In Defense of Judicial Elections (Sort Of)

by Martin J. Siegel

The election of judges has not fared well lately. Never mind that Thomas Jefferson recommended it and that most states have been at it since before electric lighting—the last several years have been rough sailing. There are many explanations.

To start with, some candidates seem to take conveniently periodic leave of their senses and run campaigns more suited to races for the office of fraternity president. A television ad in an Alabama Supreme Court race portrayed one of the candidates as a skunk. Similarly inspired by the animal kingdom (who can resist?), an ad in Michigan superimposed the head of a candidate onto the body of a cow and stamped the resulting man-beast "approved by corporations." In Wisconsin, one candidate was called "pro-child molester" in a spot featuring the grandmother of a murdered child—a sensational tactic whenever indulged but one especially questionable in this case because the targeted justice had not actually taken part in the challenged decision. An Illinois Supreme Court candidate seemed to imply that his rival approved of sending "innocent men to death row while killers walk the street." In Nevada, the famous image of a Chinese protester blocking the tank at Tiananmen Square was used to symbolize a candidate who claimed he had "stood up" to casinos. *See* Kyle Cheek, *Judicial Politics in Texas* 119–27 (2005).

Even when candidates behave, zany things happen sometimes. In partisan elections, dozens of judges are swept out all at once when one political party has an unusually good year. Seasoned and, in many cases, excellent judges are replaced with novices for reasons having nothing to do with the courts. Or voters take out their frustrations on government or politicians writ large. The failure of a Pennsylvania Supreme Court justice to prevail in a retention election in 2005 was attributed to public anger at a pay raise passed four months earlier *by the legislature.*

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Then there is the problem with names. Because voters lack information about particular candidates, having the right sort of name can mean everything. In 1976, Don Yarbrough spent $350 and gave one speech but still won a seat on the Texas Supreme Court for no discernible reason other than that voters apparently confused him with U.S. Senator Ralph Yarborough or another Don Yarbrough who had previously run for governor. He later resigned, fled the country, and served six years in federal prison.

Names can hurt as well as help. In 2008, Democrats swept most offices in Harris County, Texas, which includes Houston, and won all trial benches except four. See if you can tell what the rare Democratic losers had in common. Their names are Goodwille Pierre, Mekisha Murray, Andres Pereira, and Ashish Mahendru. Not surprisingly, some vowed to use more ballot-friendly nicknames or abbreviations the next time out. The gender reflected by the name on the ballot can also matter; research and anecdotal experience suggest that women tend to do slightly better in judicial elections.

Money has also flowed into judicial races in unprecedented waves, often from outside interest groups. According to one study released this year, candidates for state judgeships have raised $206 million in the past decade, more than double the amount raised in the 1990s. *See* Matthew Mosk, "ABC News Exclusive: Study Shows Money Flooding into Campaigns for State Judgeships," http://abcnews.go.com/print?id=10120048, Mar. 17, 2010. Some races are multimillion-dollar slugfests reminiscent of congressional or gubernatorial campaigns. One Illinois Supreme Court race cost close to $10 million, and even the winner called the amount raised "obscene." The U.S. Supreme Court's loosening of restrictions on corporate spending in elections in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), may further increase the sums devoted to judicial campaigns.

As a result of these developments, a growing chorus of

prominent voices has spoken out against judicial elections, including several Supreme Court justices in both opinions and speeches. As Justice John Paul Stevens put it in his *Citizens United* dissent, "concerns about the conduct of judicial elections have reached a fever pitch." *Id.* at 968. Since retiring, Justice Sandra Day O'Connor has frequently and vocally criticized judicial elections and now leads an effort—formally housed at the Institute for the Advancement of the American Legal System at the University of Denver—to persuade states to reform them. In 2000, a "National Summit on Improving Judicial Selection," organized by the chief justice of Texas and attended by 95 judicial and other leaders, produced a statement more or less endorsing "moving to a wholly appointed judiciary," though it acknowledged such "movement . . . has not occurred in most states." "Symposia, National Summit on Improving Judicial Selection," 24 *Loy. L.A. L. Rev.* 1353, 1354 (June 2001). The American Bar Association and the American Judicature Society have also condemned aspects of state elective systems and called for major changes. Beyond the legal world, editorial boards consistently inveigh against the practice of electing judges.

