states. *See* Greene, *supra* note 6, at 36-37.

ble with respect to race, political affiliation, and legal specialty.[170] They also suggested that the commission proceedings be open to the public to avoid secrecy and public distrust of the process.[171] However, one participant cautioned that excessive openness might drive away some candidates.[172]

Professor Zeidman has also outlined a commission-based appointment system. Like several other groups, he suggests that the nominating commission be as diverse as possible.[173] He notes that the more diverse the commission, "the more likely it is to produce a representative and high quality judiciary."[174] The commission would identify, recruit, interview, evaluate, and recommend candidates to the appointing authority.[175] The appointing authority, likely a designated executive, would choose from the recommended candidates within a specified time frame.[176] Professor Zeidman also advocates that states move away from retention elections and instead charge the nominating commission with recommending whether an existing judge be retained.[177]

## CONCLUSION

By ignoring the significant practical effects of the New York convention system, the Court incorrectly held that the system was constitutional. Although the Court stated that it had not focused on "the manner in which political actors function under . . . [election] requirements," past decisions are inconsistent with that assertion.[178] In reality, the New York system places significant burdens on candidates, excludes candidates not backed by their party, and endangers the independence and quality of the judiciary.

The Court declined an opportunity to push New York towards a judicial selection process that would benefit both judicial candidates and the public. Such alternatives would increase the quality and diversity of the judiciary while raising the public's confidence in the judicial system. The importance of such judicial reforms cannot be underestimated. As Justice Kennedy stated, "[t]he rule of law, which is the foundation of freedom, presupposes a functioning judiciary respected for its independ-

170. *See id.* at 49.
171. *Id.* at 56-58.
172. *Id.* at 60 (stating that discussions within the commission should remain private, while names of finalists should be publicized).
173. Zeidman, *supra* note 2, at 831-32.
174. *Id.* at 832.
175. *Id.*
176. *Id.*
177. *Id.* at 833 (stating that the commission would recommend whether to reappoint the judge based upon judicial performance evaluations and reviews).
178. N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 799 (2008).

ence, its professional attainments, and the absolute probity of its judges."[179]

*Justin Schneider**

179. *Id.* at 803 (Kennedy, J., concurring).

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# *STONERIDGE INVESTMENT PARTNERS V. SCIENTIFIC-ATLANTA:* RETHINKING THE FRAUD-ON-THE-MARKET PRESUMPTION AND THE POLICY CONSIDERATIONS PERMEATING THE COURT'S DECISION

## INTRODUCTION

Recent corporate scandals have led many Americans to demand accountability for fraud in the securities markets.[1] After losing billions in the wake of the Enron and Worldcom scandals, investors started questioning the integrity of the securities in which they invested.[2] This, however, was not the first time American investors and policy makers entertained concerns over the safety of the securities markets.[3] Outraged by corporate deception and unfair trade practices in the early 1930s, Congress enacted § 10(b) of the Securities Exchange Act of 1934 to ensure effective punishment of fraudulent practices in the securities markets.[4] For over fifty years, the Supreme Court's decisions reflected that, under § 10(b), fraud would not be tolerated.[5] Recently, however, the Court has made it increasingly difficult for injured investors to maintain § 10(b) claims against persons defrauding the market.[6]

Part I of this Comment explains pertinent case law, economic theory, and legislation prior to *Stoneridge*. Part II summarizes the holding in *Stoneridge*. Part III analyzes *Stoneridge*, criticizes the Court's holding, and provides suggestions for a more appropriate rule. This Comment concludes that the recent holding in *Stoneridge* unnecessarily raises the hurdle for primary actor liability by further limiting the fraud-on-the-market presumption of reliance in contravention of the economic principles supporting that presumption. In the end, the Court's decision is a reflection of pro-business policy considerations that degrade the integrity of U.S. securities markets.

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1. *See* Celia R. Taylor, *Breaking the Bank: Reconsidering* Central Bank of Denver *After Enron and Sarbanes-Oxley*, 71 MO. L. REV. 367, 384 (2006).

2. *See id.* at 375, 384.

3. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 779-80 (2008) (Stevens, J., dissenting).

4. *See* Securities Exchange Act of 1934 § 10(b), 48 Stat. 881 (1934) (current version at 15 U.S.C.A. § 78(j) (West 2008)); *see also* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 195 (1994).

5. *See Cent. Bank of Denver*, 511 U.S. at 192-94 (Stevens, J., dissenting).

6. *See id.*; *see also Stoneridge*, 128 S. Ct. at 768.

## I. BACKGROUND

### A. *Section 10(b) of the Securities Act of 1934 and Rule 10b-5*

In response to public outcry following manipulative trading practices leading up to the Great Depression, Congress enacted § 10(b) making it:

> unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [T]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[7]

With the express authority of Congress as embodied in § 10(b), the Securities and Exchange Commission (SEC) propounded Rule 10b-5 to combat fraudulent activities in the markets by making it unlawful:

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[8]

Not surprisingly, the intent of Congress in enacting § 10(b) was to promote honest securities markets and rebuild investor confidence after the stock market crash of 1929.[9] Congress designed the broad scope of § 10(b)'s language as a "catchall" provision to prevent fraudulent activities in securities markets.[10] Moreover, the purpose of the 1934 Act was to ensure fairness in the impersonal securities markets where, traditionally, common-law remedies had failed defrauded investors.[11] In sum, Congress enacted § 10(b) to preserve fairness and integrity in America's securities markets.[12]

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7. 15 U.S.C.A. § 78(j) (West 2008).

8. 17 C.F.R. § 240.10b-5 (2008). Rule 10b-5 is the SEC's implementation of § 10(b). *See* United States v. O'Hagan, 521 U.S. 642, 651 (1997). Accordingly, for purposes of this Comment, use of the term "a § 10(b) claim" refers to both the statutory provision and the SEC Rule 10b-5.

9. *See O'Hagan,* 521 U.S. at 658.

10. *See* Chiarella v. United States, 445 U.S. 222, 246 (1980) (Blackmun, J., dissenting).

11. *Id.* at 248.

12. *Id.*; *see also* H.R. REP. NO. 94-229, at 91 (1975) (Conf. Rep.), *as reprinted in* 1975 U.S.C.C.A.N. 321, 322.

1. The Elements of a § 10(b) Claim

During eighty years of jurisprudence, the Court has established that to maintain a claim under § 10(b), a plaintiff must generally prove: (1) a material misrepresentation or omission; (2) scienter;[13] (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.[14] The Court, however, noted that deceptive conduct[15] could also satisfy the first element.[16]

*B.* Superintendent of Insurance of the State of New York v. Bankers Life and Casualty Company[17]

In *Superintendent of Insurance of the State of New York v. Bankers Life and Casualty Company,* the Supreme Court recognized that § 10(b) carried an implied right of action for private plaintiffs.[18] In *Bankers Life*, respondent Bankers Life agreed to sell all of the stock of Manhattan Casualty Company to a third party for $5,000,000.[19] However, the buyer conspired to pay for the stock using Manhattan's own assets.[20] Manhattan investors were deceived into believing that the assets were being used to fund the purchase of government bonds.[21] Importantly, the statutory text of § 10(b) does not explicitly confer the right for private parties to maintain suits.[22] Yet, the Court interpreted § 10(b)'s broad remedial language to implicitly confer a private right of action.[23] Thereafter, defrauded investors had a powerful remedy under § 10(b) to disgorge persons engaging in securities fraud of their ill-gotten gains.

*C.* Chiaralla v. United States[24]

In *Chiaralla v. United States,* the Court expanded upon the rule that a misrepresentation stemming from nondisclosure of material information under Rule 10b-5 is not actionable unless the actor had a duty to

13. Scienter, to put it succinctly, is a wrongful state of mind. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193, 197 (1976).

14. Dura Pharms, Inc. v. Broudo, 544 U.S. 336, 341 (2005).

15. "Deceptive act" is an ever-changing term. Prior to *Stoneridge*, the prevailing definition included only a misrepresentation or an omission by one with a duty to disclose. *See infra* notes 81-83. In *Stoneridge*, however, the Court recognized that a "deceptive act" included not just misrepresentations and omissions, but other unspecified "deceptive conduct." *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769-70 (2008).

16. *See Stoneridge*, 128 S. Ct. at 769 (holding that it was erroneous for the circuit court to conclude that only misstatements or omissions by one with a duty to disclose are deceptive under § 10(b). The Court noted that a deceptive act does not require a specific written or oral statement for liability to attach).

17. 404 U.S. 6 (1971).

18. *Id.* at 13 n.9.

19. *Id.* at 7.

20. *Id.*

21. *Id.* at 8-9.

22. *See* 15 U.S.C.A. § 78(j) (West 2008) (conferring power only to the SEC to promulgate appropriate regulation).

23. *Bankers Life*, 404 U.S. at 12-13, 13 n.9.

