January 2005

If At First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts

Amam McLeod

University of Michigan, Ann Arbor

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Election Law Commons, and the Judges Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol107/iss2/7

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
Editor's Note
from Volume 107, Issue 2


The above student note should have given proper attribution to materials filed as part of the pending litigation of Clark v. Druckman, No. 32577 (W. Va. 2005). In the interest of full disclosure, the author developed this student note while affiliated with a law firm involved in the above litigation.

Correction
from Volume 107, Issue 2


Footnote 68: This citation should read as follows: See GREENBERG QUINN ROSNER RESEARCH, INC., JUSTICE AT STAKE CAMPAIGN, JUSTICE AT STAKE – POLL OF 1000 RESPONDENTS 4 (Oct. 30 – Nov. 7, 2001), available at http://www.faircourts.org/files/justicestakepoll2001.pdf (last visited Mar. 30, 2005). The sentence on page 509 referencing footnote 68 should read as follows: Also, a national survey by the Justice at Stake Campaign found that seventy-six percent of the respondents believed that contributions exert at least some influence on the judges who receive them.
IF AT FIRST YOU DON'T SUCCEED:
A CRITICAL EVALUATION OF
JUDICIAL SELECTION REFORM EFFORTS

Aman McLeod

I. INTRODUCTION ................................................................. 499
II. ELECTIONS - A POPULAR AND CONTROVERSIAL MEANS OF
SELECTING AND RETAINING JUDGES .............................. 501
III. STUDIES OF ELECTED JUDGES' DECISIONAL PROPENSITIES 502
A. The Effect of Constituent Opinion .................................. 502
B. The Effect of Campaign Contributions ............................. 505
IV. THE IMPORTANCE OF JUDICIAL IMPARTIALITY .......... 509
V. JUDICIAL ELECTION REFORM ............................................. 511
   A. Merit Selection and Retention ................................... 512
   B. Problematic Campaign Speech or Materials ................. 514
      1. Voluntary Campaign Speech Restrictions ................... 514
      2. Campaign Monitoring Committees ............................. 514
      3. Fair Reporting Compacts ....................................... 515
   C. Problematic Campaign Financing ................................ 515
      1. Voluntary Campaign Spending and
         Contribution Limits ............................................. 515
      2. Public Financing ................................................ 516
      3. Blind Trust Funds ............................................... 519
      4. Strengthening Disqualification Rules ....................... 520
      5. Prohibiting Contributions from Certain Sources ......... 521
VI. CONCLUSION ...................................................................... 521

I. INTRODUCTION

In 1812, Georgia became the first state to provide for the popular election of its judiciary. Since then, Georgia, like many other states, has been in-
volved in an effort to reconcile two very different ideals in its judicial system: accountability to the public and impartiality. Impartiality, which is the principle that judges should treat litigants in an equal and unbiased manner, is of fundamental importance in a constitutional form of government. However, since the Nineteenth Century, Americans have tried to maintain the impartiality of the judiciary while at the same time adapting the institution to accord with the view that judges should understand and be responsive to the values and desires of the citizens in their communities.

This Article will argue that, in spite of the best efforts of many over the years, attempts to reconcile judicial accountability with impartiality have not succeeded. It will also argue that these efforts are doomed to failure because of the impossibility of creating a system in which judges remain impartial, but are given an incentive to cultivate the good will of others in order to keep their jobs. Although elections are not the only means used to select and reselect judges, this Article will focus primarily on the effects of elections on judicial impartiality. This is because elections are the most widely used form of judicial selection and reselection, and because most of the research on the effects of public opinion on judicial decision making involves courts that are subject to elections.

Part II focuses on the controversy surrounding elections as a means of judicial selection and retention. Part III presents the results of various studies which indicate that electoral considerations can compromise the impartiality of some judges, while Part IV advances the thesis that impartiality is a more important attribute than accountability to the judiciary. Part V evaluates various reforms that have been proposed to diminish the threat that elections pose to judicial impartiality, and Part VI presents an argument as to why none of these reforms can effectively reconcile accountability with impartiality within the judiciary. Finally, Part VII advocates the elimination of judicial elections and all other forms of judicial reselection as the only means of removing the threat that reselection poses to the judiciary’s reputation for impartiality. This section also suggests alternatives to judicial reselection, including appointment of judges for life, or for a single, lengthy term, that would better insure the independence and impartiality of the judiciary both in appearance and in fact.


5 See id. at 3-12. Thirty-nine states use some form of elections (partisan, non-partisan, or retention) to select or retain their judiciary at some level. Id.
II. ELECTIONS - A POPULAR AND CONTROVERSIAL MEANS OF SELECTING AND RETAINING JUDGES

Today, nearly all states have built some form of tenure review into their judicial systems as a routinized means of holding judges accountable for their decisions. A distinction is made here between "routinized" means of holding judges accountable, such as elections, and "extraordinary" means of holding them accountable, such as impeachment and removal, which are usually reserved for incidents of ethical or criminal misconduct. Massachusetts, New Hampshire, and Rhode Island stand out as the only states that do not force their judges to submit to any form of reselection. Furthermore, among those states that use some form of judicial tenure review, there can be no doubt about the popularity of elections as a means of selecting judges and deciding whether they should remain in office. Today, all but eleven states and the District of Columbia use elections in either the selection or retention process. However, despite the fact that most of the states have tried to build accountability into their judicial systems by using elections, there is no consensus about which election system best protects judicial impartiality. For example, today there are three distinct election based systems for selecting and retaining judges: partisan elections, in which judicial candidates appear on the ballot with their political party affiliations; non-partisan elections, in which judicial candidates appear without party affiliations; and retention elections, in which judges appear without their party affiliations and in which citizens vote yes or no about whether a judge should remain in office for another term. Partisan elections represent the oldest form of judicial elections. However, many states have turned away from them over the last century, in favor of non-partisan elections and retention elections, in part, as a way of protecting the judiciary’s reputation for fairness from the deleterious effects of having judges openly associated with political parties and their policy positions. Still, complaints persist that judicial candidates’ need to raise money to fund their election campaigns compromises their ability

6 See id.
8 See American Judicature Society, supra note 4, at 4-12.
9 The eleven states are Connecticut, Delaware, Hawaii, Massachusetts, Maine, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia. See id.
10 See id.
12 See id. at 17.
13 See id. at 24-25.
to fairly decide the cases before them and lower the public’s confidence in the impartiality of the judiciary. Critics of judicial elections have also pointed out that the electorate in these contests is often uninformed, and that judicial candidates sometimes make statements or engage in political activities that compromise their reputation for impartiality.