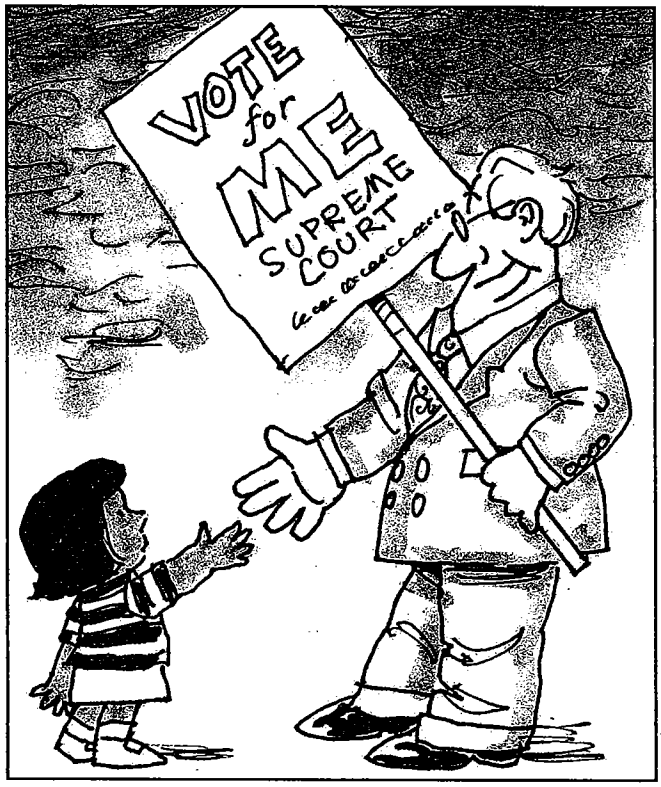
As if all of this were not bad enough, along came *Caperton*, a cartoonish case seemingly encapsulating the practice's every evil. By now, *Caperton*'s basic facts are well known: giant coal company loses a $50 million judgment, company chairman spends $3 million to unseat member of West Virginia Supreme Court soon to review the award, new justice elected with the aid of the $3 million repeatedly refuses to recuse himself, award is overturned in a 4–3 decision. *See Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2257–59 (2009). To bag his target, the chairman funded a group named "And For The Sake Of The Kids," though children were far afield from the real, more pecuniary matters probably on his mind. The U.S. Supreme Court finally required the recusal as a matter of due process. *See id.* at 2264–66. The whole sordid business parallels John Grisham's novel *The Appeal*. When Matt Lauer asked Grisham about the plausibility of the things depicted in his novel, Grisham replied, "it's already happened," and described *Caperton*. Joan Biskupic, "Supreme Court Case with the Feel of a Best Seller," *USA Today*, Feb. 16, 2009, *available at* www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

Given this difficult record, what sort of masochistic lover of hard cases would try defending judicial elections? In my case, it's personal. In 2008, I ran for an intermediate appellate court and lost. So, as a former participant in a judicial election—even one who came up short—I view judicial elections rather like an eccentric uncle. His flaws are all too apparent, but you feel vaguely obligated to speak up for him all the same. This does not mean I believe judicial elections are the best way to pick judges, only that they have benefits I had not fully appreciated and which are sometimes overlooked in the increasingly frequent, necessary debates over reform.

More importantly, judicial elections appear to be here to stay whether we like them or not, at least for the foreseeable future. If so, we may as well take note of their good points and, better yet, consider how to improve them rather than simply quit the field in disgust.

All but 11 states elect at least some of their judges; 15 conduct partisan elections, 20 hold nonpartisan elections, and 19 appoint judges who must then face voters in retention elections. *See* "Fair and Independent Courts: A Conference on the State of the Judiciary," 95 *Geo. L. J.* 1104, app. 1 (Apr. 2007). It has been estimated that 89 percent of state judges must win or retain their seats through election. *See* David K. Stott, "Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform," 2009 *B.Y.U. L. Rev.* 481, 485 (2009).

Statistics on the high proportion of judges who are elected can be misleading, however. Even in states where judges are elected, most first take the bench by virtue of an appointment to fill a vacancy. *See* Jona Goldschmidt, "Merit Selection: Current Status, Procedures and Issues," 49 *U. Miami L. Rev.* 1, 11 (Fall 1994). Once appointed, judges are significantly more likely to prevail in any subsequent election, whether it is contested or simply a retention election, because of their status as incumbents. They will also usually avoid contested primaries. Thus, interim appointments and the power of incumbency make elective systems more stable and predictable—that is, more appointive, less elective, and less objectionable—than they might seem on paper.



One virtue of judicial elections I did not credit sufficiently is that they expose judges to the real people who fill their jury and witness boxes. The district encompassing the bench I ran for spans 10 counties in southeast Texas and includes Houston, which is extremely diverse and urban, as well as small rural counties far from the downtown skyscrapers surrounding the courthouse. The district contains over 4 million people. If a candidate campaigns with any energy at all, he will quickly meet an extraordinarily wide range of people from every sort of background, ethnicity, religion, occupation, and life experience, and with every sort of viewpoint and outlook. He will leave his comfort zone of similarly minded lawyers and find himself in conversation with ranchers in Brenham, energy executives in downtown Houston, nurses in Pearland,

stay-at-home moms in Galveston, shrimpers in Chambers County, doctors in Houston's vast medical center, farmers in Sealy, international traders in Westchase, and on and on.