24. 445 U.S. 222 (1980).

disclose the information to investors.[25] In *Chiaralla*, the defendant worked for a financial printer that frequently handled corporate takeover bids.[26] The defendant would decipher insider information regarding takeovers and subsequently buy stock in those companies.[27] When the information was released to the public, the defendant sold his shares and made a significant profit.[28] The crux of the case concerned whether a defendant's silence could be considered a manipulative or deceptive device under § 10(b).[29] Using corporate insider trading and fiduciary relationships as its guide, the Court concluded that § 10(b) liability does not attach to a defendant's silence in the absence of a duty to disclose the information stemming from a position of trust.[30]

*D. The "Efficient Market" Theory*

The efficient market theory is an economic hypothesis relied upon by the Court,[31] as well as lower federal courts,[32] and is the backbone of the fraud-on-the-market presumption.[33] In short, the theory proposes that well-developed markets are "informationally efficient."[34] In particular, the theory holds that within well-developed impersonal trading markets any public information regarding a particular security is quickly seized upon by investors and therefore reflected in the market price.[35] For example, misinformation about a company's increased earnings that reaches the efficient market will very quickly be acted upon by investors. In light of the earnings information, some investors will buy or sell the stock of that company. The buying and selling, based in part upon the misinformation about earnings, will lead to an increase in trading activity and therefore an increase or decrease in the stock's price. In sum, the efficient market theory holds that in well-developed markets, all public information, good or bad, is reflected in a security's market price.[36]

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25. *Id.* at 228.
26. *Id.* at 224.
27. *Id.*
28. *Id.*
29. *Id.* at 226.
30. *Id.* at 235.
31. *See, e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224, 248-49 (1987) (applying the efficient market theory).
32. *See, e.g., In re* PolyMedica Corp. Sec. Litig. v. PolyMedica Corp., 432 F.3d 1, 14-17 (1st Cir. 2005) (applying the efficient market theory).
33. *See* William O. Fisher, *Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?*, 54 EMORY L.J. 843, 847-49 (2005).
34. *See In re* PolyMedica, 432 F.3d at 14-17.
35. *See* Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235, 1240-41 (1990).
36. *See* Roger J. Dennis, *Materiality and the Efficient Capital Market Model: A Recipe for the Total Mix*, 25 WM. & MARY L. REV. 373, 374-81 (1984); *see also* Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970); *see also In re* LTV Sec. Litig., 88 F.R.D. 134, 142-47 (N.D. Tex. 1980) (providing detailed descriptions of the history of the efficient market hypothesis and its application to the fraud-on-the-market presumption).

There are actually three distinct forms of the efficient market theory: the weak form, the semi-strong form, and the strong form.[37] The weak form simply states that past information has no bearing on a security's future market price.[38] The weak form is largely ignored by the courts.[39] In contrast, the strong form dictates that both public and private information is already reflected in a security's market price.[40] Similar to the weak form, the strong theory has also been uniformly rejected by the courts.[41] However, the semi-strong form states that a security's market price reflects all public information.[42] It is the semi-strong form that has been generally accepted by the courts and forms the basis for the fraud-on-the-market presumption of reliance.[43]

Eventually, the efficient market theory was used to support the "random walk" investing theory which states that markets are so efficient it is impossible for any investor to "beat" the market using information that is available to the rest of the investing public.[44] The basis of the random walk theory is that any public information an investor obtained would already be reflected in the market price thereby offsetting that investor's ability to use the information to his tactical advantage.[45]

To be sure, the efficient market theory has come under fire for some of its limitations.[46] In general, however, the concept that all public information has the ability to influence a security's market price is fairly well accepted.[47]

### *E.* Basic Incorporated v. Levinson[48]

In *Basic Incorporated v. Levinson*, the Court established the standard that a plaintiff (or class of plaintiffs) can satisfy the reliance re-

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37. *See* Nathaniel Carden, *Implications of the Private Securities Litigation Reform Act of 1995 for Judicial Presumptions of Market Efficiency*, 65 U. CHI. L. REV. 879, 883-41 (explaining three forms of the efficient market theory).

38. *Id.* at 883.

39. *See id.*

40. *See id.*

41. *Id.*

42. *Id.*

43. *See id.* at 883-84. As the courts have generally adopted the semi-strong form of the efficient market theory, use of the term "the efficient market theory" within this Comment refers to the semi-strong form.

44. *See* BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET 100 (W.W. Norton & Company Inc. 2007) (1973) (providing brief overview of the random walk theory and the efficiency of capital markets).

45. *See id.*

46. *See* Frederick C. Dunbar and Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 DEL J. CORP. L. 455, 531 (2006) (concluding that the efficient market is not efficient during market bubbles); *see also* Note, *Securities law—Fraud-on-the-Market—First Circuit Defines An Efficient Market for Fraud-On-The-Market Purposes.—In re* Polymedica Corp. Securities Litigation, *432 F.3d 1 (1st Cir. 2005)*, 119 HARV. L. REV. 2284, 2289-90 (2006) (stating that an efficient market may respond to all information, but it does not respond to all information with an equal effect on market price).

47. *See* Carden, *supra* note 37, at 883-84.

48. 485 U.S. 224 (1988).

quirement of § 10(b) by virtue of a defendant's "fraud on the market."[49] In that case, petitioner Basic, Inc., entertained offers to merge but concurrently issued three public announcements stating that it was not considering a merger.[50] Plaintiffs as a class alleged that they sold their stock after Basic, Inc., made its first denial and that Basic, Inc.'s misrepresentations regarding the merger artificially depressed the value of the company's stock.[51] Because plaintiffs were a class, determining each individual's reliance on Basic, Inc.'s statements would overwhelm the common elements of the case.[52]

To remedy this problem, the Court fashioned the fraud-on-the-market rebuttable presumption of reliance, which is based in large part on the economic principles and scholarship surrounding the efficient market theory.[53] In creating the presumption, the Court reasoned that in modern impersonal securities markets, the market itself performs a valuation function by transmitting information regarding the market price of a security.[54] The Court adopted the views of the Third Circuit's opinion in *Peil v. Speiser*,[55] by reciting that:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements . . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.[56]

In *Basic*, the Court established that purchasers of stock rely on the integrity of the price of a stock as a reflection of its value.[57] In reaching this position, the Court noted that a significant body of empirical data suggested that market prices are affected by *all available* public information.[58] Accordingly, public misstatements are necessarily reflected in a security's market price.[59] Since no person would "knowingly roll the dice

49. *Id.* at 247.
50. *Id.* at 227.
51. *Id.* at 228.
52. *Id.* at 242.
53. *Id.* at 241-49.
54. *Id.* at 244.
55. 806 F.2d 1154, 1160-61 (3d Cir. 1986).
56. *Basic*, 485 U.S. at 244 (quoting *Peil*, 806 F.2d at 1161).
57. *Id.* at 242.
58. *Id.* at 246 (stating that empirical evidence supports that the market price of shares traded within well-developed markets is a reflection of "all publicly available information, and, hence, any material misrepresentations.").
59. *Id.*

in a crooked crap game," the Court held that all purchasers of securities rely on the integrity of the market.[60]

To invoke the presumption, the Court adopted the same test applied by the circuit court in that case: (1) the defendant made public misrepresentations; (2) the misrepresentations were material; (3) the securities were traded in an efficient market; (4) the misrepresentations would lead a reasonable investor to misinterpret the value of the securities; and (5) the securities were traded in the time period between when the defendant made the misrepresentations and when the truth was revealed to the public.[61] The Court also noted that the second and fourth elements could collapse into a single element.[62]

However, the Court expressly stated that the presumption of § 10(b) reliance under the fraud-on-the-market theory was rebuttable.[63] In an abundance of caution, the Court warned that "any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."[64]

*F.* Central Bank of Denver v. First Interstate Bank of Denver[65]

In *Central Bank of Denver v. First Interstate Bank of Denver*, the Court overruled more than thirty years of precedent by holding that an actor's aiding and abetting another's fraudulent conduct was not actionable under § 10(b).[66] In 1986, a public building authority issued bonds to fund a planned residential area.[67] The bonds were secured by land owner assessment liens, which required that the value of the land be at least 160 percent of the bonds.[68] The value of the land was to be assessed annually.[69] In 1988, the developer of the land provided an assessment to the Central Bank of Denver that remained largely unchanged from 1986 despite a significant downturn in the real estate market.[70] In response, the Central Bank of Denver demanded a reassessment of the land, but worked with the developer to delay the reassessment until after a bond issue.[71] Prior to the reassessment but after the bond issue, the public building authority defaulted on the bonds.[72] Purchasers of the bonds

60. *Id.* at 247 (quoting Schlanger v. Four-Phase Sys., Inc., 555 F. Supp. 535, 538 (S.D.N.Y. 1982)).
61. *Id.* at 248 n.27.
62. *Id.*
63. *Id.* at 248.
64. *Id.*
65. 511 U.S. 164 (1994).
66. *Id.* at 191.
67. *Id.* at 167.
68. *Id.*
69. *Id.*
70. *Id.* at 167.
71. *Id.* at 167-68.
72. *Id.* at 168.

brought an action under § 10(b) alleging that the Central Bank of Denver aided and abetted the Authority's fraudulent conduct by tacitly agreeing to stay the reassessment until after the bond issue.[73]

In eliminating aider and abettor liability, the Court once again paid close attention to the statutory text of § 10(b).[74] Importantly, the text of the statute only prohibits the use or employment of a manipulative or deceptive act.[75] The Court focused on this language and reasoned that an actor must actually "make" a manipulative or deceptive act in order to be within the purview of § 10(b).[76] In sum, the Court held that an actor does not "use or employ" a manipulative or deceptive act as proscribed by § 10(b) unless that actor "makes" a manipulative or deceptive act such as a material misrepresentation or omission.[77]

Central to its holding, the Court noted that aiders and abettors do not make statements at all, but rather, facilitate the statements of others.[78] Accordingly, the Court reasoned that aiding and abetting was not conduct prohibited by the text of § 10(b) since aiders and abettors do not use or employ (make) a manipulative or deceptive act.[79] The Court was concerned that, were the rule otherwise, aiding and abetting could extend to include actors that did not engage in the conduct Congress intended to proscribe in § 10(b).[80] Another rationale to support the Court's holding was that allowing liability against aiders and abettors circumvented the reliance requirement of a § 10(b) claim.[81] That is, how can a plaintiff rely on a misstatement that is never "made" by the defendant?[82]

However, the Court was not without reservation and at the end of its opinion noted that:

> The absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities acts. Any person or entity, in including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met.[83]

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73. *Id.*
74. *Id.* at 175.
75. *Id.*; *see also* 15 U.S.C.A § 78(j) (West 2008).
76. *Cent. Bank*, 511 U.S. at 176.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 180.
82. *Id.*
83. *Id.* at 191.

