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## *SPEECH*

### THE BALLOT AND THE BENCH

SHIRLEY S. ABRAHAMSON\*

*In this Speech, Shirley S. Abrahamson, Chief Justice of the Wisconsin Supreme Court, discusses and examines the benefits and drawbacks of popular elections of state court judges. While acknowledging that elections have the potential to compromise the integrity of the judiciary, in part because both voters and campaign donors will come before the court, the Chief Justice concludes that state electoral systems can be important tools to educate voters about the practice of judging and the importance of judicial independence.*

#### INTRODUCTION

Delivering a lecture named for Justice Brennan is a special honor. I first met Justice Brennan when we sat together as judges at a law school moot court competition. As I came to know him better, I saw not only a brilliant figure in the law but a warm human being with a sincere interest in people.

And it is always wonderful to return to New York City, my hometown, where people do not think I speak oddly.

Tonight I speak about a fascinating, difficult, and very personal subject: selecting judges, a subject now in its fourth century of debate in this country. Discussion about the selection of state court judges proliferates in academic journals, seminars, and the media.

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\* Chief Justice, Wisconsin Supreme Court. A.B., 1953, New York University; J.D., 1956, Indiana University; S.J.D., 1962, University of Wisconsin. My thanks to my judicial assistant Robin Whyte and my law clerks Arlo Chase (1999-2000) and Megan McCarthy (2000-2001) for their editorial assistance.

This text is an edited, slightly expanded, and annotated version of the Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice sponsored by the New York University School of Law and Brennan Center for Justice, delivered on March 15, 2000.

To set the stage for our discussion, it's appropriate to recall how lawyer William J. Brennan, Jr., became a judge. It's a story, like that of many judges, not just about qualifications, but about what he did, whom he knew, and the stars lining up in the right position.

Bill Brennan, a New Jersey native, was a successful management-side labor lawyer in Newark, New Jersey. He worked with Arthur Vanderbilt, a prominent New Jersey lawyer, Dean of New York University School of Law, and later Chief Justice of the New Jersey Supreme Court. Together they struggled to institute court reform in New Jersey.

Vanderbilt later prevailed on Brennan to accept an appointment as a New Jersey trial court judge. A mutual friend of Vanderbilt and Brennan's persuaded Republican Governor Alfred Driscoll to appoint Democrat Brennan. Brennan was the governor's second choice; the first choice, a state legislator, declined the offer.

Brennan moved quickly to the intermediate appellate court, and in March 1952 Governor Driscoll appointed Brennan to the New Jersey Supreme Court. State law required the governor to appoint a Democrat to maintain a bipartisan court. Again, Brennan was the governor's second choice for the judicial position.

Four years later, Brennan gave a speech in Washington, D.C. on procedural reforms that made a favorable impression on U.S. Attorney General Herbert Brownell. After leaving Brennan's speech, Brownell observed, "We might find something for this guy."<sup>1</sup>

Soon after, U.S. Supreme Court Justice Sherman Minton resigned, and President Eisenhower told Brownell he wanted to appoint a Catholic and a state court judge.<sup>2</sup> The political party affiliation of the appointee was not important because the President wanted to say

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<sup>1</sup> Kim Isaac Eisler, *A Justice for All: William J. Brennan, Jr., and the Decisions that Transformed America* 85 (1993).

<sup>2</sup> Since 1900 only three appointments have been made from the ranks of state supreme court justices—Oliver Wendell Holmes (1902), Benjamin N. Cardozo (1927), and William J. Brennan, Jr. (1956).

Doubtless you wonder whether I believe that prior state judicial service is good preparation for service on the Supreme Court. Apparently the Presidents who have appointed Justices in this century have not valued state court service too highly. Of course I believe that it is. However, I do not think that it can be fairly maintained that prior state judicial service is necessarily a preferred preparation.

William J. Brennan, Jr., *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. Fla. L. Rev. 225, 237 (1996) (citation omitted).

in the upcoming 1956 presidential election campaign that his Court appointments were bipartisan.<sup>3</sup> Imagine that!