Learning what these people have to say in casual conversation—about the justice system or whatever else happens to come up—provides interesting and potentially useful perspectives. I did not suddenly become an expert on the issues facing rural Texas by attending a few county fairs, but I did have cause to think with more depth and at least anecdotal data about some of the people and questions affected by what the court does. Places and concepts acquired faces, names, and mental images.

Should some tidbit of information picked up on the campaign trail control the outcome of a case or predetermine judicial thinking on a particular subject? Of course not. But some degree of well roundedness and familiarity with the community beyond the latest bar association meeting is not a bad thing in a judge. As Justice Felix Frankfurter observed in a different context, we need not "protect the court as a mystical entity or the judges as . . . anointed priests set apart from the community." *Bridges v. California*, 314 U.S. 252, 292 (1941) (Frankfurter, J., dissenting). The chief justice of Kentucky put it this way at a recent conference:

> [I]n my opinion, and this is strictly opinion . . . judicial campaigns, the process of running for a judicial office, is not an altogether negative event. It is something perhaps like a root canal, you feel better when it's over but you realize there is something positive in that process. By running for office judges and judicial candidates have an opportunity to learn what real people are doing on a daily basis and learn what they are thinking. Lawyers, as a practical matter, and judges are perhaps not entirely in touch with the real world at all times and so it gives them an opportunity to have a certain level of contact with real folks who are living their lives and those are things that judges need to know.

"The Debate Over Judicial Elections and State Court Judicial Selection," 21 *Geo. J. Legal Ethics* 1347, 1359 (Fall 2008) (remarks of Chief Justice Joseph Lambert).

Just as would-be judges learn about the community during a judicial campaign, people learn more about the doings of their courts. At an early appearance in my campaign, I gave my standard, undoubtedly tedious spiel and then agreed to answer any questions. The first was "What does the court of appeals do?" *Imagine, someone with no idea of what goes on in a court of appeals!* Hard for any lawyer-nerd like me to grasp. I hemmed and hawed and then started in with an explanation I was to find myself refining and recapping throughout the course of the race. Judicial elections provide innumerable occasions every two years for dozens of lawyers to fan out through the community and talk about the courts and the law. In that way, they play at least some role in educating citizens about the least-known branch of their government.

Aside from whatever substantive knowledge may be transmitted on these occasions, the fact of the interaction itself says something positive about our bottom-up form of government and the proper humility of its employees. Campaigns give people a chance to rub shoulders with judges and appreciate their status as public servants, not just the forbidding, black-robed officials who literally sit above them in courtrooms flanked by flags and uniformed security. The order that exists in court and the figure presented by the judge there convey an important and reassuring message, one centered on the authority and dignity of the law. But humanizing judges on occasion and giving people the opportunity to see the other side of the coin are not bad things either.

Of course, some of what lawyers campaigning for judicial office say to their fellow citizens about the courts and other judges is neither accurate nor appropriately decorous. Once upon a time, state laws and bar rules attempted to keep judicial elections civil by preventing candidates from commenting on matters likely to come before the courts and, more generally, from smearing opponents. In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), however, the Supreme Court invalidated a Minnesota rule preventing a judicial candidate from "announc[ing] his or her views on disputed legal or political issues"—a rule implicated when a candidate distributed literature "criticizing several Minnesota Supreme Court decisions." *Id.* at 768. Holding that "[w]e have never allowed the government to prohibit candidates from communicating relevant information to voters during an election," the Court struck down Minnesota's regulation. *Id.* at 781.

The commonly held view is that *White* has accelerated the nastiness and expense of judicial campaigns, and this is undoubtedly true to some degree. Justice O'Connor, who joined the 5–4 majority, has since reportedly voiced misgivings over the decision. *See* Stott, *supra,* at 482. But the sometimes overlooked fact is that most judicial elections do not feature millions of dollars in fundraising and vicious attack ads. These evils are mainly attributes of elections to a handful of supreme courts that have become particular battlegrounds in recent years. Judging the hundreds or perhaps thousands of judicial elections that occur every cycle by what happens in the worst of the supreme court races is a little like judging the merits of the entire federal appointment and confirmation system by the relatively few nominations that run aground. The exception does not always prove the rule.