In reserving this caveat, the Court made no mention of the language permeating its opinion beforehand, namely, that an actor must use or employ a manipulative *or deceptive act.*[84] Instead, the Court held that a "deceptive act" as mentioned in § 10(b) only includes making a material misstatement or omission.[85] This small textual difference was later found to be erroneous in *Stoneridge,*[86] but nevertheless greatly reduced the perceived scope of conduct encompassed by the term "deceptive act."[87] Indeed, a normal reading of the above caveat seems to suggest that the only conduct prohibited by § 10(b) are manipulative acts or material misstatements or omissions.[88] The text of § 10(b), however, broadly proscribes deceptive acts, which, as plainly evident, encompasses conduct more expansive than merely misstatements and omissions.[89] It was not until *Stoneridge* that the Court acknowledged that a deceptive act could include deceptive *conduct*, not just misstatements and omissions.[90]

### 1. Chaos After the Storm: § 10(b) Litigation Following *Central Bank*

The Court's opinion in *Central Bank* caused an upheaval in the securities world.[91] Shortly after the Court issued the opinion, Congress enacted the Private Securities Litigation Reform Act of 1995[92] (PSLRA). PSLRA changed the pleading requirements of § 10(b) actions and granted the SEC additional authority in prosecuting aiding and abetting in the securities markets.[93] Originally, the proponents of PSLRA sought a Congressional declaration that aiders and abettors are liable under §

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84. *Id.*

85. *See id.* The Court relied on *Santa Fe Industries v. Green*, 430 U.S. 462, 473-74 (1977) to conclude that the term "deceptive act" as it is used in § 10(b) only prohibits the making of a material misstatement or an omission by one with a duty to disclose. This finding, however, was held as erroneous in *Stoneridge*. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008).

86. *Stoneridge*, 128 S. Ct. at 769 (stating that it was error for the circuit court to conclude that only misstatements, omissions by one with a duty to disclose, and manipulative trading are "deceptive acts" as proscribed in § 10(b)).

87. Following *Central Bank*, many lower courts interpreted that the only deceptive acts for which § 10(b) liability could attach were material misstatements and omissions by persons with a duty to disclose. *See, e.g.*, Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 384 (5th Cir. 2007).

88. *See id.*

89. 15 U.S.C.A. § 78(j) (West 2008); *see also Stoneridge*, 128 S. Ct. at 775 (Stevens, J., dissenting).

90. *See Stoneridge*, 128 S. Ct. at 769.

91. *See* Andrew S. Gold, *Reassessing the Scope of Conduct Prohibited by Section 10(b) and the Elements of Rule 10b-5: Reflections on Securities Fraud and Secondary Actors*, 53 CATH. U. L. REV. 667, 667 (2004).

92. Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995).

93. *Id.*

10(b). However, in a legislative compromise,[94] Congress only extended a right of action to the SEC.[95]

In the aftermath, lower courts struggled over the implications of *Central Bank*'s holding.[96] Specifically, while *Central Bank* required that an actor "make" a statement in order for liability to attach, it did not define what actions would suffice for a statement to be considered "made."[97] As a result, three standards developed in the lower courts.[98]

a. The "Bright Line" Test

Jurisdictions subscribing to the bright line test recognize a primary § 10(b) violation only if an actor actually makes a material misstatement attributable to the actor at the time of public dissemination.[99] In order for a misstatement to be attributable to an actor, it must be communicated by that actor directly to the investing public or the actor must have known or should have known that the misstatement would reach the public.[100] According to the bright line rule, an absence of attribution of the deceptive act to the defendant at the time a plaintiff's investment decision was made would circumvent the reliance requirements of § 10(b) and the Court's decision in *Central Bank*.[101] In sum, the bright line test equated "making" a misstatement with attribution of the misstatement to the speaker.[102] The justification for the bright line test is aptly described in *In re MTC Electronic Technologies Shareholders Litigation*:

> [I]f Central Bank is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).[103]

Not all courts, however, interpreted *Central Bank* as requiring attribution of a misstatement to a speaker in order for that speaker to have used or employed the misstatement.

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94. *Stoneridge*, 128 S. Ct. at 778-79 (Stevens, J., dissenting).

95. *Id.*; *see also id.* at 771.

96. *See* Cecil C. Kuhne, III, *Expanding the Scope of Securities Fraud? The Shifting Sands of Central Bank*, 52 DRAKE L. REV. 25, 33 (2004).

97. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994).

98. *See* Kuhne, *supra* note 96, at 33 (describing the "bright-line" test and the "participation" test); *see also In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 439 F. Supp. 2d 692, 723 (S.D. Tex. 2006) (describing the "scheme" test).

99. *See, e.g.*, Regents of Univ. of Cal. v. Credit Suisse First Boston, Inc. (USA), 482 F.3d 372, 385-86 (5th Cir. 2007); *see also* Gold, *supra* note 91, at 676-78.

100. *See* Kuhne, *supra* note 96, at 34.

101. *Id.*

102. *Id.* at 33.

103. *In re* MTC Elec. Techs. S'holders Litig., 898 F. Supp. 974, 987 (E.D.N.Y. 1995); *see also* Kuhne, *supra* note 96, at 33.

b. The "Participation" Test

Under the participation test it is not necessary that an actor actually make a statement (let alone one attributable to him) to be primarily liable under § 10(b).[104] Rather, an actor must only substantially participate in the creation of fraud.[105] In effect, the participation test equates *creating* a misrepresentation with *making* a misrepresentation.[106] Under the participation test, conduct such as involvement in the creation of false documents, or overstating revenues without public attribution have been held to be primary § 10(b) violations.[107]

c. Hybrid "Scheme" Liability

Litigation stemming from the Enron scandal created a new standard of liability combining pertinent portions of both the bright line and participation tests.[108] Under "scheme" liability, an actor can be liable for a misrepresentation if it was created with the purpose and effect of furthering a scheme to defraud.[109] In essence, misrepresentations in furtherance of a scheme are considered deceptive acts directly prohibited by the text of § 10(b).[110] That is, misrepresentations in furtherance of a scheme to defraud are primary violations of § 10(b), not aiding and abetting.[111] The Supreme Court rejected scheme liability in *Stoneridge*.[112]

## II. *STONERIDGE INVESTMENT PARTNERS V. SCIENTIFIC-ATLANTA*[113]

### *A. Facts*

In late 2000, executives from the cable service provider Charter Communications (Charter) realized Charter's revenue would fall short of Wall Street's projections to the tune of fifteen to twenty million dollars.[114] To cover up the deficit, Charter engaged in a series of deceptive acts with the suppliers of its cable boxes, Scientific-Atlanta and Motorola (Respondents).[115] Particularly, Charter entered into sham deals whereby Charter would overpay a sum of twenty dollars for each cable box and in return, the box providers would use the overpayment to purchase adver-

104. *See* Simpson v. AOL Time Warner, Inc., 452 F.3d 1040 (9th Cir. 2006).
105. *See id.* at 1048-50.
106. *Id.* at 1048; *see also* Kuhne, *supra* note 96, at 37-42.
107. *See* Kuhne, *supra* note 96, at 38-39.
108. *See In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 439 F. Supp. 2d 692, 723 (S.D. Tex. 2006).
109. *See id.* at 723-24.
110. *See id.*
111. *See id.* at 724.
112. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 770-72 (2008) (finding that deceptive acts of Respondents engaged in with the purpose and effect of defrauding investors could not satisfy the reliance and causation elements of a § 10(b) claim absent a public disclosure).
113. 128 S. Ct. 761 (2008).
114. *Id.* at 766.
115. *Id.*

tising from Charter.[116] Charter would then record the advertising as revenue.[117] All parties were aware that the agreements had no economic substance, yet respondents still agreed to the arrangement.[118]

In order to deceive Charter's auditor, respondent Scientific-Atlanta authored and submitted a false letter to Charter stating that it had increased production costs by twenty dollars per cable box.[119] Similarly, respondent Motorola entered into a contract serving no useful business purpose whereby Charter agreed to purchase a specific number of cable boxes and would pay liquidated damages to respondent Motorola in the amount of twenty dollars per cable box that it did not purchase, with the expectation that Charter would not buy all of the cable boxes and would have to pay the damages.[120] The monies paid in liquidated damages would then be used by respondent Motorola to purchase advertising from Charter.[121] The letters and contracts were backdated to appear as separate transactions from the purchase of advertising in order to not raise any suspicions with Charter's auditor.[122] In total, Charter overpaid Respondents seventeen million dollars that was subsequently used to purchase advertising.[123] As known to all involved, Charter reported the seventeen million as revenue on its financial statements filed with the SEC and disseminated to the investing public.[124]