The year Justice Brennan went on the U.S. Supreme Court was the year I graduated from law school. Twenty years later, in 1976, Wisconsin's governor appointed me to a vacancy on the Wisconsin Supreme Court. I have no tale, interesting or otherwise, to explain my appointment. I was not active in politics, and my \$25 contributions to political campaigns were few and far between. I tell myself—and I tell anyone else who will listen—that my appointment was obviously based totally on merit.<sup>4</sup>

In Wisconsin, all judges must stand for election in nonpartisan elections, that is, judicial candidates are not identified with a political party. I stood for election in 1979 and every ten years thereafter. Each of my three elections—1979, 1989, and 1999—was hotly contested, which might very well be a record in Wisconsin. The last campaign involved such lofty issues as the appropriateness of my sponsoring a staff aerobic class in the courtroom after hours, my decision to hang a portrait of the first woman to be admitted to the Wisconsin Supreme Court bar, and the removal of computer games from justices' computers. I was also the target of television ads challenging my votes in specific cases involving a school locker search,<sup>5</sup> a *Terry* stop,<sup>6</sup> and the sexual predator law.<sup>7</sup> More than \$1 million was raised by both candidates, and the election set a record for Wisconsin judicial campaign spending.<sup>8</sup> The most fun thing about the race was winning it.

So I come here this evening as a maven on the topic of the ballot and the bench. With my election experiences, you might think I would be unalterably opposed to the elective system of selecting

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<sup>3</sup> For discussions of Justice Brennan's career and appointment to the U.S. Supreme Court, see generally Hunter R. Clark, *Justice Brennan: The Great Conciliator* (1995); Eisler, *supra* note 1; Reason & Passion: Justice Brennan's Enduring Influence (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997); Proceedings of the Bar and Officers of the Supreme Court of the United States, In Memoriam: Honorable William J. Brennan, Jr., May 22, 1998; In Memoriam: William J. Brennan, Jr., 111 Harv. L. Rev. 1 (1997).

<sup>4</sup> I have explained, tongue-in-cheek, that in the 1970s women were appointed to the bench in alphabetical order. Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 Golden Gate U. L. Rev. 489, 490-91 (1984).

<sup>5</sup> *Isiah B. v. State*, 500 N.W.2d 637 (Wis. 1993).

<sup>6</sup> *State v. Morgan*, 539 N.W.2d 887 (Wis. 1995).

<sup>7</sup> *State v. Post*, 541 N.W.2d 115 (Wis. 1995); *State v. Carpenter*, 541 N.W.2d 105 (Wis. 1995).

<sup>8</sup> Wisconsin Citizen Action, *Courting the Supremes: Big Money in Wisconsin State Supreme Court Elections 1989-1999*, at 2 (1999).

judges—both in practice and theory. But I am not—that is, I am not opposed to electing judges in a state like Wisconsin.<sup>9</sup>

There is no perfect system for selecting judges. No system guarantees the best qualified judges, even if we could agree on qualifications. Each selection method has its strengths and weaknesses, and each presents problems and opportunities.<sup>10</sup> People will evaluate the pluses and minuses differently and choose a selection system that most closely meets their comfort level. Furthermore, although the strengths and weaknesses, and problems and opportunities, of a selection method can, and should, be discussed in the abstract, the system chosen as best will depend to a large extent on the legal, historical, and political culture of the jurisdiction.

So here I am, inviting you to join with me in reexamining the election of judges, this time from the perspective of a judge who has been deep and often in the electoral trenches and who has had to decide cases before, during, and after elections.<sup>11</sup>

Exploring ways to improve the elective system is crucial. Most state court judges are elected. Nearly 87% of state trial judges and nearly 82% of state appellate judges stand for election of some type.<sup>12</sup> And, we should remember, more than 90% of the judicial business in this country is handled by state courts.<sup>13</sup> Bill Brennan never forgot that. He wrote:

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<sup>9</sup> See Shirley S. Abrahamson, Remarks before the ABA Commission on Separation of Powers and Judicial Independence, Washington, D.C. (Dec. 13, 1996), reprinted in 12 St. John's J. Legal Comment. 69 (1996); see also Larry V. Starcher, Choosing West Virginia's Judges, 12 W. Va. Law. 18 (1998) (favoring election of judges in West Virginia).

<sup>10</sup> For a discussion of the strengths and weaknesses of several methods of judicial selection, see generally Peter D. Webster, Selection and Retention of Judges: Is There One "Best" Method?, 23 Fla. St. U. L. Rev. 1 (1995).

<sup>11</sup> For current media coverage of judicial selection, judicial elections, and judicial independence, see the Brennan Center for Justice at New York University School of Law's twice-weekly e-mail service called the Court Pester E-lert. To examine the E-lert, visit the Brennan Center website at [www.brennancenter.org](http://www.brennancenter.org).