Despite the fact that there are complaints about the negative effects of judicial elections on the judiciary, the following question must be asked: what evidence exists to support these allegations? A simple way to answer this question would be to say that anything that causes people to doubt the fundamental fairness of the judiciary is a threat to the institution’s political legitimacy and to the authority of its decisions, and that because elections raise such doubts, they should be eliminated from the judicial selection and reselection process. However, this answer is insufficient because it does not take seriously the responsibility of those who call for a fundamental change in one of society’s most important institutions to present evidence to support their claim that the institution is flawed and to suggest ways to correct the problem.

Anecdotal evidence about isolated incidents of suspicious behavior by certain judges or courts can always be dismissed as unrepresentative of a larger pattern of biased behavior on the part of the judges or courts implicated. More persuasive evidence about the possible influence of electoral considerations on judges’ decision making can come from studies that survey several courts, many judges, and a large number of cases. The results of such studies, especially those that are designed to control for effects of other variables that could be confounded with the effects of electoral stimuli, are more persuasive than anecdotal evidence because they cannot be as easily dismissed as aberrational.

III. STUDIES OF ELECTED JUDGES’ DECISIONAL PROPENSITIES

A. The Effect of Constituent Opinion

Evidence supporting the conclusion that judges’ behavior on the bench is influenced by factors relevant to their electoral fortunes has been mounting over the last two decades. For example, in a case study of the Louisiana Supreme Court, Melinda Gann Hall tested her hypothesis that appellate judges who
wish to quell public criticism of their rulings will tend to dissent from majority opinions less frequently than those who are not as concerned about public opinion.\textsuperscript{18} Hall based this supposition on the fact that dissenting opinions tend to distinguish their authors from the rest of the court, and might be less easily defensible in the eyes of the public, given that they failed to garner the support of a majority of the court.\textsuperscript{19} In a series of in-depth interviews with the members of Louisiana's high court, Hall found that a justice who described himself as a liberal because he tended to favor the defense in criminal appeals more often than the rest of the court, said that he frequently sided with the majority in death penalty appeals (whether for or against the defendant) in an effort to blunt potential criticism that he was too soft on criminals when his term expired.\textsuperscript{20} In the interviews, this judge stated that retaining his office was his primary motivation for engaging in this strategy, and that in doing so he sometimes let political considerations outweigh his honest assessment of the merits of the case.\textsuperscript{21} He explained his decision to limit his dissents in death penalty cases by specifically citing the amount of publicity that these high profile decisions were likely to receive in the state's newspapers and in potential opponents' campaigns against him.\textsuperscript{22} He was also very much aware of the fact that his general opposition to the death penalty put him at odds with the views of most of his constituents.\textsuperscript{23} The fact that he was engaging in this strategy because he feared being out of step with his electorate is highlighted by the fact that two other justices on the same court who did not as frequently side with criminal defendants in non-capital cases, and who did not express as much anxiety about their chances of being reelected, dissented more often in capital cases than the justice who feared for his seat.\textsuperscript{24}

In a landmark empirical study following up on the evidence from Louisiana, Hall tested the hypothesis that elected judges respond to what they perceive to be their constituents' policy preferences by examining the voting patterns of the justices of the following courts of last resort in criminal appeals: Kentucky, Louisiana, North Carolina, and of the Texas Court of Criminal Ap-


\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.} at 1119-22. Hall's study of the Louisiana justices' votes in criminal appeals found that this justice was the most likely of all of the justices on the court to favor the accused in criminal appeals. \textit{Id.} at 1121.

\textsuperscript{21} \textit{Id.} at 1120.

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.} at 1121-23.
Specifically, Hall wished to discover whether there was evidence that the "liberal" justices of other supreme courts were mimicking the defensive behavior of the Louisiana justice who sought to blunt charges that he was "soft" on criminals by avoiding dissents in capital punishment cases. The study was further facilitated by the fact that public opinion polls in all of these states indicated that their citizens strongly supported the death penalty, which, in turn, suggested that the justices who supported the accused in such cases were acting contrary to the wishes of their constituents.

Hall then identified ten "liberal" justices whose voting records indicated that they supported the defense more often than their colleagues in criminal appeals. Her findings confirmed her hypothesis that liberal justices in states where the death penalty is popular often seek to protect themselves from political criticism by siding with the majority in death penalty cases. However, she also found that the liberal justices' sensitivity to the political consequences of their votes was greater if those justices were elected from districts as opposed to statewide, if they had held elected office previously, or if they faced another election within two years or less. Hall also discovered that liberal justices who won their last elections by smaller margins and justices who had experience seeking reelection were more likely to vote with the conservative majority in death penalty cases than were justices who had won by larger margins, or who had not yet sought reelection to the court.

These findings about the sensitivity of judges to matters affecting their reelection were confirmed in a larger study published three years later by Hall and Paul Brace. This study looked at supreme court justices from California, Illinois, Kentucky, Louisiana, New Jersey, North Carolina, Ohio, and Texas, and included variables to control for the influence of important state legislation, case facts, and the political environment in the state. The results indicated that elected justices from states with contested elections were significantly more

25 Melinda Gann Hall, Electoral Politics and Strategic Voting in State Supreme Courts, 54 J. Pol. 427, 433 (1992). Note that the Texas Court of Criminal Appeals is the court of last resort for criminal cases in Texas. See id. The Texas Supreme Court serves this function for all other types of cases. See Tex. Const. of 1876, art. V, § 3, cl. a.
27 Id. at 435.
28 Id. at 433-36.
29 Id. at 438-40.
30 Id. at 438-42.
31 Id. at 439.
33 Id. at 13-24.
JUDICIAL SELECTION REFORM EFFORTS

likely than those from states with retention elections (or without elections) to favor the state in death penalty appeals.\textsuperscript{34} A later study of the California Supreme Court's justices showed that some of them displayed the same sort of responsiveness to public opinion about the death penalty, and, more specifically, to active targeting by political opposition.\textsuperscript{35}

B. The Effect of Campaign Contributions

However, the empirical evidence suggesting the influence of electoral considerations on judges' decisions is not limited to studies of how the political environment shapes judges' decisional propensities. Empirical evidence also exists indicating that the need to raise funds for elections might also be influencing some judges as they decide the cases before them.\textsuperscript{36} Given that running for office is a costly proposition for judges,\textsuperscript{37} and that judges see the ability to raise money as vitally important to their election prospects,\textsuperscript{38} it is logical to assume that judges might reward those who contribute to them with favorable rulings, and punish those who do not contribute to them with unfavorable rulings in an effort to make sure that their campaign coffers will be full at the next election. Accordingly, many judges, scholars, journalists, and others have commented on the possibly deleterious implications of campaign contributions for judicial independence and impartiality.\textsuperscript{39}

\textsuperscript{34} Id. at 21-25.