*B. Procedural History*

When the scheme was uncovered, injured investors brought a class action lawsuit against Charter and certain of its executives, Charter's auditor, and Respondents. The class alleged that by engaging in the fraudulent transactions and affirmatively drafting false backdated documents, both Respondents were liable under § 10(b) as primary actors.[125] Petitioners Stoneridge Investment Partners, L.L.C. (Petitioners) acted as the lead plaintiff.[126] To prove their claim, Petitioners sought to invoke "scheme" liability, alleging that Respondents engaged in deceptive conduct with the purpose and effect of furthering a scheme to make a misrepresentation to investors.[127]

The district court granted Respondents' motion to dismiss for failure to state a claim on which relief could be granted.[128] The Eighth Cir-

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 767.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *See id.*
126. *Id.*
127. *Id.* at 770.
128. *Id.* at 767.

cuit affirmed the district court's dismissal, reasoning that Respondents did not make misstatements that were relied upon by the class, and therefore, primary § 10(b) liability could not attach.[129] In short, the district and circuit courts ruled that Respondents' conduct did not fit squarely into the caveat reserved by the Court's holding in *Central Bank*; that is, Respondents did not make a misstatement that independently satisfied all of the elements of § 10(b). Therefore, Respondents were merely aiding and abetting Charter's deceptive conduct and could not be liable under the precepts established in *Central Bank*.[130]

*C. Majority Opinion*

Justice Kennedy delivered the opinion of the Court, holding that Respondents only aided and abetted Charter and therefore could not be found liable under § 10(b).[131] The Court reasoned that unless Respondents' conduct satisfied all of the elements of a § 10(b) action, Respondents could not be considered primary actors and would be excluded from liability under the rule set forth in *Central Bank*.[132] In determining whether Respondents met each element, the Court acknowledged that the conduct of Respondents would be considered a "deceptive act" as that term is used in § 10(b).[133] In doing so, the Court resolved the ambiguity permeating its earlier decisions and held that a deceptive act included not only misstatements and omissions, but also deceptive *conduct*.[134]

Nevertheless, the Court held that the class could not prove the necessary element of reliance.[135] In rejecting Petitioner's fraud-on-the-market argument, the Court reasoned that Respondents did not make a public statement to the investing public and Charter's filing with the SEC did not mention Respondents.[136] In other words, Respondents' deceptive conduct was not publicly attributable to Respondents.[137] The Court reasoned that Respondents' conduct did not make it "necessary or inevitable" that Charter file the transactions as fraudulent revenue with the SEC.[138] Ultimately, the majority concluded that the investing public had no way of knowing, and therefore no way of relying on, Respondents' deceptive acts.[139]

The majority rejected Petitioners' contention that Respondents should be liable under the hybrid "scheme" liability theory that evolved

129. *Id.*
130. *Id.*
131. *See id.* at 768.
132. *Id.* at 769.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 770.
139. *Id.* at 769.

during the Enron cases after *Central Bank*.[140] Specifically, Petitioners asserted, "in an efficient market investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect."[141] Therefore, Petitioners argued that since Respondents engaged in deceptive conduct with the purpose and effect of defrauding Charter's investors, Respondents were liable as primary violators of § 10(b) under the "scheme" liability framework.[142] The majority, however, noted that the elements of reliance and causation under the "scheme" theory were too remote for liability to attach.[143] On this point, the Court felt that it would be too tenuous to find that Petitioners relied upon Respondents' deceptive acts when those acts were not directly communicated to the market by Respondents and Petitioners had no way of attributing the acts to Respondents.[144]

The Court reasoned that Petitioners' theory would extend liability beyond the realm of the securities markets (and therefore § 10(b)) and into the realm of day-to-day business.[145] Costs associated with being a publicly traded company would increase and foreign companies would be deterred from entering America's securities markets.[146] Expanding the scope of liability, according to the majority, was not within the statutory language of § 10(b) or the power of the Court.[147]

To buttress its holding, the majority relied on Congress' enactment of the PSLRA after *Central Bank*.[148] Importantly, when enacting the PSLRA, Congress entertained the notion of extending aiding and abetting liability to private citizens under § 10(b) but it ultimately chose not to do so.[149] The majority stated:

> And in accord with the nature of the cause of action at issue here, we give weight to Congress' amendment to the Act restoring aiding and abetting liability in certain cases but not others. The amendment, in our view, supports the conclusion that there is no liability.[150]

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140. *Id.* at 770.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 769.
145. *Id.* at 770.
146. *Id.* at 772.
147. *Id.* at 771.
148. *Id.*
149. *Id.* In fact, SEC Chairman Arthur Levitt suggested extending a private right of action in his testimony and report to Congress. *See Aiding and Abetting Liability Under the Federal Securities Laws: Hearings on the Impact of the Supreme Court's Decision in Central Bank Before the Subcomm. on Securities Comm. on Banking, Housing, and Urban Affairs of the S.*, 103d Cong., 2d Sess. (1994), *available at* 1994 WL 233142; *see also Stoneridge*, 128 S. Ct. at 768-69 (citing S. Hearing No. 103-759, at 13-14) (1994)).
150. *Stoneridge*, 128 S. Ct. at 772.

*D. Dissenting Opinion*

Justice Stevens, joined by Justices Souter and Ginsburg, dissented based on their view that Respondents' fraud was itself a deceptive act satisfying all of the elements for § 10(b) liability.[151] That is, Respondents conduct was a primary violation of the statute and therefore amounted to more than aiding and abetting.[152] The dissent argued that *Stoneridge* was distinguishable from *Central Bank* because the Respondents in that case did not actually commit a deceptive act.[153] The dissent believed the majority's view encompassed an overly broad interpretation of *Central Bank* and imposed an inappropriate "super causation" view of reliance unsupported by authority.[154] Specifically, the dissent stated that reliance is not meant to be a difficult hurdle to cross, but traditionally has only required transaction causation.[155] To prove transaction causation, a plaintiff need only show that "but for" the deceptive act, he or she would not have purchased or sold securities.[156] Further, the dissent asserted that the rebuttable presumption of reliance under the fraud-on-the-market theory was created precisely for this type of situation, where investors cannot prove that they relied on the defendant's misrepresentations, but instead relied on the market and were thereafter defrauded.[157]

The dissent noted that Petitioners' theory of liability would not extend to the entire market but only to those persons and entities engaging in fraudulent conduct.[158] In closing, the dissent commented that the 1934 Act was created to prevent fraud and that every wrong deserves a remedy.[159]

## III. ANALYSIS

### *A. Rethinking the Scope of the Fraud-on-the-Market Presumption of Reliance: The Court Should have Expanded the Applicability of the Presumption when it Held that a "Deceptive Act" Included More than Just Statements and Omissions*

In *Stoneridge*, the Court held that Petitioners could not use the fraud-on-the-market presumption of reliance because Respondents did not make a public misrepresentation as required by *Basic*.[160] Unable to prove reliance, Petitioners could not satisfy all of the elements of a §

151. *Id.* at 774 (Stevens, J., dissenting).
152. *Id.*
153. *Id.*
154. *Id.* at 774-75.
155. *Id.* at 775.
156. *Id.* at 776 (citing Lentell v. Merrill Lynch & Co., 396 F.3d 161, 172 (2d Cir. 2005); Binder v. Gillespie, 184 F.3d 1059, 1065-66, (9th Cir. 1999)).
157. *Id.*
158. *Id.* at 779.
159. *Id.* at 779-82.
160. *Id.* at 769-70 (finding that Respondents' deceptive acts were not communicated to the public and therefore the public did not have any knowledge of those acts).

10(b) claim and could therefore only be considered aiders and abettors based on the rule set forth in *Central Bank*.[161] The Court, however, applied the elements of the fraud-on-the-market presumption without considering that, at the time *Basic* was decided, and indeed, from the *Santa Fe* decision in 1977 until *Stoneridge* in 2008, the prevailing rule of law was that a deceptive act only included misrepresentations or omissions by one with a duty to disclose.[162] When the *Stoneridge* Court overturned this precedent by acknowledging that a deceptive act could include conduct other than a misrepresentation or omission,[163] it should have also considered how this expansion would affect the fraud-on-the-market presumption.

1. Reliance Under the Fraud-on-the-Market Theory Should Not be Limited Solely to a Defendant that Makes a "Public Misrepresentation," but Should Apply to Any Defendant Engaging in a Deceptive Act the Substance of which Becomes Public

The economic principles permeating the fraud-on-the-market theory are equally applicable to information contained in a public misrepresentation as to information contained in a nonpublic deceptive act that is later disseminated to the public.[164] Accordingly, although *Basic* requires that the defendant make a public misrepresentation,[165] the precepts of the efficient market theory underlying *Basic's* holding dictate that any material information that becomes public will influence a security's market price in the same manner as a direct public misrepresentation.[166] In the wake of *Stoneridge*, it has become clear that the Court needs to reconsider whether the fraud-on-the-market presumption applies to deceptive acts other than misstatements. This Comment proposes that, even though *Basic* requires that a defendant speak a misrepresentation to the market, that rule was created when a deceptive act only included misstatements

161. *See id.*

162. *See id.* In *Santa Fe*, the Court inferred that an act is not "deceptive," as that term is used in § 10(b), absent a misstatement or an omission by one with a duty to disclose. *See* Santa Fe Indus. v. Green, 430 U.S. 462, 473-74 (1977). The Court affirmed this rule in *Central Bank*. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 177 (1994). Generally, in the thirty-one years between *Santa Fe* and *Stoneridge*, the prevailing rule among lower courts reflected that a deceptive act only included misstatements and omissions. *See* Fidel v. Farley, 392 F.3d 220, 235 (6th Cir. 2004); *accord* Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1204-06 (11th Cir. 2001); Wright v. Ernst & Young L.L.P., 152 F.3d 169, 175 (2d Cir. 1998); Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1225-27 (10th Cir. 1996); *In re* Software Toolworks, Inc. Sec. Litig., 50 F.3d 615, 628 n.3 (9th Cir. 1994); *In re* Dynegy, Inc. Sec. Litig., 339 F. Supp. 2d 804, 914-16 (S.D. Tex. 2004); *In re* Homestore.com, Inc. Sec. Litig., 252 F. Supp. 2d 1018, 1040-41 (C.D. Cal. 2003). Indeed, even the Eighth Circuit applied that test in the lower proceedings of *Stoneridge*. *In re* Charter Commc'ns, Inc., Sec. Litig., 443 F.3d 987, 992 (8th Cir. 2006).