<sup>12</sup> Task Force on Lawyers' Political Contributions, Am. Bar Ass'n, Report and Recommendations of the Task Force on Lawyers' Political Contributions (Part Two) 3 n.1 (1998).

Professor Roy A. Schotland corrected these figures, concluding that 87% of appellate court judges and 87% of trial court judges stand for some form of election. Roy A. Schotland, Comment, 61 Law & Contemp. Probs. 149, 154-55 (1998); see also Task Force on Selecting State Court Judges, Citizens for Indep. Courts, Choosing Justice: Reforming the Selection of State Judges, in The Reports of the Task Forces of Citizens for Independent Courts, Uncertain Justice: Politics and America's Courts app.2 at 115 (The Constitution Project, 2000) [hereinafter *Uncertain Justice*].

For additional information on elected and nonelected judges, see Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 725-26 (1995); An Interview with Roy Schotland, Ct. Rev., Fall 1998, at 12, 13.

<sup>13</sup> Roy A. Schotland, Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?, 2 J. L. & Pol. 57, 77 (1985). Although

The spotlight is often focused upon the decisions of the United States Supreme Court. . . . Actually the composite work of the courts of the 50 states has greater significance in measuring how well America attains the ideal of equal justice under law for all. . . . The overwhelming number of final and vital decisions upon which depend life, liberty, and property thus are decisions of the state courts.<sup>14</sup>

Let me give you a road map that will allow those who are not interested to leave now. I begin by addressing judicial elections, including their chief criticism: that elections are a threat to judicial independence. Next I speak about threats to judicial independence of appointed judges. I argue that in any judicial selection system, the best way to ensure judicial independence is to develop the public's understanding of, and respect for, the concept of judicial independence. Having said all that, I acknowledge several areas of growing concern that I have with judicial elections.

I favor election of judges because the elective system can be an educational experience for both the judges and the electorate.

Judges who are running for election take the time to ride with law enforcement officers, make rounds with social workers and doctors, visit schools and factories, and lunch with the fork-and-knife clubs and bar associations. These visits give a judge the opportunity to understand the legal system from the perspective of the users: litigants and lawyers. When I write an opinion I am also mindful that one of the opinion's many audiences is the public. I try to make my opinions comprehensible to a lay reader (which probably makes them more comprehensible to lawyers, too).

Elections can increase the citizen's understanding of the judicial function and the need for judicial independence. The public's appreciation of and respect for judicial independence is, I think, the best way to ensure that the judiciary will remain independent. I see these benefits of the elective system as outweighing, at least in some states, the less-appealing aspects of elections.

I caution, however, that improvements are needed in the elective system to ameliorate growing problems, including voters' lack of in-

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the exact percentage cannot be readily determined, no one disputes that state courts handle the vast bulk of litigation in this country.

A retired judge of the California Court of Appeals argues that "state courts have become the equivalent of judicial chicken fat in the academy, despite the fact that this is where the vast bulk of litigation is decided." Robert S. Thompson, Comment on Professors Karlan's and Abrams' Structural Threats to Judicial Independence, 72 S. Cal. L. Rev. 559, 563 (1999).

<sup>14</sup> William J. Brennan, Jr., Justice Nathan L. Jacobs—Tributes from His Colleagues, 28 Rutgers L. Rev. 209, 210 (1975).

formation and interest and increased campaign expenditures—two problems that are ironically interdependent.

I acknowledge that my position on judicial elections is not a popular one. My son, the N.Y.U. School of Law graduate, advises that I should reconsider my position supporting elective judges—or at least keep it quiet. My friend Abner Mikva, former Congressman, former Chief Judge of the District of Columbia Circuit Court of Appeals, and former White House Counsel to President Clinton, condemns judicial elections out of hand. Although born in Milwaukee, he lost that natural advantage by spending most of his life in Chicago and D.C. Judge Mikva jokes that my position can be attributed only to something in the Wisconsin drinking water.

## I

### JUDICIAL ELECTIONS: ADVANTAGES AND CRITICISMS

Scholars, lawyers, and bar associations have been nearly unanimous in condemning judicial elections.<sup>15</sup> Judicial elections are, they say, at odds with the concept of judicial independence.

Elected judges pose the *majoritarian* dilemma: In a government committed to constitutionalism and the protection of rights, how can judges accountable to the electorate, accountable to the majority, safeguard the minority?<sup>16</sup> Judicial independence ultimately is thus the focus of this—and for that matter, any—discussion about the selection of judges.