Unlike supreme court races, most lower court elections are still quieter affairs characterized by relatively low levels of spending, campaigns centered on the biography of the candidate, campaigning through personal networking, and low-cost methods of promotion such as yard signs or a small number of mail pieces. Because the funds involved are usually modest, spending rarely dictates outcomes. A review of the 2006 judicial elections in Cook County, Illinois, found "very little connection between candidates' vote percentages and the margins by which they outspend or are outspent by their opponents." Albert J. Klumpp, "The 2007 Judicial Elections: Partisanship, Campaign Spending, & Voter Turnout," 21 *CBA Rec.* 34, 35 (Jan. 2007).

Despite the new freedom granted by *White*, candidates typically hew to traditional campaign content. In Dade County, Florida's 2004 elections, for example, political scientist Rebecca Salokar observed that "candidates preferred to campaign on experience and qualifications alone, a style that was also embraced by the broader legal and civic community." Rebecca Mae Salokar, "After *White*: An Insider's Thoughts on Judicial Campaign Speech," 26 *Just. Sys. J.* 149, 155 (2005). A more recent examination of lower court elections in six states by two professors also found that they remain "friends and neighbors efforts" and "do it yourself affairs" without paid staff or much assistance from interest groups or parties. "Most messages in lower court campaigns focus on experience and qualifications; few campaigns launched

negative attacks or made positions on specific issues a central message of their campaign." Brian Arbour and Mark McKenzie, *2008 Judicial Campaign Survey* (unpublished) at 1 (July 2009).

In addition to the benefits of throwing judges together with real people on occasion, proponents of judicial elections stress their role in holding judges accountable. Whether that is positive depends on the kind of accountability in question. The bad sort occurs when elected judges are or appear to be beholden to contributors, the political parties they belong to, a desire for popularity or re-election, personal agendas, the goals of one or another segment of the bar or electorate—or anything else besides the law and the facts.

How often does this happen? The evidence is mixed. An analysis of Ohio Supreme Court decisions by the *New York Times* in 2006 found that justices voted in favor of their contributors 70 percent of the time, and a Louisiana study found similar discouraging results. *See* Lawrence M. Friedman, "Benchmarks: Judges on Trial, Judicial Selection and Election," 58 *DePaul L. Rev.* 451, 460–61 (Winter 2009).

On the other hand, an evaluation of Wisconsin showed that lawyers who donated to judges were no more likely to win their cases. *See id.* And three law professors who reviewed the decisions of the judges of the highest courts of every state from 1998 to 2000 for independence, productivity, and quality arrived at similar conclusions. According to their measure of independence—the rate at which judges wrote opinions disagreeing with the decisions of other judges of the same political party—judges chosen in partisan elections unexpectedly demonstrated the greatest independence. *See* Stephen Choi, G. Mitu Gulati, and Eric Posner, "Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary," John M. Olin Law and Economics Working Paper No. 357, at 17–22 (Aug. 2007), *available at* www.law.uchicago.edu/lawecon/index.html. The professors also determined that elected judges are more productive (measured by number of opinions written), though the opinions of appointed judges were of higher quality (measured by how often out-of-state courts cited them). *See id.* at 26–32, 39–40. "Although our evidence does not prove that elected judges are superior to appointed judges," the professors concluded, "it casts doubt on the conventional wisdom [that appointed judges are superior], and broadens the scholarly debate." *Id.* at 4.

Whatever the reality, recent polls reflect doubts about elected judges. People assume they are influenced by campaign contributions and biased toward supporters. *See* Friedman, *supra,* at 459–60; Adam Skaggs, "Judging for Dollars," *New Republic*, Apr. 3, 2010, *available at* www.tnr.com/article/politics/judging-dollars. Incredibly, some surveys *of judges* revealed many acknowledging that contributions sometimes color their decisions. *See id.* According to a former California Supreme Court justice, "you cannot forget the fact that you have a crocodile in your bathtub. You keep wondering whether you're letting yourself be influenced, and you do not know. You do not know yourself that well." Bert Brandenberg and Roy A. Schotland, "Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns," 21 *Geo. J. Legal Ethics* 1229, 1240 (Fall 2008) (quoting Otto Kaus). This kind of "accountability" is the great danger of elective systems and the reason why they should be substantially reformed or dispensed with altogether. Maintaining public confidence in the courts and the impartiality of judges in jurisdictions where judges are elected is essential, yet polls suggest that both are eroding.

There is a narrower form of accountability, however, that has nothing to do with the substance of decisions or the outcomes of cases, and this form of accountability is properly fostered by judicial elections. When judges have committed financial or other impropriety, elections can provide a quicker and surer path to removal than the process of impeachment, which can take an agonizingly long time to reach fruition. There may also be offenses warranting removal short of the necessarily high bar of impeachment. Much has been written about gaps in the system of judicial self-discipline over the past few years; elections can provide a necessary cure for sluggish, secret, or overly generous treatment of judges by one another in rare cases of misconduct. Of course, this presumes that judicial misdeeds are publicized widely enough to affect the course of an election. If the media and voters are not paying attention, judicial elections cannot serve as a corrective. But while most judicial contests are soporific events, scandal is the one thing that can catapult them onto the front pages and into public consciousness, particularly in smaller jurisdictions.