163. *Stoneridge*, 128 S. Ct. at 769.

164. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 244-48 (1987) (stating that empirical studies have shown that a security's market price is a composite of all available public information, and therefore, all public misrepresentations); *see also supra* Part I.D.

165. *See Basic*, 485 U.S. at 247.

166. *See supra* Part I.D.

or omissions by persons with a duty to disclose.[167] As an omission inherently cannot be spoken, the *Basic* rule was designed to apply solely to misrepresentations.[168]

In *Stoneridge*, when the Court expanded the scope of conduct amounting to a deceptive act proscribed by § 10(b) it should have reconsidered the applicability of the fraud-on-the-market presumption of reliance to deceptive acts other than just misrepresentations instead of determining that the presumption was inapplicable. Notably, the same result is achieved upon a security's market price whether a defendant makes a public misrepresentation or whether that defendant, like in *Stoneridge*, commits a deceptive act in secrecy and the substance of that act later reaches the public through other means.[169] Misinformation that becomes public is not less fraudulent, and does not abstain from influencing a security's market price, simply because the defendant does not communicate it directly to the market.[170]

As the Court noted in *Basic*, the fraud-on-the-market theory is premised on the notion that investors rely on the market price when purchasing or selling a security and that price is affected by all available public information.[171] Importantly, the efficient market theory notes that after information becomes public, it is reflected in the market price.[172] At that point, if the information is false, investors have been defrauded because the market price they are relying upon is not genuine.[173] Surely, if fraudulent information becomes public and is reflected in the market price, then under the efficient market theory it is of little consequence how that information came to the public eye.

Thus, on one hand, the Court in *Basic* noted that all public information is reflected in a security's price,[174] but on the other hand, the Court only allowed the presumption to apply if the defendant made a public misrepresentation.[175] One possible explanation for this inconsistency is that when *Basic* was decided a misrepresentation was the only type of "deceptive act" proscribed by § 10(b) that could be communicated to the

167. *See Stoneridge*, 128 S. Ct. at 776 (Stevens, J., dissenting).

168. *See supra* Part I.E.

169. *See Basic*, 485 U.S. at 243-47; *see also supra* Part I.D. If the efficient market theory and the Court's reasoning in *Basic* hold that a security's market price is affected by *all* public information, then that market price has the potential to be affected by *any* form of information that reaches the public. In this sense, the market price does not distinguish between a public misrepresentation, or a misrepresentation or other deceptive act that is not directly communicated to the public but *becomes* public at a later date through any means.

170. *See Basic*, 485 U.S. at 241-47; *see also supra* Part I.D.

171. *Basic*, 485 U.S. at 241-47.

172. *Id.*; *supra* Part I.D.

173. *See Basic*, 485 U.S. at 241-47; *see also supra* Part I.D.

174. *See Basic*, 485 U.S. at 244-48.

175. *Id.* at 248.

public.[176] Thus, the *Basic* court had no occasion to consider whether the fraud-on-the-market presumption could apply to other forms of conduct or communication.[177] As a result, when the *Stoneridge* court acknowledged at the outset of its decision that a "deceptive act" encompassed more than just misrepresentations and omissions, it should not have summarily dismissed the applicability of the fraud-on-the-market presumption of reliance because Respondents had not made a "public misrepresentation."[178] Had the Court considered how expanding the scope of prohibited deceptive acts would affect the fraud-on-the-market presumption, it would have also had to address that the rationale supporting the fraud-on-the-market presumption does not distinguish between information that is directly communicated to the public or arrives there via some other means.[179] To an efficient market, information is information—regardless of its source.[180]

In determining that the fraud-on-the-market presumption did not apply, the Court found it fatal that "no member of the investing public had knowledge, either actual or presumed, of Respondents' deceptive acts."[181] The Court relied on *Basic* for this assertion.[182] However, affirmative knowledge of the defendant's acts appears nowhere in *Basic* and runs contrary to the rationale permeating that decision.[183] Rather, the efficient market theory and the Court's rationale for the fraud-on-the-market presumption in *Basic* speak about how *information* influences the price of a security when it infiltrates the market.[184] It is the mere presence of that information, not the identity of the person supplying that information, that affects a security's market price.[185] Moreover, it is the plaintiff's reliance on the integrity of that price, as opposed to the identity and nature of defendant's actions, that forms the basis for the fraud-on-the-market presumption.[186] If anything, *Basic* holds that a plaintiff using the fraud-on-the-market presumption does *not* need to have knowledge of the defendant's deceptive acts so long as those acts somehow become public and influence the market price of a security.[187]

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176. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 776 (2008) (Stevens, J., dissenting).

177. *Compare* Santa Fe Indus. v. Green, 430 U.S. 462, 473-77 (1977) (establishing that the term "deceptive conduct" only includes misstatements and omissions by one with a duty to disclose), *with Basic*, 485 U.S. at 248 (holding that the fraud-on-the-market theory only applies to public misrepresentations). *See also Stoneridge*, 128 S. Ct. at 776 (Stevens, J., dissenting).

178. *See Stoneridge*, 128 S. Ct. at 769.

179. *See Basic*, 485 U.S. at 241-47; *see also supra* Part I.D.

180. *See supra* Part I.D.

181. *Stoneridge*, 128 S. Ct. at 769.

182. *See id.*

183. *See Basic*, 485 U.S. 224.

184. *See id.* at 241-47; *see also supra* Part I.D.

185. *See Basic*, 485 U.S. at 246-47; *see also supra* Part I.D.

186. *See Basic*, 485 U.S. at 246-47 (holding that traders of securities in well-developed markets rely on the integrity a security's market price).

187. *See id.* at 244-49; *see also Stoneridge*, 128 S. Ct. at 776 (Stevens, J., dissenting).

However, the Court reasoned in *Stoneridge* that knowledge of the Respondents' deceptive acts, by means of attribution of the acts to the Respondents in a public statement, served a vital causation function.[188] Without a clear public statement, the Court felt that it was impossible for the Petitioners to rely on the "Respondents' own deceptive conduct."[189] This reasoning, however, eschews the principles underlying the fraud-on-the-market presumption, which dictate that the fraud-on-the-market plaintiff relies on the integrity of the market's price instead of having to rely on the defendant's own deceptive conduct.[190] The Court circumvented this reasoning by preemptively stating that the fraud-on-the-market presumption was inapplicable.[191] However, as mentioned, this should not have been the case. The dissent stated that the majority applied the wrong standard for causation and used that standard to assert that the fraud-on-the-market presumption did not apply.[192] Instead, the dissent argued that the majority should have looked at causation first, using the correct standard, and it would have found that the fraud-on-the-market presumption sufficed for the Petitioners to at least plead reliance.[193]

This Comment agrees with the dissent's causation and reliance views but also asserts that a causation analysis for a plaintiff using the fraud-on-the-market theory should reflect the market's role, and the Court should have considered this. Notably, the theory of causation applicable to a plaintiff who must prove actual reliance is not perfectly interchangeable with a plaintiff using the fraud-on-the-market theory to establish reliance.[194] The difference lies in the nature of each plaintiff's injury and how each defendant's deceptive acts influenced those injuries.[195]

Take, for example, a plaintiff bringing a traditional § 10(b) claim against a defendant who made a misrepresentation during face-to-face

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188. *See Stoneridge*, 128 S. Ct. at 769 (stating that a plaintiff's reliance upon a defendant's deceptive act is essential because it ensures a causal connection between the defendant's conduct and the plaintiff's injury).

189. *Id.* at 770.

190. *See Basic*, 485 U.S. at 246-47.

191. *See Stoneridge*, 128 S. Ct. at 769.

192. *See id.* at 776-77 (Stevens, J., dissenting).

193. *See id.* (noting that traditionally, reliance only requires transactional causation, meaning that but for the deceptive act, the plaintiff would not have entered into the securities transaction). In the alternative, the dissent argued that Petitioner had successfully alleged that Respondents' acts proximately caused Charter's misstatement of income and knew that their acts would enter those statements and thereafter the market. *Id.*

194. *Compare Basic*, 485 U.S. at 244-47 (holding that a plaintiff using the fraud-on-the-market presumption relies on the market's integrity and is injured when the defendant's public misrepresentation affects that integrity), *with Stoneridge*, 128 S. Ct. at 769 (holding that a plaintiff not pleading a presumption must prove that he or she directly relied on the defendant's deceptive act). Essentially, a central theme of this Comment is that the Court required Petitioner to show direct reliance on Respondents' deceptive acts and that those acts directly caused Petitioner's injury, when it should have adopted the fraud-on-the-market presumption and allowed Petitioner to rely upon the market.