\textsuperscript{38} See, e.g., Banner, supra note 37, at 455-58; Stephanie Hanes, Baltimore County Judges Get Aggressive In Election: But Some Lawyers Call Their Fund-Raising Tactics Extreme for Bench Seats, BALT. SUN, Apr. 13, 2003, at 1B; Frontline: Justice for Sale (PBS television broadcast, Nov. 23, 1999).

\textsuperscript{39} See, e.g., James J. Alfini & Terrance J. Brooks, Ethical Constraints on Judicial Election
Several studies have focused directly on the effect of campaign contributions on judicial decision-making. For example, Texans for Public Justice ("TPJ") released a study of the petitions for review filed with the Texas Supreme Court between 1994 and 1998.\(^4\) The TPJ found that the court was four times more likely to accept a petition filed by a party, attorney, or law firm that had contributed money to one or more of the justices who stood for election at some point during the period in question than if the petition was filed by an entity that had not made any contributions.\(^4\) The TPJ study also revealed that justices who faced an election during the period under study relied heavily on contributions from parties, attorneys, and law firms, with fifty-two percent of the contributions that the justices received coming from these sources, and that the probability that a petition would be accepted increased as the amount contributed to the court increased.\(^4\) For example, TPJ found that on average, a petitioner who gave the court $100,000 over the period was seven-and-a-half times more likely to have a petition accepted than was a petitioner who did not contribute during the period, and that, on average, petitions from those who gave $250,000 or more, were ten times more likely to be accepted than were petitions from those who did not contribute.

Another study, conducted by Stephen Ware, looked at the effects of the campaign contributions on the rulings of the Alabama Supreme Court in cases regarding the validity and scope of arbitration clauses in contracts.\(^4\) Ware

\(^4\) See TEXANS FOR PUBLIC JUSTICE, supra note 36. Only those petitions that were filed by one party in the case were included in the study. Id. at 4. Cases in which both sides petitioned for appeal were excluded. Id.

\(^4\) The Texas Supreme Court has nine justices, and requires at least four justices to vote in favor of granting the petition in order for the Court to decide the case. Id. at 5. The justices' votes and their deliberations about the petitions are strictly confidential, and the justices are not required explain why they granted or rejected a given petition. Id.

\(^4\) The only parties included in this study were those that were "institutional entities," like corporations and foundations, or individuals and groups affiliated with entities, such as employees of the corporation or political action committees founded or supported by the corporation. Id. at 4.

\(^4\) Id. at 8-9.

\(^4\) On an individual level, the percentage of total contributions from parties, law firms, and lawyers ranged from a high of sixty percent for one justice, to a low of forty-three percent for another. Id. at 7.

\(^4\) Id. at 10-16.

\(^4\) Id. at 10.

\(^4\) Id.

\(^4\) Ware, supra note 36, at 583.
found that there was a nearly perfect correlation between a justice having supported or opposed arbitration clauses, and whether that justice received campaign funds from businesses or from trial lawyers. Ware studied these cases and these contributors because trial lawyers almost always support candidates who are sympathetic to the interests of plaintiffs (primarily in tort actions), while businesses and their lobbying groups regularly support candidates who are sympathetic to the interests of defendants. In nearly every case, justices who derived support from businesses voted to uphold the arbitration clauses at issue in the case, while those justices who received money from trial lawyers almost always voted to invalidate such clauses.

Ware noted, however, that his study could not demonstrate a causal link between the Alabama justices' voting patterns and the source of their contributions, because it did not control for a number of factors that might influence the justices' decisions in a given case. Other studies of the effect that contributions have on judges' voting habits by Waltenburg and Lopeman, McCall, and the author have been more rigorous, in that they have included control variables that allow researchers to better isolate the effect of campaign contributions on the justices' voting proclivities.

For example, using a more sophisticated model, Waltenburg and Lopeman studied decisions in tort cases from the supreme courts of Alabama, Kentucky, and Ohio, and found that pro-plaintiff contributions from attorneys and a justice's partisan affiliation were significant predictors of a pro-plaintiff vote. Later, Madhavi McCall conducted an even more detailed study of the effects of contributions on judicial decisions. Looking at a group of cases decided by the Texas Supreme Court between 1994 and 1997, she found that conservative justices (i.e., justices whom one would not expect to favor plaintiffs in the cases that she chose), were more likely to favor plaintiffs with their votes in cases.

---

49 Id. at 627.
50 Id. at 596-600.
51 Id. at 617. Businesses tend to favor arbitration as a means of dispute resolution in a number of situations because it is cheaper and faster than formal litigation. See Steven J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POLICY ANALYSIS NO. 433 (Apr. 18, 2002), available at http://www.cato.org/pubs/pas/pa433.pdf. Trial lawyers generally oppose arbitration, they say, because the rules of evidence, discovery and procedure that are used in most arbitration cases disadvantage their clients, who are generally consumers. See, e.g., Alabama Trial Lawyers Association, *Why Consumers Should Be Concerned About Arbitration*, at http://www.atla.net/arbitration.htm (last visited Nov. 4, 2004). Furthermore, they claim, arbitrators do not have to adhere to ethics rules, and arbitration clauses are usually written so as to prohibit review of the arbitrator’s decision by a court. See id.
52 See Ware, supra note 36, at 601.
53 See infra notes 57-62 and accompanying text.
54 Waltenburg & Lopeman, supra note 36, at 250-58.
55 McCall, supra note 36, at 359-70.
concerning procedural issues if these plaintiffs or their lawyers had made contributions to those justices during the most recent election cycle.\textsuperscript{56}