There are also judges whose temperament or capacity to do the work may have suffered over time. In places where lawyer evaluations or "bar polls" percolate out from lawyers to their friends and neighbors and to civic groups and media outlets making endorsements, judges can pay a price for performance widely perceived to be poor. The review of the 2006 elections in Cook County found that receiving bar and newspaper recommendations yielded a 4.6 to 6.7 point advantage. Klumpp, *supra,* at 35. In the election I took part in, the only incumbent appellate judge to lose a primary was thought to have done so at least in part because of much lower ratings in bar polls. As with misconduct, this sort of accountability depends on sufficient numbers of properly informed voters. But at least in some extreme cases, elections can bring about beneficial changes that could not occur without some mechanism for replacement.

Weighing merit selection against contested elections may be a waste of time.

In sum, judicial elections are not all bad. They have positive attributes easily overlooked in our correct if increasingly reflexive condemnation of the latest misleading television spot in the latest grossly over-funded supreme court race. That is not to say that judicial elections are preferable, on balance, to appointive systems. But that scarcely matters if states are unwilling to abolish them, as they seem to be.

Electing judges gained favor in the Jacksonian era as a reaction to the belief that state legislators and executives used judgeships to reward cronies and manipulate the courts, and some of that populism lingers on today in many states' unwillingness to change. Rural legislators from districts where the judges are personally well known to the electorate also rarely see the need for a new system. One commentator has calculated that, if change occurs at the same pace it has over the last

century, it will take 160 years before all appellate judges are appointed rather than elected, and 770 years for trial judgeships. Roy Schotland, "National Summit on Improving Judicial Selection: Introduction: Personal Views," 34 *Loy. L.A. L. Rev.* 1361, 1367 (2001). As the Conference of Chief Justices recently put it:

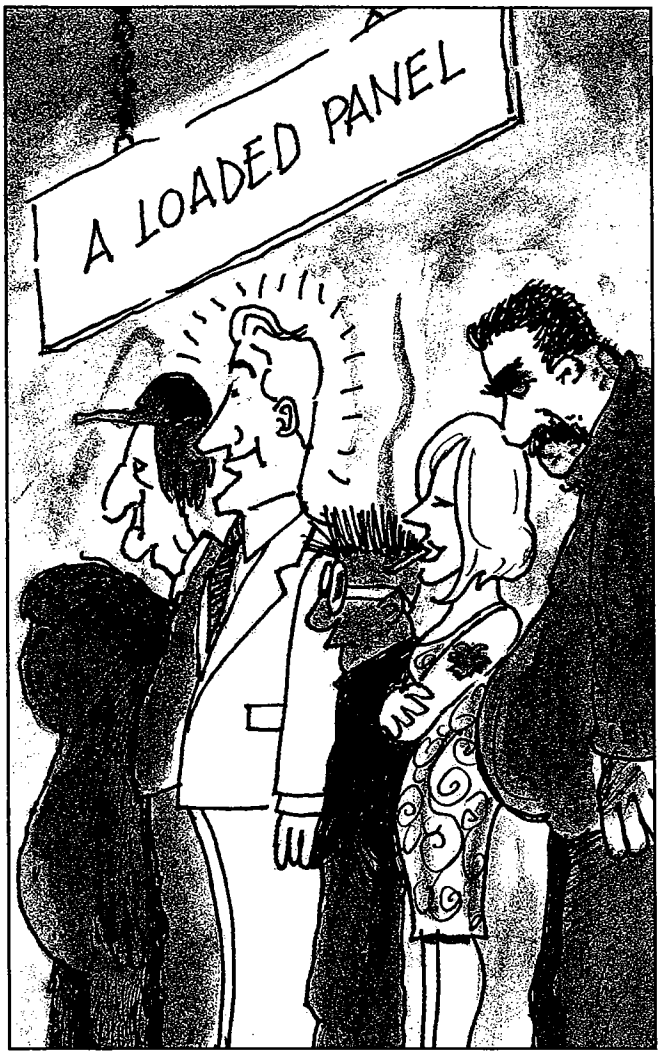
> Whatever one's view of the desirability of judicial elections, a generation of experience (including recent rebuffs by the voters of Florida, Ohio, and South Dakota of attempts to eliminate judicial elections), makes it clear that elections will stay in many and perhaps all of the states that have that system. It follows that our goal must be to reduce the problems in judicial elections, as well as the problems in appointive systems that are also experiencing pressure to become more political.