195. *See Stoneridge*, 128 S. Ct. at 769.

negotiations. In this example, the plaintiff must prove actual reliance on the defendant's misrepresentation and that his or her reliance on that misrepresentation caused economic loss.[196] Here, the plaintiff's injury shares a direct link with the defendant's conduct. There is no middleman. In this hypothetical, if the plaintiff relied on the defendant's misrepresentations and that reliance caused the plaintiff's injury, then the plaintiff has successfully pleaded the reliance and causation elements of his § 10(b) claim. Because of the direct link between the injury and the defendant's conduct, attribution of the deceptive conduct to the defendant is necessary to prevent circumventing the reliance and causation elements. In sum, a plaintiff who must prove actual reliance is unable to do so absent knowledge of the defendant's identity and deceptive act. Actual reliance is a test with two parties where one person made a statement and the other directly relied on it.

On the other hand, a plaintiff using the fraud-on-the-market presumption is pleading an injury that came to fruition by a different means.[197] Particularly, such a plaintiff is alleging that he or she specifically *did not* rely directly on the defendant's misrepresentation.[198] Instead, he or she relied on the integrity of the market and its reflection of the value of a security as represented by that security's price.[199] The market, in this case, performs a valuation function that is not present in a face-to-face negotiation.[200] Here it is possible for the plaintiff to rely on the price of a security and suffer an injury when that price is affected by misinformation as a result of the defendant's deceptive acts without actually discovering the identity of that defendant or his or her deceptive acts.[201] Accordingly, the plaintiff can suffer an economic loss that is caused by the defendant's deceptive act by virtue of that act infiltrating the market and affecting the market price and, in turn, the plaintiff's reliance upon that price.[202] Causation, in this instance, should reflect that the plaintiff relies on the market instead of the deceptive actor. The introduction of the market changes the nature of plaintiff's reliance as well as how the defendant's conduct causes the plaintiff's injury.[203] Specifically, if reliance is designed to ensure a sufficient causal connection between the plaintiff's injury and the defendant's deceptive act, changing the nature of that plaintiff's reliance should necessarily change the nature

196. *See Stoneridge*, 128 S. Ct. at 769 (inferring that if a presumption of reliance is inapplicable, a plaintiff must prove actual reliance upon the defendant's deceptive act and that the defendant's deceptive act caused plaintiff's injury).

197. *Basic*, 485 U.S. at 242-49 (noting that a plaintiff proving reliance under the fraud-on-the-market presumption is injured by virtue of the defendant's deceptive act infiltrating the market with misinformation that degrades the integrity of the market price upon which the plaintiff is relying).

198. *Id.* at 241-42.

199. *Id.* at 245-46.

200. *Id.* at 244-45.

201. *See supra* Part I.D.

202. *See Basic*, 485 U.S. at 246-47.

203. *Id.* at 243-45.

of causation.[204] Therefore, in *Stoneridge*, the Court should have found that Petitioners relied on the market's integrity, and that Respondents influenced that market.

The Court declined to follow this reasoning by applying, as aptly put in the dissent, a "super-causation"[205] theory that requires attribution of the deceptive act to the defendant within a public communication.[206] The Court noted that, allowing anything less than public attribution would result in causation that is too remote.[207] However, this really is not the case. Rather, the causation element has one extra proxy because of the market's role.[208] A causation analysis under the fraud-on-the-market presumption should reflect that it has an additional actor, the market, and that the plaintiff relies on the market.[209] Thus, causation under the fraud-on-the-market presumption should be a test involving three parties: the defendant, the market, and the plaintiff. Specifically, if a defendant's deceptive acts influenced the market, and the plaintiff relied on the integrity of that market, a sufficient causal connection should exist.[210]

There is no question that Respondents used or employed (made) a deceptive act as defined in *Central Bank*.[211] In fact, the Court concedes that Respondents' conduct would be considered a deceptive act under the language of § 10(b).[212] Yet, the Court rests its opinion on the fact that it was Charter, not Respondents, who reported the false revenue to investors.[213] It is inherently contradictory for the Court to state that on the one hand, Respondents committed a deceptive act; while on the other hand, investors could not have relied on that act under the fraud-on-the-market presumption when the substance of it became public and affected the market price. The Court failed to see that Respondents' deceptive act was not just the making of sham contracts; rather, the Respondents were making sham contracts for the sole purpose of inflating Charter's revenue in a statement they knew would be distributed to the public. When that revenue was disseminated to the market[214] and when its falsities surfaced and affected the price of Charter's stock, it is difficult to see how

204. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008).
205. *Id.* at 774.
206. *Id.* at 769-70; *see also id.* at 774-76 (Stevens, J., dissenting).
207. *Id.* at 769.
208. *Basic*, 485 U.S. at 243-47.
209. *Id.*
210. *See Stoneridge*, 128 S. Ct. at 776 (Stevens, J., dissenting) (arguing that a correct view of causation coupled with the fraud-on-the-market theory should have allowed Petitioners to plead reliance).
211. *See id.* at 769.
212. *Id.*
213. *Id.* at 770.
214. Charter, as a publicly-traded company, was required to disclose its revenue to the SEC for publication. *See, e.g.*, 17 C.F.R. § 229.301(c)2 (2008). Presumably, Respondents were not ignorant of this fact.

the requisite causal connection was not met under the rationale supporting the fraud-on-the-market theory.

The Court rested its holding on the notion that the securities industry needs a clear and predictable standard with which to conform.[215] *Stoneridge* provides that standard, but for the wrong reasons.

### *B. Policy Considerations Underlying* Stoneridge

The explanation for the Court's holding in *Stoneridge* likely comes from policy considerations. Interested parties filed nearly thirty Amicus briefs in the case.[216] Many of those briefs urged the Court to take the

215. *Stoneridge*, 128 S. Ct. at 770-72.

216. Amici Curiae Brief of Charles W. Adams and William Von Glahn in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701932; Brief for Amici Curiae States of Arkansas et al. in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701934; Brief for Attorneys' Liab. Assurance Soc'y, Inc. as Amicus Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363261; Brief for Bus. Roundtable as Amicus Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363259; Brief for Change to Win and the CtW Inv. Group as Amici Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701933; Brief for Former SEC Comm'rs and Officials and Law and Fin. Professors as Amici Curiae Supporting Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2329638; Brief for Professors James D. Cox et al. as Amici Curiae in Support of Petitioners, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701606; Brief for Richard I. Beattie et al. as Amici Curiae Supporting Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363253; Brief for the Am. Inst. of Certified Pub. Accountants as Amicus Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363263; Brief for the Nasdaq Stock Mkt., Inc. and NYSE Euronext as Amici Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2958946; Brief for the United States as Amicus Curiae Supporting Affirmance, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2329639; Brief of AARP et al. as Amici Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701939; Brief of Amici Curiae Am. Ins. Ass'n and Prop. Cas. Insurers Ass'n of Am. in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 3068882; Brief of Cal. State Teachers' Ret. Sys. as Amicus Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701937; Brief of Council of Institutional Investors as Amicus Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701610; Brief of Merrill Lynch & Co., Inc. as Amicus Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363254; Brief of Ohio et al. as Amici Curiae in Support of Petitioner, 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1957413; Brief of Org. for Int'l Inv. et al. as Amici Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363262; Brief of the Am. Ass'n for Justice as Amicus Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701936; Brief of the Am. Bankers Ass'n et al. as Amici Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2329637; Brief of the Chamber of Commerce of the U.S. as Amicus Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363260; Brief of the Def. Research Inst. in Support of Respondents Amicus Curiae for Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2329636; Brief of the Los Angeles County Employees Ret. Ass'n et al. as Amici Curiae in Support of Petitioners, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-

Respondents' position and affirm the circuit court's decision. The Court picked up on several general concerns permeating the arguments of Respondents' Amici and those arguments are reflected in the Court's holding.

1. Snowballing Litigation and Keeping Up with the Joneses: Policy Considerations Important to the Court

Sixteen Amici filed briefs in support of Respondents' position, and, while each had its own advice for the Court, several themes emerged. First, Respondents' Amici argued that Petitioners' theory would lead to an explosion of expensive class-action litigation that would in turn make U.S. financial markets less competitive with foreign markets that either do not allow, or significantly limit, class action lawsuits.[217] A second theme alleged that adopting Petitioners' theory would not provide a rule that was "clear and predictable" enough to be administered in the economy at large.[218] Third, Respondents' Amici contended that there are adequate safeguards and deterrents in place to protect against fraud and compensate its victims without the need of a private right of action against aiders and abettors.[219]

a. Class-Action Lawsuits Make U.S. Markets Uncompetitive

As succinctly put by one of Respondents' Amici:

> There is a widely acknowledged perception, backed by empirical evidence, that a hostile U.S. litigation environment materially in-

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43), 2007 WL 1701940; Brief of the Nat'l Ass'n of Mfrs. as Amicus Curiae in Support of Respondents , Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363258; Brief of the N.Y. State Teachers' Ret. Sys. et al. as Amici Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701935; Brief of the N. Am. Sec. Adm'rs Ass'n, Inc., as Amicus Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701938; Brief of the Regents of the Univ. of Cal., Court-Appointed Lead Plaintiff in the Enron Sec. Litig., as Amicus Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701942; Brief of the Sec. Indus. and Fin. Mkts. Ass'n and Futures Indus. Ass'n as Amici Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363256; Brief of the Wash. Legal Found. as Amicus Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363255.