A study conducted by the author on the effects of campaign contributions focused solely on the contributions of the firms who represented clients in certain types of civil cases decided by the Michigan Supreme Court.\textsuperscript{57} The results of the study indicated that, after controlling for the effects of party affiliation, the experience of the firms who argued the case, and other theoretically significant variables, firms contributing more than their rivals to a justice in that justice’s last campaign had a greater chance of winning that justice’s vote than did the firms that were “out-contributed” in cases having to do with the legality of acts of the state government or of a local government.\textsuperscript{58} For example, this study revealed that in cases involving government regulation (i.e. environmental regulations, zoning, taxation, etc.), on average, the probability that a Democratic justice would favor the government’s position in these cases rose by approximately seventeen percent when the firms favoring the government’s position had a five thousand dollar contribution advantage over their opponents than when both sides had contributed the same amount.\textsuperscript{59} On the other hand, the probability that a Republican justice would favor the government’s position under the same circumstances, on average, rose by approximately twenty-eight percent.\textsuperscript{60} If the firms opposing the government’s position in the case had a five thousand dollar contribution advantage, a Democratic justice was, on average, approximately six percent less likely to vote for the government’s position than if both sides had contributed the same amount.\textsuperscript{61} In the same circumstances, a Republican justice was, on average, approximately fourteen percent less likely to favor the government’s position.\textsuperscript{62}

Although the evidence is not yet conclusive,\textsuperscript{63} these studies suggest that perceptions of public opinion and contributions can affect judges’ decision making. However, a simple recitation of the results of studies indicating that at least some judges’ decisions are influenced by campaign contributions and constitu-

\textsuperscript{56} Id. at 359-67.

\textsuperscript{57} McLeod, \textit{supra} note 36, at 43-76.

\textsuperscript{58} Id. at 61-70.

\textsuperscript{59} Id. at 69 tbl. 9.

\textsuperscript{60} Id.

\textsuperscript{61} Id.

\textsuperscript{62} Id.

\textsuperscript{63} For example, in their study of the voting behavior of the justices of the Wisconsin Supreme Court, Ditslear and Williams failed to find any link between the contributions of attorneys who had cases decided by the court, and the judges voting proclivities. Corey A. Ditslear and Margaret S. Williams, Bidding for Justice: The Influence of Contributions on State Supreme Courts 13-23 (Aug. 30, 2003) (unpublished manuscript on file with author).
ent opinion does not constitute an argument as to why these influences on the judiciary are undesirable. The next section will put forward an argument about why judicial impartiality is more important than judicial accountability, and about why the two attributes might not be able to co-exist comfortably within the same institution.

IV. THE IMPORTANCE OF JUDICIAL IMPARTIALITY

As in the Nineteenth Century, many still argue today that judges’ decisions should be influenced by electoral considerations. For example, West Virginia Supreme Court Justice Larry V. Starcher claims that elections are beneficial because they result in a judiciary that is more accountable, independent, and legitimate than those selected in other systems. However, this argument discounts the critical importance of impartiality, both in appearance and in fact, to the judiciary’s ability to function effectively. Starcher apparently does not see the damage that is done to the judiciary’s moral and political authority when the public becomes convinced that the outcome of a case is influenced by the judge’s desire to stay on the bench. If the lack of confidence in the judiciary becomes severe, it could lead people to shun courts as fora for resolving disputes, and generally weaken respect for law. Also, the fact that such damage might be occurring is not simply conjectural. For example, in a recent poll by the American Bar Association, seventy-two percent of respondents indicated that they were at least somewhat concerned that having to raise money might compromise judges’ impartiality. Also, a national survey by the Justice at Stake Campaign found that seventy-six percent of the voters believed that contributions exert at least some influence on the judges who receive them.


65 See Starcher, supra note 64, at 769-70.

66 See Baker, supra note 14, at 173-74.


68 See GREENBERG QUINLAN ROSNER RESEARCH, INC., JUSTICE AT STAKE CAMPAIGN, JUSTICE AT STAKE—STATE JUDGE FREQUENCY QUESTIONNAIRE 5 (Oct. 30 to Nov. 7, 2002), available at http://faircourts.org/files/JASNationalSurveyResults.pdf (last visited Jan. 23, 2005). But see A.B.A. Poll, supra note 70 (reporting that a majority of respondents indicated that they were more likely to trust elected judges than non-elected judges).
Judicial impartiality is an indispensable feature of constitutional government. However, judicial elections and other forms of reselection compromise judicial impartiality in appearance and in fact, by giving judges an incentive when deciding a case to grant excessive weight to the opinions of the public, their campaign contributors, and others whom they believe to be influential in their reselection efforts.

The maintenance of this impartiality does not require judges to completely ignore the policy preferences of their communities when deciding the cases before them. Indeed, consideration of a community’s traditions and policy preferences is a well-established tool that judges use to help them interpret and apply the law, and can greatly improve the quality and relevance of their decisions. However, thinking about whether an interpretation of a legal provision is in keeping with a community’s traditions and favored policies is different from judges handing down decisions that are contrary to their honest assessment of the law and the facts out of fear that the decision will leave them electorally vulnerable, or will anger those who can keep them on the bench.

A thoughtful consideration of a community’s traditions, attitudes and policy choices, and of how these reflect on a given issue before the court requires meditation, scholarly reflection, and a balanced consideration of a community’s history. However, the shorter the time interval before the expiration of a judge’s term, the more likely a judge is to give excessive weight to present public opinion, or to the opinion of the loudest or most influential voices in a community, which might be only temporarily inflamed by some issue. On the other hand, a judge who never has to face reelection, or one who has to face it in several years, has far less incentive to excessively weight current public opinion or the opinions of those who can remove him/her. The fear of removal from

69 See supra note 2 and accompanying text.


71 See, e.g., Lawrence, 539 U.S. at 568-73.

72 See, e.g., Hall, supra note 18, at 439-44.; McCall, supra note 36, at 364.

73 See William Mishler & Reginald S. Sheehan, The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions, 87 AM. POL. SCI. REV. 87, 96-98 (1993) (arguing that there is, on average, a five year lag between shifts in public opinion on a given issue and shifts in Supreme Court decisions on the same issue); Helmut Norpoth et al., Popular Influence of Supreme Court Decisions, 88 AM. POL. SCI. REV. 711, 716 (1994) (arguing that there are very long lags between shifts in pubic opinion on an issue and corresponding shifts in Supreme Court decisions). But see Roy B. Flemming & B. Dan Wood, The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods, 41 AM. J. POL. SCI. 468, 493 (1997), William Mishler & Reginald S. Sheehan, Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective, 58 J. OF POL. 169, 195 (1996) (arguing that individual justices of the Supreme Court, as opposed to the majority of the Court, respond more quickly to shifts in public opinion on a given issue).
office might also cause a judge to make a decision that ignores the community’s long standing values, or that is poorly reasoned, or that sets poor public policy, in order to avoid being punished for a decision that opposes momentary popular opinion. In the worst case scenarios, as studies by Hall\textsuperscript{74} and Brace and Hall\textsuperscript{75} indicate, fear of removal might cause judges to condemn a person to death despite their honest view as to the legally correct outcome of the case.