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<sup>15</sup> The American Bar Association has endorsed merit selection since 1937. More recently the American Bar Association has recognized that a majority of judges are elected and has proposed reform of the elective system. See Task Force on Lawyers' Political Contributions, *supra* note 12, at 19-59.

Professor Kathryn Abrams, using a realism approach to judicial elections, criticizes the idealism in legal circles about state judicial elections and judicial independence. Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Finance*, 72 S. Cal. L. Rev. 505, 505-06 (1999).

Professor Roy A. Schotland laments the naivete in law school teaching about state judges, judicial elections, and judicial independence. Schotland, *supra* note 13, at 77-81.

<sup>16</sup> In the 1830s Alexis de Tocqueville expressed concern with the independence of elected state court judges:

I am aware that a secret tendency to diminish the judicial power exists in the United States; and by most of the constitutions of the several states the government can, upon the demand of the two houses of the legislature, remove judges from their station. Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power, but the democratic republic itself.

Alexis de Tocqueville, 1 *Democracy in America* 279 (Alfred A. Knopf, Inc. 1945) (1835).

But if elected judges pose the *majoritarian* dilemma, appointed federal judges with life tenure have posed the *countermajoritarian* dilemma, for Justice Scalia,<sup>17</sup> among others: In a democracy, how can nonelected federal judges justify overturning legislation adopted by popularly elected officials representing, at least in theory, the will of the people?<sup>18</sup>

Nevertheless, academic writings express a preference for the system established by the Federal Constitution—appointment of judges by the President and the Senate to serve “during good Behaviour.”<sup>19</sup> The theory is that once appointed, federal judges will be free from executive, legislative, and electoral influence.<sup>20</sup>

In the nineteenth century, the states began to move from appointive judges to an elected judiciary.<sup>21</sup> For example, on admission to the union in 1848, the Wisconsin constitution provided for election of all judges.<sup>22</sup> Wisconsin, populated then and now by former New Yorkers, was influenced by the 1846 New York constitution that provided for an elected judiciary.<sup>23</sup>

Today, 150 years later, judicial accountability and public participation—the Jacksonian populist era ideals—are still the principal reasons offered in favor of judicial elections. The people are the sole legitimate source of power. Judges should be accountable to the people because judges make decisions that affect the community. The people should have the power to get rid of bad judges even if the criteria for the removal of judges may be different from the criteria for removing legislators and governors. Citizens should be en-

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<sup>17</sup> See *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (castigating “illiberal Court” for inscribing “countermajoritarian preferences of the society’s law-trained elite[ ] into our Basic Law”).

<sup>18</sup> For discussions of the countermajoritarian dilemma, see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-23 (2d ed. 1986); Laurence H. Tribe, *American Constitutional Law* 10-12 (2d ed. 1988); Croley, *supra* note 12, at 693.

<sup>19</sup> U.S. Const. art. III, § 1.

<sup>20</sup> To some, the unelected status of the judiciary is exactly what preserves the judges’ legitimacy in a democracy. See, e.g., Croley, *supra* note 12, at 694.

<sup>21</sup> In eight of the original thirteen states, many of the judges were appointed by the legislature; in the other states, the governor appointed judges, but only with the approval of a special council. Charles H. Sheldon & Linda S. Maule, *Choosing Justice: The Recruitment of State and Federal Judges* 3 (1997). Just over one-half of the twenty-nine states that were part of the Union in 1846 utilized popular election of all judges. Every state admitted between 1846 and 1912 adopted popular election for some if not all judges. See *id.* at 3, 8; William R. Moser, *Populism, A Wisconsin Heritage: Its Effect on Judicial Accountability in the State*, 66 Marq. L. Rev. 1, 53-54 (1982); see also Lawrence M. Friedman, *A History of American Law* 110-11 (1973); J. Willard Hurst, *The Growth of American Law: The Law Makers* 140 (1950).

<sup>22</sup> Wis. Const. art. VII, §§ 4, 7 (1848).