217. *See, e.g.*, Brief for Attorneys' Liab. Assurance Soc'y, Inc. as Amicus Curiae in Support of Respondents, *supra* note 216, at *9; Brief for Former SEC Comm'rs and Officials and Law and Fin. Professors as Amici Curiae Supporting Respondents, *supra* note 216, at *14-15; Brief for the Am. Inst. of Certified Pub. Accountants as Amicus Curiae in Support of Respondents, *supra* note 216, at *21-22; Brief of Org. for Int'l Inv. et al. as Amici Curiae in Support of Respondents, *supra* note 216, at *11.

218. *See, e.g.*, Brief for Bus. Roundtable as Amicus Curiae in Support of Respondents, *supra* note 216, at *17-18; Brief for Richard I. Beattie et al. as Amici Curiae Supporting Respondents, *supra* note 216, at *28; Brief of Merrill Lynch & Co., Inc. as Amicus Curiae in Support of Respondents , *supra* note 216, at 16-19.

219. Brief of the Sec. Indus. and Fin. Mkts. Ass'n and Futures Indus. Ass'n as Amici Curiae in Support of Respondents, *supra* note 216, at *21-23; Brief of the Wash. Legal Found. as Amicus Curiae in Support of Respondents, *supra* note 216, at *12-16.

> creased the costs and risks associated with raising capital in the U.S. markets. Several recent studies demonstrated that this environment is a driving force behind the precipitous decline in the U.S. capital market activity.[220]

This argument asserted that class-action lawsuits greatly increase the cost of doing business in U.S. markets and this cost is not present in foreign markets.[221] The main fuel for this argument came from three reports concluding that foreign companies feared entering U.S. markets because of the possibility of class-action lawsuits against them, and that such fears played an important role in the recent decline in U.S. market share.[222] Therefore, allowing § 10(b) liability without public attribution of a misrepresentation to a defendant would lead to a huge increase in the amount of class-action lawsuits resulting in further erosion of U.S. market share.[223] In short, the chilling effect would get colder, encouraging "[f]light to [f]oreign [e]quity [m]arkets, [w]hich [o]ffer [i]ncreasingly [c]ompetitive [a]lternatives."[224]

b. Petitioner's Theory is Not "Clear and Predictable"

Another theme surfaced among Respondents' Amici alleging that if § 10(b) liability was extended to persons who engaged in conduct with the purpose and effect of creating fraud, business transactions would effectively be created on an "ad hoc" basis without the guidance of a clear and predictable rule.[225] This would come as a disadvantage to an area that demands predictability.[226] Importantly, Amici argued that the purpose and effect (the liability theory advanced by Petitioner) of a business transaction is completely subjective, so that persons engaged in legitimate transactions have no clear way of guarding against liability.[227] That is, discerning the purpose and effect of a particular transaction involves a subjective analysis that is of little predictive value. Indeed, Amici feared that conduct that was legitimate during the transaction

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220. Brief of Org. for Int'l Inv. et al. as Amici Curiae in Support of Respondents, *supra* note 216, at *11.

221. *See, e.g., id.*

222. U.S. CHAMBER OF COMMERCE, COMMISSION ON THE REGULATION OF U.S. CAPITAL MARKETS IN THE 21ST CENTURY: REPORT AND RECOMMENDATIONS 30 (2007), *available at* http://www.uschamber.com/publications/reports/0703capmarketscomm.htm; MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP 78 (2007), *available at* http://www.schumer.senate.gov/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf; COMM. ON CAPITAL MKTS., INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 34 (2006), *available at* http://www.capmktsreg.org/pdfs/11.30 Committee_Interim_ReportREV2.pdf.

223. *See* Brief of Org. for Int'l Inv. et al. as Amici Curiae in Support of Respondents, *supra* note 216, at *14-15.

224. Brief for the Nasdaq Stock Mkt., Inc. & NYSE Euronext as Amici Curiae in Support of Respondents, *supra* note 216, at *12-15.

225. *See, e.g.*, Brief of the Am. Bankers Ass'n et al. as Amici Curiae in Support of Respondents, *supra* note 216, at *15.

226. *See id.*

227. *See id.*

could later be artfully pleaded to appear as being entered into with the purpose and effect of creating fraud. As stated: "[T]his Court should not create an amorphous and subjective theory of potentially catastrophic liability that would impede the important functions of banks and other financial institutions in providing the financial fuel that drives our Nation's economy."[228] In sum, the parties to business transactions need to know what they can and cannot do in order to avoid § 10(b) liability.

c. Adequate Remedies Already Exist, and Those Remedies Deter Fraud

A third theme advanced by Respondents' Amici argued that adequate remedies are already in place to guard against aiding and abetting without the need for creating a private right of action.[229] Indeed, Amici asserted that aiders and abettors already face significant deterrents under the current rule of law.[230] For example, the SEC can bring actions against aiders and abettors and return ill-gotten profits to injured investors.[231] In fact, Amici reminded the Court that the SEC returned many billions of dollars to investors between 2002 and 2006.[232] Moreover, the Department of Justice is able to bring criminal charges against aiders and abettors.[233] One Amici alleged that criminal prosecution for aiding and abetting had the possibility to not only stigmatize a violator's business prospects, but effectively bankrupt the company.[234] The Securities Industry and Financial Markets Association argued that criminal penalties have the potential to end a career or shut down a company.[235] Lastly, Amici alleged that state law remedies are also in place to guard against fraud.[236]

2. The Court Adopts the Views of Respondents' Amici

Even a cursory review of *Stoneridge* reveals that the views of Respondents' Amici struck a note with the Court. Indeed, the concerns of Respondents' Amici are peppered throughout the Court's opinion, with an entire section devoted to those concerns.[237] The Court touched upon how, if the Petitioner's theory was accepted, "the implied cause of action would reach the whole marketplace in which the issuing company does business."[238] Moreover, the Court noted that Petitioners sought to apply

228. *Id.* at *14.
229. *See, e.g.*, Brief of Former SEC Comm'rs & Officials & Law & Fin. Professors as Amici Curiae Supporting Respondents, *supra* note 216, at *18-19.
230. *Id.* at *18.
231. *Id.*
232. *Id.*
233. *Id.*
234. Brief of the Sec. Indus. & Fin. Mkts. Ass'n & Futures Ind. Ass'n as Amici Curiae in Support of Respondents, *supra* note 216, at *22-24.
235. *Id.*
236. *Id.* at *28.
237. Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 772-74 (2008).
238. *Id.* at 764.

§ 10(b) "beyond the securities markets into [the realm of financing business-to-purchase and supply contracts] the realm of ordinary business operations . . . [The latter realm is governed], for the most part, by state law."[239] Additionally, the Court noted that "[s]econdary actors are subject to criminal penalties and civil enforcement by the SEC," and that "both parties agree that criminal penalties are a strong deterrent."[240] Petitioners' Amici refuted some of Respondents' Amici's arguments; however, none of those arguments appear in the Court's opinion.

3. A Response: Policy Considerations the Court Should Have Noticed

The Court's *Stoneridge* opinion makes it clear that only deceptive acts either (1) communicated to the public by the actor, or (2) identified to the public at the time a security is bought or sold will face liability under § 10(b).[241] Unfortunately, the rule is equally clear to persons seeking to defraud the market: make sure your name stays out of public releases and let someone else do the talking. Fraud in the market is not likely to stop and defrauders are consistently coming up with new ways to cheat investors.[242] To such persons, *Stoneridge* poses no obstacle.

In support for its "clear and predicable" rule, the Court reasons that uncertainty and the increased cost of business under any other rule would not only hinder existing businesses, but deter foreign corporations from entering the American market.[243] Yet, the sanctity of our securities markets does not balance upon either premise. Instead, a single factor binds the market: investor confidence.[244] Simply put, if investors do not believe that the markets are secure, they will invest their money elsewhere. This confidence is derived from investor perception of market integrity.[245] Surely, investors both local and foreign are attracted to the U.S. securities markets because they are the largest and safest in the world.[246] These accolades are not mutually exclusive. To be sure, the U.S. markets are the largest *because* they are the safest.[247]

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239. *Id.*
240. *Id.* at 773.
241. *Id.* at 769.
242. *See* Taylor, *supra* note 1, at 389.
243. *Stoneridge*, 128 S. Ct. at 772.
244. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 244-47 (1988); *see also* Taylor, *supra* note 1, at 388.
245. *See Basic, Inc.*, 485 U.S. at 244-47 (1988); *see also* Taylor, *supra* note 1, at 388.
246. See Cheryl Nichols, *H.R. 2179, The Securities Fraud Deterrence and Investor Restitution Act of 2004: A Testament to Selective Federal Preemption*, 31 SUFFOLK TRANSNAT'L L. REV. 533, 537-38 (2008) (explaining that U.S. securities markets are the largest in the world due in part to investor confidence secondary to regulatory framework); *see also* W. Carson McLean, *The Sarbanes-Oxley Act: A Detriment to Market Globalization & International Securities Regulation*, 33 SYRACUSE J. INT'L L. & COM. 319, 324-25 (2005) (noting that U.S. securities markets are the largest in the world).
247. *See* Nichols, *supra* note 246, at 539-40.