The perceived importance of money to winning judicial elections can have a similarly corrosive effect on judicial impartiality.\textsuperscript{76} Those with great wealth will almost always enjoy an advantage over the poor in terms of influencing the world around them to serve their ends. Their financial influence can be exercised in the political process through campaign contributions to legislative or executive officials to manipulate the content of the law, or in the courts through their ability to hire experienced and politically active firms, or to afford expert witnesses and consultants to aid in litigation. However, if a judge is fair, independent, and free of the influence of campaign contributions or other considerations regarding job retention, there might be a greater chance the judge will see through an elaborate and expensive legal presentation if the underlying case is legally weak to rule in favor of a poor litigant who has the law on her side. But a poor litigant’s chances of victory might be reduced, despite the strength of her claims, if that litigant has not contributed to the judge who hears her case, or cannot obtain the services of a firm that has made contributions. Thus, hiring an expensive firm to argue a case or contributing to influence a legislator to change a law is different in principle from paying off the judges who preside over the nation’s courts. As stated earlier, one of the ideals held forth to all citizens in our society is that all who come before the courts will stand as equals, which implies that receiving a fair hearing in court should not depend on having a significant financial involvement in judicial politics, or on being represented by a law firm that does. Judicial elections, by giving judges an incentive to raise money, and, therefore, to ingratiate themselves to contributors, undermine this ideal. Most disturbingly, the aforementioned recent studies by Waltenberg and Lopeman, McCall, and the author suggest that some judges might be acting on this strong incentive to please their contributors.\textsuperscript{77}

V. JUDICIAL ELECTION REFORM

Given the negative impact that judicial elections and contributions appear to have on the functioning of the judiciary, what are the prospects for successfully reforming judicial elections so as to reduce their deleterious effects on

\textsuperscript{74} See Hall, supra notes 18, 25.
\textsuperscript{75} See Brace & Hall, supra note 32.
\textsuperscript{76} See supra Part III.B.
\textsuperscript{77} See id.
judicial impartiality? The following sections will describe the host of reforms that have been proposed over the years to limit the damaging effect elections have had on the judiciary, and explain why none of them have succeeded or are likely to succeed in quieting concerns about elections due to the fundamental difficulty of creating a judicial system in which judges are simultaneously impartial and accountable for the decisions they make.

A. Merit Selection and Retention

In recognition of what is perceived to be the infeasibility of abolishing judicial elections, those who have concerns about electing judges have focused on encouraging reforms of the election process. Some, like the American Judicature Society ("AJS"), have lobbied hard for the abolition of contested elections in favor of a system combining so called "merit" selection and retention elections.78

Specifically, the AJS argues that merit selection with retention elections is a better system for selecting and retaining judges than contested elections in several ways. First, the AJS claims that in contested elections (both partisan and non-partisan), judicial candidates often receive a party’s endorsement as a reward for faithful support and fundraising rather than for professional experience or character.79 Second, the AJS points out that judicial elections rarely offer voters an opportunity to make an informed choice among the candidates given the low profile of most judicial races and the presence of ethics rules that inhibit the candidates’ ability to directly discuss issues that might be of great concern to the voters.80 Third, the AJS calls attention to the possibility that the need to collect campaign contributions in contested elections might compromise the independence and impartiality of the judges who receive the money.81 Finally, according to the AJS, the merit selection and retention alternative ensures that professional, as opposed to political, qualifications play the paramount role in deciding which candidates reach the bench.82 The AJS also claims that merit selection and retention eliminates any potential bias caused by campaign contri-

79 Id. at 1-2.
80 Id. at 1. The validity of this criticism has been called into question, however, by the U.S. Supreme Court’s decision in Republican Party of Minn. v. White, 536 U.S. 765 (2002), in which the Court struck down ethics rules that limit judicial candidates’ freedom to announce their views about disputed legal or political issues during campaigns. See id. at 788.
81 See American Judicature Society, supra note 78, at 2.
82 Id. at 1-2.
butions, while simultaneously preserving the public’s ability to hold judges ac-
countable for their decisions.83

There is not much evidence, however, to prove that merit selection and
retention systems actually produce the benefits that the AJS claims. For ex-
ample, studies in states that use merit selection and retention elections indicate that
political considerations are usually just as important in these systems as they are
in systems that use contested elections.84 This is primarily because the selection
commissions that compile the lists of candidates from whom a governor must
choose are themselves usually highly partisan in terms of their composition and
deliberations.85

Furthermore, while it is no doubt true, as the AJS claims, that merit se-
lection allows the public to hold judges accountable by removing them from
office, AJS apparently fails to consider that the mere possibility of removal it-
self might impact judges’ decisions by forcing them to account for the potential
electoral opposition that might be generated by a given decision. There have
been a number of high profile instances in which judges were not retained fol-
lowing vitriolic political campaigns against them, all of which capitalized on
public outrage at a handful of these judges’ unpopular decisions.86 Also, these
campaigns involved relatively high levels of spending on both sides, which
shows that retention elections do not necessarily remove judges’ incentive to
cultivate contributors, lest they too fall victim to a well-financed effort to re-
move them from the bench.87

However, in addition to the abolition of contested elections, a host of
other reforms of the judicial election process have been proposed that are aimed
at preserving the impartiality of the judiciary and its reputation for fairness and
integrity. The following is a discussion of the critical problems that observers
have identified with respect to judicial elections, and some of the reforms that
have been proposed in recent years to deal with them.

83 Id.
84 See Beth M. Henschen et al., Judicial Nominating Commissioners: A National Profile, 73
JUDICATURE 328, 331-32 (1990); Malia Reddick, Merit Selection: A Review of the Social Scientific
85 See Reddick, supra note 84, at 730, 732-34.
86 For accounts of successful campaigns to remove judges, see Traciel V. Reid, The Politiciza-
tion of Judicial Retention Elections: The Defeat of Justices Lanphier and White, in RESEARCH ON
JUDICIAL SELECTION 1999 45-72 (American Judicature Society 1999); Robert S. Thompson, Judi-
cial Retention Elections and Judicial Method: A Retrospective on the California Retention Elec-
87 See, e.g., Reid, supra note 86, at 47-68. In this article, Reid describes the well-financed
efforts to remove Justice David Lanphier in Nebraska and Justice Penny White in Tennessee in
1996. Id.
B. Problematic Campaign Speech or Materials

Many of those who scrutinize judicial elections are concerned about the tenor of judicial campaigns, specifically about the tendency of some candidates to make statements about themselves or their opponents that are misleading, or that generally lower public confidence in the fairness and honesty of the judiciary as a whole. Some of the proposed solutions to this problem are as follows:

1. Voluntary Campaign Speech Restrictions

Some local bar associations and state judicial conduct advisory boards have promulgated guidelines to help judicial candidates raise the quality of the dialogue in judicial campaigns. Some of these organizations encourage candidates to abide by the guidelines by offering the candidates rewards for compliance, such as endorsements or free advertising in their publications. Still, these restrictions are voluntary, and many candidates may see it as being in their interest not to abide by them, in an effort to differentiate themselves from their opponents in the eyes of the public.