<sup>23</sup> N.Y. Const. of 1846, art. VI, §§ 12-17.

couraged to participate as fully as possible in civic life. Electing judges is citizen participation. Elections legitimize the judicial authority.<sup>24</sup>

The dispute about judicial selection did not then, and does not today, ordinarily center on the quality of judges. Empirical studies do not demonstrate that the method of selection produces a different kind of judiciary, although we suffer from a shortage of accurate factual information.<sup>25</sup> What we do know, however, is that no system can claim a monopoly on producing good—or bad—judges.<sup>26</sup>

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<sup>24</sup> For expressions of these sentiments in the debates and public discussions in Wisconsin on the selection of judges, see, for example, *The Attainment of Statehood* 640-42 (Milo M. Quaife ed., 1928); *The Convention of 1846*, at 288-92 (Milo M. Quaife ed., 1919); *The Movement for Statehood 1845-1846*, at 284-86, 314-15, 382-84, 445-53, 459-62, 502-05 (Milo M. Quaife ed., 1918); *The Struggle Over Ratification 1846-1847*, at 29-30, 134, 245-52, 281-84, 468-69, 485-88, 493-95, 558-60, 582-83 (Milo M. Quaife ed., 1920); Moser, *supra* note 21, at 54-56.

For a current debate on appointment or election of Wisconsin Supreme Court Justices, see Chuck Chvala & Ed Garvey, *Face Off: Should Supreme Court Justices Be Appointed by the Governor?*, *Wis. Counties*, Jan. 2000, at 36; Mary Hubler, *Governor Should Appoint Supreme Court Justices*, *Wis. Lawyer*, Oct. 1999, at 37.

<sup>25</sup> See Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 *Alb. L. Rev.* 339, 339-41 (1996) (citing research showing that selection process makes little difference in characteristics of judges chosen but can reallocate power in process of choosing judges); Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 *Psychol. Pub. Pol'y & L.* 242, 247-48 (1997) (arguing that research does not show that merit selection systems produce better judges than do elections).

<sup>26</sup> By the early twentieth century, elective judiciaries in some states were viewed as plagued by incompetence and corruption. A compromise between judicial appointment and election, between judicial independence and accountability—dubbed the Missouri plan—was adopted by several states. Under this plan, the governor would appoint judges from a slate of persons selected by a merit selection committee. Sometime after appointment, the judge would face the electorate in an uncontested election at which the voter would signify a yes or no to retention of the judge. This system has been favored as eliminating partisan politics and the adverse consequences of contested elections, yet giving the people a voice in judicial selection.

As a practical matter, political maneuvering may exist in the selection and working of the merit selection committee, but the maneuvering has been removed from public scrutiny.

Furthermore, retention elections, like contested elections, have revolved around particular controversial judicial decisions and have become increasingly expensive. See Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 *S. Cal. L. Rev.* 1969, 1980-81 (1988); Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 *S. Cal. L. Rev.* 2007, 2027-42 (1988).

As I see it, retention elections may be more threatening to judicial independence than contested elections. Retention elections allow for surprise last-minute attacks. In a retention election, all attention is focused on the incumbent, and an incumbent is running against an idealized nonexistent judge. See Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 *S. Cal. L. Rev.* 1995, 2003 (1988).

In several states, judges face retention on vote of the executive or legislative branches. Retention review by a governor or legislature presents the same threat to judicial indepen-



Instead, the dispute about the method of selection centered then, and centers today, on competing notions of democratic theory. The concern is whether elected judges will inevitably tailor their decisions to fit popular opinion. If judges are to be independent, should they not by definition be free from the pressure of the electorate?

Edward Ryan, a delegate to the 1846 Wisconsin constitutional convention who later became a Chief Justice of the Wisconsin Supreme Court, saw the issue clearly.<sup>27</sup> Judicial elections, at least superficially, seem at odds with the concept of judicial independence. The function of the judiciary is interpretation, he said, and "interpretation cannot be a representative function."<sup>28</sup> "[T]he judiciary," Ryan stated, "represents no man, no majority, no people. It represents the written law of the land; . . . it holds the balance, and weighs right between man and man, between the rich and the poor, between the weak and the powerful . . . ."<sup>29</sup>

Judicial independence, a concept not easy to define, reflects the ideal that judges decide cases fairly, impartially, and according to the facts and law.<sup>30</sup> Although all judges do not reason alike or reach the same result, decisions should be based on determinations of the evidence and the law, not on public opinion polls, personal whim, prejudice or fear, or interference from the legislative or the executive branches or private citizens or groups. Judicial independence is a means to an end—the end is due process, procedural and substantive,

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dence as retention popular elections and contested partisan and nonpartisan elections. Because the political branches promote programs that are subject to judicial review, judicial job retention might very well depend on attention to the special interests of the governor or legislature.