Concededly, foreign investors and institutions may be somewhat deterred by an increase in the cost of business or capital. However, the financial uncompetitiveness of U.S. markets as envisioned by Respondents' Amici is not solely a result of an increased cost of business secondary to an increase in the amount of class-action litigation.[248] In fact, at least one commentator has opined that fear of class actions is but a small facet in the decline of U.S. competiveness in the financial services industry.[249] For example, the initial fee for being listed on the NASDAQ (which, ironically, filed an Amicus brief arguing that class-action litigation is to blame for the decrease in U.S. competitiveness) is approximately $100,000 with a subsequent yearly fee of between $25,000 and $75,000 to maintain the listing.[250] Comparatively, the cost for listing on competitor foreign markets was approximately $7,500 for an initial fee and the same amount yearly to maintain the listing.[251] The fact that listing fees on the NASDAQ are approximately ten times as dear surely undermines the competitiveness of U.S. financial services, along with a myriad of other social and economic factors.[252]

Instead, entering a market is likely a balancing of several pros and cons for any foreign entity. This Comment proposes that such entities do not enter a market solely because it is has the lowest cost of business. If this were true, the U.S. markets would likely be a lot less populated. Rather, entities both local and foreign enter the U.S. markets because of the enormous amount of investors trading and the amount of capital such investors make available for funding new opportunities.[253] However, this market rests on a foundation based upon its integrity, and each chip the Court takes out of that foundation brings the house closer to tumbling down. Congress recognized this when it enacted the 1934 Act. The Court recognized this when it created the fraud-on-the-market presumption. Unfortunately, *Stoneridge* marches to the beat of a different drummer.

Primarily, the Court's unwavering reliance on *Central Bank* was misplaced. The conduct of the defendants in *Central Bank* was considerably more benign than that of Respondents in *Stoneridge*.[254] In *Central*

248. *See* Elizabeth F. Brown, *The Tyranny of the Multitude is a Multiplied Tyranny: Is the United States Financial Regulatory Structure Undermining U.S. Competitiveness?*, 2 BROOK. J. CORP. FIN. & COM. L. 369, 376 (2008) (suggesting that, in addition to an increase in class action litigation, expanding the number of regulatory agencies decreases competiveness).

249. *See id.* at 390.

250. *Id.* at 400.

251. *Id.*

252. *See id.* at 376.

253. *See* McLean, *supra* note 246, at 324-25 (suggesting that U.S. securities markets have the largest amounts of investors and capital available for investment and these attributes make it attractive to foreign companies).

254. *Compare* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 167-68 (1994) (noting that respondent's conduct was delaying a land reassessment until after a bond issue), *with* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc. 128 S. Ct. 761, 766-67 (2008) (ex-

*Bank*, the defendants merely postponed a land reassessment until a bond issue was complete.[255] In fact, the *Central Bank* Court concluded that such actions did not amount to a deceptive act within the meaning of § 10(b).[256] However, in *Stoneridge*, Respondents not only agreed to engage in a fraudulent scheme, they actively participated by drafting, backdating, and then signing contracts with the sole purpose of defrauding the market.[257] The Court concluded that such actions amounted to "making" a deceptive act as defined in *Central Bank*.[258] In light of this significant factual difference, the Court should have used caution in relying so heavily on *Central Bank*'s precepts.

The dissent implied that since Respondents "made" a deceptive act they should have been considered primary actors under the strictures of *Central Bank*.[259] Applying this reasoning, the Court was not even presented with the issue of aiding and abetting, and, accordingly, its reliance upon the precedent and policy considerations applicable to aiding and abetting are inapposite to the factual scenario presented by the *Stoneridge* Respondents' conduct. As a result of this interpretation, plaintiffs will seize upon the dissent's reasoning and lower courts will likely continue to develop confusing law as to what conduct amounts to primary liability and what is merely aiding and abetting.

Likewise, the Court's rationale that adequate remedies and deterrents are in place falls short of the mark. Specifically, the Court states that the SEC's enforcement is not "toothless," having collected more than $10 billion in disgorgement since 2002.[260] Recently, however, the SEC has pleaded for additional help in the form of a private right of action.[261] While the SEC's efforts may not be entirely toothless, the SEC is an agency of limited resources.[262] In the words of several former SEC commissioners who submitted an Amicus brief in support of Petitioners:

> The SEC's disgorgement and civil money penalty powers, although enhanced by the Sarbanes-Oxley Act, are limited, and will generally cover only a fraction of the damage done to investors by serious securities fraud. "Moreover, the SEC with limited resources cannot

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plaining that Respondents drafted false contracts and correspondence and backdated those documents to engage in a circular transaction to artificially boost Charter's revenue).

255. *Cent. Bank of Denver*, 511 U.S. at 167-68.
256. *See id.* at 177-78.
257. *Stoneridge*, 128 S. Ct. at 767.
258. *Id.* at 769.
259. *Id.* at 775 (Stevens, J., dissenting).
260. *Id.* at 773.
261. *See, e.g.*, Simpson v. AOL Time Warner, Inc., 452 F.3d 1040, 1048 (9th Cir. 2006).
262. *See* Taylor, *supra* note 1, at 385.

possibly undertake to bring actions in every one or even most of the financial fraud cases that have proliferated of the past few years."[263]

The same Amicus proffered that, while the SEC has disgorgement authority, its efforts are not as effective as a private right of action in compensating the victims of fraud.[264] For example, the SEC was only able to disgorge and return approximately $440 million of the nearly $40 billion of claimed losses as a result of Enron.[265] So, while the SEC's authority may not be "toothless," it certainly does not have the bite the Court suggested. At the end of the day, the Court may not be required to defer to the SEC's judgment, however, that does not mean it should ignore it completely.

Perhaps most misguided of all are the Court's continuing efforts to guarantee a "clear and predictable" rule for the business world. In creating such a rule, the Court in *Stoneridge* gives businesses engaging in shady transactions a shield, when the legislative intent behind § 10(b) mandates that it should be giving plaintiffs injured by those transactions a sword.

Respondents (and their Amici) asserted that they did not break any laws and that the contracts they entered into with Charter were completely legitimate.[266] However, when Charter approached Respondents with the revenue-inflating deal, Respondents had to make a decision of whether to participate. On the one hand, Respondents and their numerous counsel presumably knew the current state of the law regarding § 10(b) liability. Indeed, the law was clear and predictable. As the law then existed, Respondents knew that if they did not speak to the public or have a duty to speak they could not be found liable in a private suit for engaging in the sham transactions.[267]

On the other hand, however, Respondents also certainly knew that their dealings with Charter had no economic value and did not serve any decent economic purpose. While those transactions may have been "legitimate" according to the law as it then existed, they definitely did not serve a legitimate purpose.

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263. Motion for Leave to File Brief Out of Time & Brief Amici Curiae of Former SEC Comm'rs in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2065260, at *8.

264. *Id.* at 7-8.

265. *Id.* at 8.

266. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 767 (2008) (stating that Respondents booked the sham "transactions as a wash, under generally accepted accounting principles"); *see, e.g.*, Brief of the Nat'l Ass'n of Mfrs. as Amicus Curiae in Support of Respondents, *supra* note 216, at *15 (noting that under the rule applied by the Eighth Circuit an entity can only be held liable for violating § 10(b) it makes an affirmative misrepresentation or omits facts it had a duty to disclose).

267. *See Cent. Bank of Denver*, 511 U.S. at 180 (refusing to consider reliance to be met when one does not make a misstatement or omission when there is a duty to disclose).

The question then becomes, what sort of predictable rule most accurately reflects Congress's intent as reflected in §10(b)? As one Senate report noted, §10(b) is designed to prohibit "those manipulative and deceptive practices which have been demonstrated to fulfill no useful function."[268] The Court has departed from the legislative intent it purports to follow by creating a clear and predictable rule that fosters and protects shady business transactions negatively affecting the securities markets. Instead, the Court should seek to create a rule of law that attempts to mend the gap between what is ethical and what is "legitimate."

## CONCLUSION

The Supreme Court's recent decision in *Stoneridge* is a win for persons engaging in fraud in the securities markets. The Court incorrectly determined that fraud-on-the-market theory did not apply and foreclosed Petitioners from asserting that they relied on the integrity of the market instead of on Respondents ' deceptive acts. The Court should have considered how expanding the scope of conduct encompassed by the term "deceptive act" would affect the applicability of the fraud-on-the-market presumption of reliance. This, along with a correct view of causation, would have allowed Petitioners to at least plead that Respondents' deceptive acts caused their injuries.

The Court should have noticed that, as in this case, a misrepresentation communicated directly to the public by the defendant has the same result in the market as a deceptive act committed in secrecy and later disseminated to the public. In both instances the market price is affected. Since all investors are presumed to rely on the price of a security[269] when making a trading decision, it should not matter whether that price was influenced by a direct public misrepresentation or a deception that became public at a later date. As the results are the same, the fraud-on-the-market presumption of reliance should be available under either scenario, not just for direct public misrepresentations.

Further, the chain of causation for a plaintiff applying the fraud-on-the-market presumption should no longer be compared to a standard of actual reliance. The Court should recognize that the market is an additional actor in the chain of causation for plaintiffs using the fraud-on-the-market presumption. As in this case, if the defendant committed a deceptive act, and the substance of that act reached the market, and the plaintiff was relying on the integrity of that market, a sufficient causal nexus should exist.

Instead, it appears that the Court's decision was based largely upon pro-business policy considerations proffered by Respondents and their

268. FLETCHER, FEDERAL SECURITIES EXCHANGE ACT OF 1934, S. REP. NO. 73-792, at 6 (1934).

269. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 247 (1988).

Amici. These considerations, however, are lack-luster. The competitive edge of U.S. securities markets is influenced by a myriad of social and economic factors other than just its cost of doing business. In fact, the most significant competitive advantage of our securities markets is that their size enables an enormous amount of capital to fund the businesses that need it. However, the size of our markets is secondary to their safety. Simply put, more money is available in U.S. securities markets because investors feel comfortable leaving it there. The Court's decision in *Stoneridge* should cause those investors to question the depth of that safety.

*Nelson Waneka*[*]

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