2. Campaign Monitoring Committees

These committees, the composition of which varies, can be composed of citizens, lawyers, or, in some states, judges who observe and, in a sense, “referee” the conduct of judicial campaigns. Generally, the activities of these committees include educating candidates about the ethics rules governing their conduct while running for office, responding to requests from the candidates for advice about the appropriateness of campaign activities, receiving and investigating complaints from candidates or the public about unethical conduct by candidates, and lobbying candidates and others involved in the campaign (e.g., political parties, advocacy groups, etc.) to discourage inappropriate conduct. Most of these committees are unofficial, but some committees are quasi-official, in that they are appointed by the state’s highest court, and some are official, in

---

89 See Mathias, supra note 15, at 31-32.
90 See id. at 34.
91 See id. at 34-35.
92 See Barbara Reed & Roy A. Schotland, Judicial Campaign Conduct Committees, 35 Ind. L. Rev. 781, 783-88 (2001).
93 See id.
that they receive government funding. The effectiveness of unofficial and quasi-official campaign monitoring committees is somewhat limited by the fact that they have no power to sanction candidates or other participants in the campaign except by publicly criticizing what the committee believes to be inappropriate campaign conduct, or by referring their conduct to a state's judicial disciplinary body. Furthermore, the powers of official committees are limited because they are constitutionally required to give candidates who are accused of misconduct an opportunity to defend themselves, which can significantly delay the process of taking action against them.

3. Fair Reporting Compacts

Fair reporting compacts are agreements between the major television and print media outlets in a given area to shape coverage of judicial campaigns so as not to sensationalize or distort the candidates' records, their backgrounds, or the issues in the campaign. Agreements such as these, which could be brokered by third parties, might contain provisions enjoining the parties to the compact to report incumbents' past decisions in context, to refrain from attacking candidates who refuse to discuss their political views, and to comment fairly and responsibly on the rhetoric during the campaign. Such a compact was tried once in Colorado in the early 1980's, but it was only a partial success since only some of the major media outlets in the state agreed to it.

C. Problematic Campaign Financing

The following are some of the solutions that have been proposed to deal with the harmful effects of campaign contributions on judicial independence and impartiality:

1. Voluntary Campaign Spending and Contribution Limits

Although legislatively capping spending in political campaigns is unconstitutional, voluntary spending limits have been proposed as a means to

---

94 See id. at 785-88.
95 See id.
96 See id. at 790.
97 See, e.g., MATHIAS, supra note 15, at 37.
98 See id.
99 See id. at 37-38.
reduce judicial candidates' dependence on contributions. This was tried at least once, in a campaign in Rochester, New York, in 1982. The candidates who participated reported that they were satisfied with the outcome, but this experiment has not been replicated.

However, voluntary spending limits do not hold much promise as a solution to the problems created by judicial campaign contributions because candidates who have adequate sources of funding have little incentive to either agree to or maintain voluntary spending limits. Furthermore, there is no evidence that the public will punish candidates who reject such agreements. For example, in the Rochester, New York campaign, the only candidate in the race who did not agree to limit his spending enjoyed a strong lead in the polls and won handily.

2. Public Financing

Although several states disseminate information about judicial candidates through state funded sources, at present only two states, North Carolina and Wisconsin, provide direct cash payments to candidates in some judicial races. In North Carolina, funding is provided for supreme court and court of appeals races, while in Wisconsin, funding is only provided for supreme court candidates. In North Carolina, which has partisan judicial elections, qualification for the funding begins in the primary. Candidates for the North Caro-

---

101 See MATHIAS, supra note 15, at 45.
102 See id.
103 See id.
104 See id.
105 For example, Alaska, California, Oregon and Washington publish information about some or all judicial candidates in the state and make this information available to voters free of charge. See MATHIAS, supra note 15, at 18-19.
107 See Bowers, supra note 106, at 116.
108 See Geyh, supra note 106, at 1476.
109 See N.C. Gen. Stat. § 163-278.64 (2004). The amount of this funding is to be updated every two years by the state board of elections according to section 163-278.65(b). Id. § 163-278.65(b). According to section 163.278.64(d)(1), the law permits a candidate who wishes to accept public funds to raise up to $10,000 before filing a “declaration of intent” to participate in the public funding program. Id. § 163-278.64(d)(1). Once the declaration of intent is filed, the candidate may not accept contributions exceeding the maximum amount permitted in the pre-general election period. See id. § 163-278.64(b).
South Carolina Supreme Court and the Court of Appeals must meet certain fundraising thresholds in order to be eligible to receive public funding in the general election. In both cases, the money must be raised from at least 350 individuals who contribute no more than $500 each. Once they reach the general election, candidates who accept public funding may only spend the publicly provided funds and whatever funds remain from the primary campaign. Candidates who choose not to accept public funds may raise and spend as much as they like, but the law lowers individual contribution limits for opt-out candidates for the supreme court and the court of appeals to $1000, from $4,000, which is the limit for candidates for other offices, and limits contributions from close family members to $2,000. Furthermore, if funds raised in opposition to a publicly funded candidate (i.e., funds raised by candidates or groups supporting candidates opposing the publicly funded candidate) exceed the legally established triggering amount, the publicly funded candidate can receive additional "rescue" funds from the state. The amount of rescue funds available to each participating candidate is equal to the level of triggering contributions for the type of election in question, whether it is a primary or a general election. The state draws funding for the campaigns from a number of voluntary sources, including a three-dollar voluntary state tax donation, and contributions from members of the state bar when they renew their licenses. In Wisconsin, which has non-partisan elections, funding for state supreme court campaigns comes from the Wisconsin Election Campaign Fund. The fund is maintained in part by a voluntary one-dollar tax donation by those

---

110 See id.

111 See id. During the qualifying period, a candidate seeking to qualify for public funds may contribute up to $1000 to his/her campaign. See id. § 163-278.64(d)(4). Also, the members of his/her immediate family, plus his/her siblings and parents are also allowed to contribute up to $1,000 each to the candidate’s campaign. See id.