<sup>27</sup> The 1846 constitution was not adopted, but the 1846 convention provides insight into the 1848 constitution that was adopted.

<sup>28</sup> The Convention of 1846, *supra* note 24, at 594.

<sup>29</sup> *Id.* Ryan went on to state:

Let the judiciary stand on the eternal rock of right, unswayed by all the clamorous waves of opinion chafing at its unconscious base—above all influences, above all representation—the representative of eternal and living truth.

Then, sir, it is an idle fiction, a baseless plausibility to say that principles of our representative government require the election of our judiciary by the people.

*Id.* at 595.

<sup>30</sup> See Abrahamson, *supra* note 9, at 70 (describing institutional and decisional judicial independence); Pamela S. Karlan, Two Concepts of Judicial Independence, 72 S. Cal. L. Rev. 535 (1999) (arguing that judicial independence is not single concept, but constellation of different "freedoms from" and "freedoms to").

The literature on judicial independence is voluminous. For a bibliography providing citations and abstracts for selected books, papers, reports, and articles relating to the subject of judicial independence and accountability, see generally Amy B. Atchison et al., Judicial Independence and Judicial Accountability: A Selected Bibliography, 72 S. Cal. L. Rev. 723 (1999).

a fair trial according to law. Judicial independence does not protect the judge; it protects the people.

Everyone agrees, I think, that the principle of judicial independence should apply equally to elected and appointed judges. But is there something in either selection system that encourages or impedes judicial independence?<sup>31</sup>

Stephen Bright, a leading litigator in death penalty cases, concludes that elective judges follow popular opinion in deciding capital cases.<sup>32</sup> However, Federal Court of Appeals Judge Alex Kozinski sug-

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<sup>31</sup> For a public choice analysis, see Richard L. Hasen, "High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. Rev. 1305 (1997). Hasen concludes:

The public choice analysis of judging demonstrates the unreliability of the common wisdom that judicial elections promote judicial accountability and judicial appointments promote judicial independence. In fact, most judges can vote their values, that is, act independently, most of the time, whether they are elected or appointed. Occasionally a high-salience case will lead a trial court judge subject to reelection or reappointment to deviate from voting her values in order to curry favor with voters or the appointing authorities, but those cases are rare . . . . Lengthening judicial terms, whether judges eventually stand for reelection or reappointment, removes some of the disincentives to vote their values, and lifetime judicial tenure removes nearly all disincentives for judges to vote their values.

*Id.* at 1335.

For discussions of the argument that judicial elections violate due process because of the risks of partiality, see, e.g., *In re Bybee*, 716 N.E.2d 957, 960 (Ind. 1999) ("We firmly believe that the ability of judges to provide litigants due process and due course of law is directly and unavoidably affected by the way in which candidates campaign for judicial office."); Randall T. Shepard, Campaign Speech: Restraint and Liberty in Judicial Ethics, 9 *Geo. J. Legal Ethics* 1059 (1996) (arguing that restraints on judicial conduct in campaigns and in other areas of judicial life have roots in due process); Scott D. Wiener, Note, Popular Justice: State Judicial Elections and Procedural Due Process, 31 *Harv. C.R.-C.L. L. Rev.* 187 (1996) (claiming that judicial elections create risk of partiality and lack of individualized adjudication).

<sup>32</sup> See, e.g., Stephen B. Bright, Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary, 14 *Ga. St. U. L. Rev.* 817 (1998); Stephen B. Bright, Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights, 78 *Tex. L. Rev.* 1805 (2000); Stephen B. Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 *N.Y.U. L. Rev.* 308 (1997) [hereinafter Bright, Political Attacks]; Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 *B.U. L. Rev.* 759 (1995).

Justice Brennan once stated that "community pressure on elected judges to convict people accused of capital cases 'can overwhelm even those of good conscience.'" Peter A. Joy, Insulation Needed for Elected Judges, *Nat'l L.J.*, Jan. 10, 2000, at A19 (quoting Justice Brennan).

Commentators view death penalty decisions as the most potent issue in recent judicial elections. See, e.g., Gerald F. Uelman, The Fattest Crocodile: Why Elected Judges Can't Ignore Public Opinion, *Crim. Just.*, Spring 1998, at 4.

gests that the fact that judges are "part of the community" and "are often selected to reflect the views, mores and ethics of the community" may offer a far more convincing explanation of judicial behavior than does the elective process.<sup>33</sup>

Academics who have written recently condemning judicial elections apparently are persuaded that the pressures of election and the political process are too great to expect mere mortal judges to resist them.