Conference of Chief Justices, Judicial Elections Are Different from Other Elections, Resolution of February 7, 2007, *available at* http://ccj.ncsc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html.

There are many reforms worth considering. Perhaps the most sweeping entails switching from contested elections to retention elections following some form of appointment, including so-called merit selection. Nineteen states use this method for choosing some or all of their judges. In states with merit selection, a public official, usually the governor, selects one of several candidates screened and submitted by a nonpartisan panel of lawyers and lay community leaders. The chosen candidate serves for a time and then faces an uncontested retention election.

To its supporters, merit selection achieves the benefits of an appointive system while retaining some of the flexibility and accountability inherent in elections. As in appointive regimes, candidates are screened to some degree for quality, and partisanship and political considerations diminish if the selection committee truly operates apolitically. Surveys of merit selection panel members demonstrate that most believe politics is not typically a factor in choosing candidates. *See* Goldschmidt, *supra,* at 52–53. Retention elections generally feature lesser amounts of spending, fundraising, advertising, and inappropriate acrimony. Not surprisingly, the vast majority of judges put to the voters in retention elections keep their jobs, leading to greater stability and predictability in the judiciary. Justice O'Connor, who helped create Arizona's merit selection system as a state legislator, has been described as a "merit selection evangelist." Tony Mauro, "Reformers Hope High Court Decision Will Kill Judicial Elections," *Nat'l L. J.*, Feb. 1, 2010, *available at* www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202439680529.

Still, merit selection has its critics. "Independence is a much sought and rarely satisfied component" of merit selection, U.S. Senator John Cornyn wrote in urging Texas to eliminate its partisan judicial elections; "[a]s one sage put it: 'You can't take politics out of politics.'" John Cornyn, Letter to the Editor, *Tex. Lawyer*, Mar. 30, 2009. Proving his point, an early study of Missouri's merit selection system observed several creative strategies sometimes used to politicize the selection process: "panel-loading," where the list of candidates to be evaluated by the governor contains one strongly political choice and others included only for "window dressing"; "panel-rigging," where the list has one



politically attractive choice and others who are politically unappealing, such as opponents of the governor or members of the other party; "panel-wiring," where the governor makes his choice known to the merit panel in advance; and "logrolling," where commissioners deal and trade support for one another's preferred candidates. *See* Goldschmidt, *supra,* at 51–52.

Retention elections, too, can blow up into expensive, highly charged affairs just like their contested cousins, as the campaign to unseat Rose Bird and two other California Supreme Court justices in 1986 demonstrated. In any case, carefully weighing merit selection against contested elections may be a waste of time. Research has shown that the backgrounds and qualifications of judges selected through merit selection do not differ greatly from those chosen through ordinary elections, *see id.* at 38–45, and recent "analyses of the decision-making of merit judges versus elected judges have revealed no important differences between the two groups." Malia Reddick, "Merit Selection: A Review of the Social Scientific Literature," 106 *Dick. L. Rev.* 729, 742–43 (Spring 2002).

Another reform entails making judicial elections nonpartisan, as they already are in many states. The appeal of removing partisan designations on judicial ballots requires no explanation. Judges should act without regard to political party

and so should stand for election that way. In theory, making elections non-partisan will free voters to choose solely on the basis of candidates' qualifications.

Like merit selection, though, non-partisan elections are not a panacea. Lacking the cue supplied by party affiliation and other information, voters may resort to even less relevant bases for their decision, such as how the name sounds. Overall voter participation in judicial elections declines in non-partisan contests. Moreover, one analysis of North Carolina's 2002 switch to non-partisan elections concluded that it "fails to remove partisanship from elections, merely whitewashing party labels from the ballot, but not from the actual campaigns." Brian Troutman, "Party Over? The Politics of North Carolina's 'Non-Partisan' Judicial Elections," 86 *N.C. L. Rev.* 1762, 1781 (2008). Candidates continued to campaign as members of one or the other party, and the parties themselves supported and identified them as such. *See id.* at 1781–82. Attempting to restrict speech of this kind would likely fail under *White*.

Reformers have advocated for the establishment of judicial campaign conduct committees.

A third set of reforms focuses on the financing of judicial campaigns. These range from stricter contribution limits to better disclosure to full public financing. Wisconsin offers partial public funding to supreme court candidates, while North Carolina and New Mexico offer some level of public funding to appellate court candidates. Candidates agree to keep their spending under a specific ceiling in exchange for receiving public dollars and, in the process, presumably become less beholden to lawyers and other private contributors. The American Bar Association has endorsed public financing of some judicial elections.