112 See id. § 163-278.64(d)(3).

113 See id. § 163-278.13(e2)(1)-(3).

114 See id. § 163-278.67(a). The triggering amounts for rescue funds are established by section 163-278.62(18). Id. § 163-278.62(18). According to section 163-278.62(18), the triggering level for rescue funds in primary elections equals the maximum qualifying contributions for participating candidates. Id. In contested general elections, the triggering amount equals the base level of funding available under section 163-278.65(b)(4). Id. In general elections for the court of appeals, the triggering amount is 125 times the filing fee established by section 163-107, while the triggering amount for contested general elections for the supreme court is 175 times the filing fee established by section 163-107. See id. § 163-278.65(b)(4).

115 See id. § 163-278.67(b)-(c).

116 See id. § 163-278.63(b)(1)-(6).

who file Wisconsin tax returns.\textsuperscript{118} Eight percent of the fund is reserved for state supreme court candidates in years when there is a supreme court race on the ballot, and this amount is divided equally between all candidates who apply for and are eligible to receive the funds.\textsuperscript{119} In order to receive public funds, there must be at least two candidates for the supreme court seat in question (i.e., a candidate running unopposed is not eligible for funding).\textsuperscript{120} Also, a candidate must raise a periodically adjusted qualifying amount in contributions of $100 or less between the first of July preceding the spring election and the spring non-partisan primary.\textsuperscript{121} Candidates who accept public funds may not exceed an established spending limit,\textsuperscript{122} unless they withdraw from the public funding scheme,\textsuperscript{123} or are opposed by candidates who do not agree to limit their spending.\textsuperscript{124}

Public funding of judicial campaigns also seems to hold little promise of reducing the threat that contributions pose to judicial independence and impartiality, mostly because candidates still must raise money to be eligible for the public funds. Also, public funding plans that rely on voluntary contributions by taxpayers are at the mercy of the public's desire to fund the program. The lower the amount of funding that is available, the less incentive candidates have to participate in the program. For example, taxpayer participation in the Wisconsin program fell from twenty percent in 1979 to approximately nine percent in 1998,\textsuperscript{125} and the last time all of the candidates in a Wisconsin supreme court election were fully funded was in 1989.\textsuperscript{126} Not surprisingly, the percentage of candidates participating in the public funding plan has also diminished from fifty-five percent in 1986 to fourteen percent in 2000.\textsuperscript{127} Furthermore, the nine candidates who participated in the program between 1989 and 1997 received, on

\textsuperscript{118} See id. § 71.10(3)(a).
\textsuperscript{119} See id. § 11.50(3)(a)(2).
\textsuperscript{120} See id. § 11.50(2)(b)(3).
\textsuperscript{121} See id. § 11.50(2)(b)(5). Subject to the strictures set forth in section 11.50(2)(b)(5), the minimum qualifying amount for races for the Wisconsin Supreme Court is equal to 5% of the disbursement limit established by section 11.31(1)(de) which is adjusted periodically according to the method explained in section 11.31(9)(b). See id. § 11.50(2)(b)(5).
\textsuperscript{122} See id. § 11.31(2).
\textsuperscript{123} See id. § 11.50(2)(h).
\textsuperscript{124} See id. § 11.50(2)(i).
\textsuperscript{125} See More Supporting Publicly Financed Elections in State, \textsc{Cap. Times} (Madison), Aug. 14, 1999, at 2A.
\textsuperscript{126} See Geyh, supra note 106, at 1477.
\textsuperscript{127} See id.
average, only $45,354. North Carolina’s plan for publicly financing judicial races is subject to the same problems as the Wisconsin system, since it too is funded by taxpayers who indicate their willingness to donate a portion of their taxes to fund the election scheme.

Another reason public funding is not a viable solution to the problems posed by contributions is that such plans impose spending limits on candidates when none are imposed on the private interest groups that might oppose them. The possibility of an opposition campaign being waged against a candidate if they accept public funds is yet another reason for judicial candidates not to accept the funding.

3. Blind Trust Funds

A blind trust fund plan requires an organization unaffiliated with any of the candidates or political parties to collect contributions and distribute the fund to the candidates so that the candidates do not know the identity of the individuals and organizations that contribute money to their campaigns. The bar in Dade County, Florida, implemented one such plan for the 1972 election. Under that plan, attorneys who wished to contribute gave money to the bar association, which then distributed the money to the candidates on a pro rata basis according to how the bar association rated their fitness for office. However, the plan was discontinued after 1974 when the state declared that the scheme violated state campaign finance laws and when other questions arose about the trust mechanism. In 1979, the Michigan legislature considered a plan to create a state body that would accept contributions from attorneys and distribute them to the candidates of their choice without the candidates knowing the identity of the contributor. In order to participate, the contributors had to promise to give only through the committee, and candidates had to forgo any other contributions from attorneys. The bill was never enacted into law.

Although blind trust funds might look appealing at first glance because they prevent candidates from knowing to whom they are indebted, and because

---

128 See id.
130 See MATHIAS, supra note 15, at 50-51.
131 See id. at 50.
132 See id.
133 See id.
134 See id.
135 See id.
136 See id.
they do not rely on public funds, their effectiveness as a solution is questionable for a number of reasons. The first reason for this is because there is no way to reliably prevent contributors from communicating their support to candidates. The second reason is that any state law mandating participation in a trust fund would be of dubious constitutionality, and if participation in a trust fund remains voluntary, there is little incentive for contributors to agree to it since they would then lose one of the primary benefits of the contribution (i.e., the candidate's gratitude for their support).

4. Strengthening Disqualification Rules

Most state ethics codes call for judges to recuse themselves in cases where their impartiality may be compromised. In the past, these provisions have not been interpreted as requiring judges to refuse to hear cases in which contributors to their campaigns are involved. These ethics rules could be amended or reinterpreted to require judges to recuse themselves from cases in which a party, amicus, or attorney has contributed a "substantial" amount to the judge's campaign. Exactly what amount would constitute a "substantial" amount would vary from one jurisdiction to another.