The academics refer to the late California Supreme Court Justice Otto Kaus, a wise and highly respected judge, who said that ignoring the political consequences of decisions is "like ignoring a crocodile in your bathtub" as you are shaving.<sup>34</sup> The question is whether the crocodile, the electoral pressures, will affect your decisionmaking.<sup>35</sup> Kaus was quoted as saying, "I decided the case [concerning the initiative entitled the Victim's Bill of Rights] the way I saw it. But to this day, I don't know to what extent I was subliminally motivated by the thing

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For a discussion of whether attacks on the judiciary and the efforts of politicians to change the judiciary affect due process in capital cases, see Stephen B. Bright et al., Panel, *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 Colum. Hum. Rts. L. Rev. 123 (1999).

<sup>33</sup> Alex Kozinski, *The Many Faces of Judicial Independence*, 14 Ga. St. U. L. Rev. 861, 864 (1998).

Federal Court of Appeals Judge Bobby R. Baldock commented: "While a judge must follow and adhere to the law, judges, like everyone else, watch the news and are aware of public sentiment." *A Discussion of Judicial Independence with Judges of the United States Court of Appeals for the Tenth Circuit*, 74 Denv. U. L. Rev. 355, 362 (1997) [hereinafter *Discussion of Judicial Independence*].

Legal historian James Willard Hurst offers support for Judge Kozinski's view, concluding that

[t]he whole evidence [in the fifty years after 1880] indicated no direct relation between the liberality of the courts towards legislative judgment and the circumstance that the judges were elected or appointed. The ideas and feelings prevailing in any given generation in those levels of the community from which judges came offered far more convincing explanation of judicial policy.

Hurst, *supra* note 21, at 146.

<sup>34</sup> See Gerald F. Uelman, *Otto Kaus and the Crocodile*, 30 Loy. L.A. L. Rev. 971, 973-74 (1997) (recounting Justice Kaus's famous speech).

<sup>35</sup> See, e.g., Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L. Rev. 733, 738 (1994) (discussing recent survey that found "high percentage of judges who acknowledge that retention elections exert a major influence on their behavior"); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1584 (1990) (concluding that judicial review of ballot measures "puts elected judges at greatest risk"); Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52, 52 (1987) (suggesting that greater political vulnerability of judges may stem from greater state court protection of civil liberties); Uelman, *supra* note 32, at 6 (finding "disturbing indications that judicial reluctance to reverse death penalty judgments may sometimes be reluctance to expose one's posterior to the wrath of the electorate").

you could not forget—that it might do you some good politically to vote one way or the other.”<sup>36</sup>

Every elected judge knows the crocodile is in the tub. Judges know they may have to face an unhappy electorate. A judge would be naive not to understand this fact of life.

But the judge must take care not to feed the crocodile, consciously or subconsciously, by tailoring the result of a case to popular opinion—real or perceived. An elected judge who is self-confident about decisionmaking and who is, at one and the same time, politically sensitive and idealistic, will not let public opinion shape the results of a case.<sup>37</sup> Let me tell you why—I have four reasons:

First, feeding the crocodile violates the fundamental concepts of judging and the judicial oath of office. It undermines the very institution that the judge is committed to protect. Some would dismiss these

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<sup>36</sup> Theodore J. Boutrous, Jr. et al., *Nat'l Legal Ctr. for the Pub. Interest, State Judiciaries and Impartiality: Judging the Judges* 33 (Roger Clegg & James D. Miller eds., 1996) (citing John H. Culver & John T. Wold, *Judicial Reform in California*, in *Judicial Reform in the States* 139, 156 (Anthony Champagne & Judith Haydel eds., 1993)).

Justice Kaus also admonished:

I'm afraid the era of retaining judges on the basis of their character, without tallying up their votes, is a thing of the past. There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time.

Reidinger, *supra* note 35, at 58 (quoting Justice Kaus).