North Carolina's public financing regime appears to have had a real impact. In 2006, candidates who accepted public funding prevailed over those who rejected it. *See* Troutman, *supra,* at 1776. Private contributions to judicial candidates have fallen by half. Zach Patton, "Robe Warriors," *Governing* (Mar. 2006), *available at* www.governing.com/topics/politics/Robe-Warriors.html. The system "has not favored any particular class of candidates: Seats have been won by incumbents and challengers, women and men, whites and minorities, Republicans and Democrats." Brandenberg and Schotland, *supra,* at 1252. One judge who participated in the program wrote:

> I had much more interest in my campaign and many more contributors to my campaign than ever before, since every voter could contribute even as little as $10 and truly benefit the campaign. Once my campaign raised the required funds to qualify for public financing, I was then free to spend the remainder of the campaign focusing on my record, my qualifications—and not on fund-raising.

Having seen it in operation, 74 percent of North Carolina's voters favor publicly funding judicial campaigns, according to one poll. *Id.* at 1252–53.

Yet public funding has not been an unqualified success. In Wisconsin, the system, funded by check-offs on tax returns, has failed to raise enough money to adequately fund campaigns, and candidates have increasingly declined to participate. *See* ABA Standing Comm. on Judicial Independence, *Report of the Commission on Public Financing of Judicial Campaigns* 27–29 (Feb. 2002). There are early signs that North Carolina's system is suffering from similar underfunding. *See* Troutman, *supra,* at 1776. Moreover, because states cannot constitutionally limit expenditures by third parties or interest groups for or against candidates, public financing cannot completely eliminate the high cost and contentiousness of judicial elections. Some also complain that public funding will lure marginal or unqualified candidates tempted by the prospect of an easier, subsidized campaign into the fray, while others object to taxpayers being compelled to support candidates' political speech.

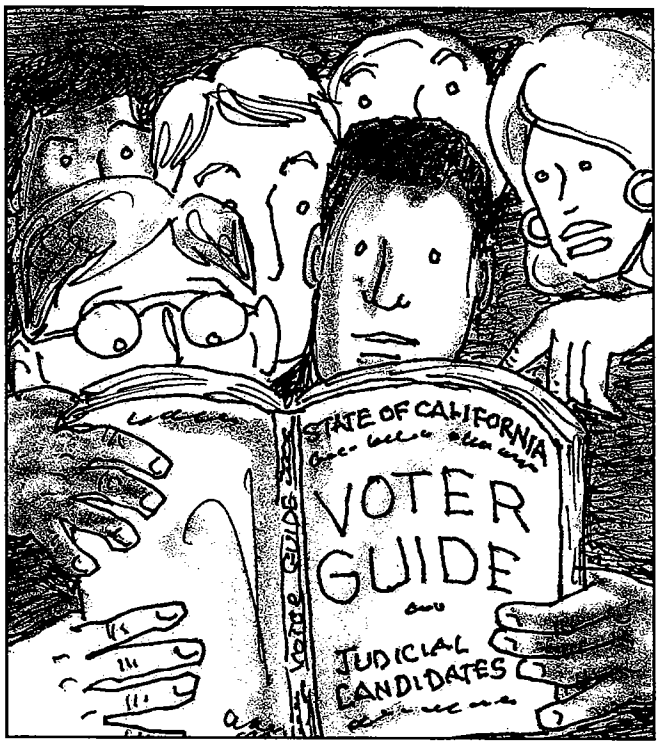
At a minimum, states should re-examine contribution limits in light of the trend toward increased spending in judicial races. They should also recognize the snowball effect of multiple contributions from a single law firm. Texas is currently the only state that limits not only the amount that can be given by individuals but also the aggregate amount permitted from employees of any one firm. *See* Brandenberg and Schotland, *supra,* at 1247. Other states should consider analogous rules. Shorter campaigns might also help. In Texas, running for judge is an 18–24 month proposition in light of the need to secure a party's nomination 8 months before the November election. Moving judicial primaries much closer to the general election or finding other ways to shorten campaigns could help reduce fundraising and campaign spending and entice higher-caliber candidates who otherwise balk at such a time-consuming diversion from their practices to seek judicial office.

While some reformers focus on donors, others look to the recipients and propose attacking the problem by heightening the duty to recuse. *Caperton* only requires recusal in "extreme" cases, but the majority noted that "states may choose to adopt recusal standards more rigorous than due process requires." *See* 129 S. Ct. at 2265–66 (quotation omitted). This could be accomplished in a number of ways. Rule 2.11(A)(5) of the 2007 ABA Model Code of Judicial Conduct recommends requiring recusal when "the judge, while a judge or a judicial candidate, has made a public statement . . . that commits or appears to commit the judge to reach a particular result." One commentator proposes other ways to make recusal motions, now notoriously hard to win, less difficult, such as assigning them to other judges, taking steps to lower their cost, and allowing each party one peremptory "recusal strike" at the beginning of the case—a procedure some states already employ. *See* Stott at 507–11. Spurred on by *Caperton*, Michigan recently strengthened its recusal rule.