Strengthening disqualification rules has some appeal as a solution to the problem of contributors wielding undue influence on judges because contributors would be prevented from reaping any direct benefits from their contributions. However, this reform would only work if the rule barred all contributors, not only those who contributed substantial amounts, because law firms and other large concerns can circumvent rules disqualifying large contributors by "bundling" their contributions to a candidate. Bundling occurs when many individuals affiliated with an organization give to a candidate in order to thwart rules limiting the amount that the organization can give to the candidate under its own name. This practice is perfectly legal under current campaign finance laws, and would certainly continue under a regime of stronger disqualification rules.

However there are other factors that make this solution problematic. Completely prohibiting judges from hearing cases involving contributors might present problems in locales that are served by only a few judges, since litigants

---

137 See, e.g., MATHIAS, supra note 15, at 52.
138 See, e.g., Alfini & Brooks, supra note 39, at 714 (claiming that at the time the article was published, no court or ethics committee had ruled that contributing to a judge's campaign was, by itself, enough to require a judge's recusal when a contributor appeared before them).
139 See MATHIAS, supra note 15, at 52.
140 See id.
who wished to contribute might be left with few judges to hear their cases. Such a prohibition might also make it very difficult for judicial candidates to get adequate financial support to run any sort of meaningful campaign. Furthermore, prohibiting judges from hearing cases involving contributors could also have the effect of giving excessive influence to those from outside of the state or locality where the candidate is running. This is because outside contributors have less chance of ever having a matter before the judges running for election, which would mean that non-local contributors would have less to fear by giving to a candidate.

5. Prohibiting Contributions from Certain Sources

Another solution to the problems arising from campaign contributions is to bar contributions from donors whose money will cast doubt on the impartiality of the winning candidate. For example, the Illinois Bar Association once proposed that attorneys licensed to practice in the state of Illinois be prohibited from contributing to Illinois judicial candidates. Ohio, in a less extreme example, has banned judicial candidates from accepting contributions from court employees, court appointees, or from anyone else that judges personally direct in the course of their official duties. The problem with this particular proposal, however, is that it does nothing to prevent other interests from influencing the judicial process through their contributions.

VI. CONCLUSION

The central reason for the ineffectiveness of all of these reforms is that they do not remedy the root cause of the threat that elections pose to judicial impartiality, which is the perverse incentive that reselection, be it legislative reselection, contested elections, or retention elections, creates in the judicial decision making process. Put simply, most judges want to keep their jobs, and whenever keeping their jobs depends on what others think of their decisions, judges have an incentive to give excessive weight to these other opinions when making their decisions, whether it is the opinions of contributors, voters, political allies, or members of the state legislature. This is the very reason why the A.B.A.'s Commission on the Twenty-First Century Judiciary ("the Commission") recommended that states do away with all forms of judicial reselection in

---

142 See Mathias, supra note 15, at 53.
143 See id.
144 See id.
146 See Ohio Code of Judicial Conduct Canon 7(C)(1) (West 2004).
favor of having judges serve for life, until a certain age, or for a single lengthy
term (fifteen years) without the possibility of reselection. On the question of
initial selection to the bench, the Commission recommended that states use the
merit selection practice currently in use in many states, under which the gover-
nor appoints judges from among a list of candidates prepared by a nominating
committee or other body that is credible, neutral, non-partisan, and diverse.
When the Commission recommended the use of nominating commissions in the
process of selecting candidates for the bench, it specifically noted that initial
selection through elections was a less favored option because it felt that elections
had a tendency to compromise the judiciary's impartial image.

The Commission's suggestion is a sensible alternative for states that
currently employ judicial elections (or other forms of re-selection) for a number
of reasons. First, it eliminates the damage that elections and other forms of rese-
lection do to the impartiality of the judiciary, and to the public's belief in that
impartiality, by ensuring that judges do not have to face any sort of reselection
in order to keep their jobs, and have any need to raise money to campaign to
keep their jobs. Second, if states chose to move to a system in which judges
were allowed to serve only a single, lengthy term on the bench, such a change
would allow for the regular cycling of new people with new ideas into the judi-
ciary. In a sense, this aspect of the proposal might also prove more effective
than elections at keeping the judiciary in tune with community mores, because it
mandates the constant infusion of new judges with new perspectives into the
institution, whereas elective systems allow the same judges to serve on the
bench for decades.

Although doing away with elections might be the proper step to take in
order to improve the quality and the perception of the American state judiciary,
advocates of reform should have no illusions about the ease of accomplishing
their task. For one thing, there are formidable legal obstacles to be overcome.
In almost all states, ending judicial elections would require a constitutional
amendment, which in many states requires a referendum and the approval of

147 See AMERICAN BAR ASSOCIATION, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON
/ABA263/finalreport.pdf (last visited Nov. 8, 2004). The Commission was careful to note, how-
ever, their belief that judges should still be subject to removal for misconduct. See id. at 70.

148 See id. One way of achieving the A.B.A. Commission's goal of keeping judicial selection
commissions focused on evaluating the professional qualifications of candidates, and away from
political considerations, might be to ensure that all commissions are balanced with regard to party
composition. A survey of judicial nominating commission members indicated that political con-
siderations figured less prominently in the decisions of commissioners who served on a board that
had an equal number of Republicans and Democrats, than in the decisions of commissioners who
did not serve on politically balanced boards. See ALLAN ASHMAN & JAMES J. ALFINI, THE KEY TO

149 See AMERICAN BAR ASSOCIATION, supra note 147, at 70-71.
super majorities of both houses of the legislature. Securing that degree of consensus on an issue as controversial as who chooses the state's judges and how long judges should serve would certainly be difficult. Also, it undoubtedly would not be easy to convince the public that taking away their right to choose their judges or to hold them accountable for their decisions would be in their best interests, despite the fact that the public appears to be concerned about the negative effects of campaign contributions and excessive partisanship in judicial campaigns.

The task of those campaigning for reform will not be made any easier by the fact that many interests, including business groups, labor unions, and attorneys might lobby hard against the change, since it would reduce their ability to influence the judiciary through campaign contributions and independent involvement in judicial campaigns.

The difficulty of achieving such a fundamental change in the judicial selection process is perhaps best illustrated by the fact that no state that at one time elected its judiciary has completely done away with elections since Virginia did so in 1869. Such reform, however, is the only way to remove the threat that judicial elections pose to judicial independence and impartiality. Although the road to reform may be long and difficult, with the integrity of our justice system at stake, it is a road worth traveling.

---

150 See, e.g., ILL. CONST. of 1970, art. XIV, § 2; MISS. CONST. of 1890, art. XV, § 273(2) (1992); OHIO CONST. of 1851, art. XVI(1) (1974).