States could also simply require recusal whenever a judge has received a campaign contribution over a certain threshold from one of the parties or its lawyers if the other side requests it. If critics of judicial elections are correct that contributors give in order to curry favor with soon-to-be-judges, and that campaigns have become too expensive, requiring recusal in cases of large contributions would have the added benefit of

reducing overall fundraising and spending in judicial races. Of course, fashioning such a rule poses the usual difficulties in drawing lines. Should recusal be mandatory where the judge has accepted sufficiently large contributions from members of an industry or a segment of the bar likely to be interested in the outcome, but not one of the specific parties or lawyers? Although Wisconsin's Supreme Court narrowly rejected this sort of rule in a recent 4–3 vote, linking automatic recusal to contributions rather than simply depending on the judge to recognize and confess his own sins bears serious consideration by other states.

Finally, some reforms aim to better educate voters about judicial candidates. Several states, including Oregon, California, Washington, Alaska, Colorado, and more recently North Carolina, produce voter guides that are either mailed to voters or available online or both. They contain basic biographical information about the candidates and may also include judicial evaluations by bar groups or conduct committees. Exit



polls have found significant voter approval of guides and indications that voters rank them higher than any other source of information about candidates. *See The Debate over Judicial Elections*, *supra,* at 1375–76 (remarks of Professor Roy Schotland). Wider and more effective dissemination and publicization of voter guides can end at least some voters' habit of making selections based on irrelevant criteria.

Reformers have similarly advocated for the establishment of judicial campaign conduct committees. As of 2007, there were 15 statewide committees and several more formed by localities. *See* David Rottman, "Conduct and Its Oversight in Judicial Elections: Can Friendly Persuasion Outperform the Power to Regulate?," 21 *Geo. J. Legal Ethics* 1295, app. (Fall 2008). They can be official or quasi-official, with some imprimatur and staffing from state administrative or judicial bodies and officers, or completely private, in which case they typically consist of a mix of prominent members of the bar and the wider community. The committees usually do some or all of the following: provide education to candidates on appropriate methods of campaigning, hold public forums on judicial campaigns and elections, devise or publicize codes of campaign conduct and ask candidates to pledge to abide by them, receive complaints about misleading advertisements or other misconduct and respond with admonishments or cease-and-desist requests circulated to the media and the public, refer complaints to official disciplinary bodies, and compile information about and evaluate sitting judges and candidates and publish that information in voter guides and other formats.

Reviews of campaign conduct committees have been mostly positive. Kentucky's committee was a significant force in the 2006 elections, distributing 40,000 copies of a set of candidate expectations, obtaining pledges of adherence from most of those running, speaking out against ads perceived to be unfair, and writing op-ed pieces. *See id.* at 1305. In return, the committee gained currency with the public; one newspaper article praised it as "a non-partisan group that has stepped up to referee candidates' claims and tactics." *Id.* at 1305–06. In Maryland, the committee resolved complaints and also garnered positive media attention. *See id.* at 1306. In Miami, the chair of the local committee noted that it was credited with improving judicial campaign tactics and that ads were consequently "more dignified." *See id.* at 1308. In 2002, the ABA's Standing Committee on Judicial Independence and other ABA and non-ABA committees recommended that bar associations form conduct committees in all jurisdictions holding judicial elections, and a variety of commentators have concurred. "If the solution to harmful speech must be more speech," Justice Stevens wrote in his dissent in *White*, "so be it." 536 U.S. at 797 (Stevens, J., dissenting).

Any one of these reforms alone may promise only modest change, and some may be unsuited to particular jurisdictions. But the right mix of innovations tailored to the specific circumstances of each state might significantly improve judicial elections. I began as a judicial candidate with a dim view of the process of electing judges, albeit one I was willing to wade into. I ended the campaign with, if not a full endorsement, at least a firsthand appreciation that there are assets as well as liabilities. Because judicial elections seem unlikely to vanish anytime soon, we should redouble our efforts to fix them and not simply lament their impressive staying power. Writing in *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008), Justice Anthony Kennedy summarized this point well:

> In light of this longstanding practice and tradition in the States, the appropriate practical response is not to reject judicial elections outright but to find ways to use elections to select judges with the highest qualifications. A judicial election system presents the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process. Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates. The organized bar, the legal academy, public advocacy groups, a principled press, and all the other components of functioning democracy must engage in this process.

Id. at 212.