<sup>37</sup> It is very difficult to measure or discern the influence of elections on judges' decisions. Some might conclude that elected judges are not highly responsive to the will of the electorate because so few elections are contested. Others might surmise that perhaps judges are shaping their decisions to avoid contested elections, that the mere threat of an election makes judges responsive to public opinion. For differing perspectives, see Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 *Judicature* 306, 313 (1994) (concluding that high percentage of judges acknowledge that retention elections exert major influence on their behavior and suggesting that “fear of losing plays a role even when losing is highly unlikely”); Croley, *supra* note 12, at 730 (concluding that it is “safe to say that elected judges *typically* have not been highly responsive to the electorate”); John Gibeaut, *Taking Aim*, A.B.A. J., Nov. 1996, at 50, 53 (covering 1994 survey of 369 state judges; 27.6% reported that retention elections made them more sensitive to public opinion; 15.4% reported they would avoid controversial cases and rulings); Hasen, *supra* note 31, at 1326 (concluding that “the public choice model of judging reveals that elected judges will be accountable only in rare circumstances”); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 *Hastings Const. L.Q.* 213, 230-31 (1983) (suggesting that judicial elections are unlikely to have influence on decisions).

Julian N. Eule concludes that principled judges—like Otto Kaus and Joseph Grodin—are compelled to “question their own fortitude in the face of the crocodile. The unprincipled ones will simply step out of the tub without telling us about it.” Eule, *Judicial Review of Direct Democracy*, *supra* note 35, at 1583 n.362.

as idealistic or naive considerations. I do not. Judges, like most people, try to live up to their responsibilities.<sup>38</sup>

Second, as a practical matter, shaping a decision to fit public opinion is a futile exercise. Every decision is a potential land mine and can provide ammunition for an opponent. But it is difficult to tell in advance which decisions will blow up.<sup>39</sup> Flag desecration<sup>40</sup> and nude dancing<sup>41</sup>—recent cases in our court, potentially hot-button issues—proved not to be controversial during my campaign.<sup>42</sup>

Judges who sit in states with capital punishment tell me all capital punishment cases incite the electorate. Wisconsin has not had capital punishment since the 1850s, so this issue is not one for Wisconsin judges.

Third, even if the judge correctly identifies the hot-button cases, the judge cannot be sure which position will ultimately prove more popular with the electorate by the time the election comes. No position is without adherents.

Fourth, it is tough enough to make decisions without considering extraneous factors, like public opinion and elections. Once a judge starts feeding the crocodile with “tailored” decisions, she cannot stop. The crocodile becomes hungrier and hungrier, and it must be fed continually.

Why would any judge want to come to chambers every day bearing the crocodile on her back? A judge soon finds out it is just easier to call the case on the facts and law.

My own experience, not surprisingly, supports my views about judicial independence of elected judges. Let me tell you about cases that came before our court in 1995 raising the constitutionality of Wis-

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<sup>38</sup> Judges are not only checked by their own commitment, professionalism, and integrity, but also by institutional realities, the dynamics of the judicial decisionmaking process, the desire to earn the respect of sibling judges, the bar and the public, and the authority of appellate courts to reverse decisions. Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 St. Mary's L.J. 965, 992 (1993).

<sup>39</sup> In reading a draft of this Speech, Professor Roy Schotland wrote “forgive me, but I can’t help querying your ‘But it is difficult to tell in advance which decisions will blow up.’” Personal Communication from Roy A. Schotland, Prof. of Law, Georgetown Univ. Law Ctr., to author (May 2, 2000) (on file with author). My response to Professor Schotland is that I appreciate his skepticism, but that I have found that predictions about what cases are hot are often wrong, and that popular views can change between a decision and an election.

<sup>40</sup> *State v. Janssen*, 580 N.W.2d 260 (Wis. 1998).

<sup>41</sup> *Lounge Mgmt. v. Trenton*, 580 N.W.2d 156 (Wis. 1998).

<sup>42</sup> Crime, in general, has been a high-profile issue in judicial campaigns in the last quarter of the twentieth century, including mine. In earlier times, hot-button issues were farm foreclosure, labor strife, and school busing. Hans A. Linde, *Hercules in a Populist Age*, 103 Harv. L. Rev. 2067, 2070 (1990) (reviewing Joseph R. Grodin, *In Pursuit of Justice* (1989)).

consin's sexual predator law.<sup>43</sup> This law permits defendants who are adjudicated as sexual predators to be institutionalized beyond the terms of their criminal sentences.

I wrote the sole dissent, concluding that the sexual predator law was unconstitutional.<sup>44</sup> Popular opinion probably supported the law. But I was voting on constitutionality, not on the wisdom or popularity of institutionalizing sexual predators rather than freeing them. I do not think six justices on the Wisconsin court or five justices on the U.S. Supreme Court voted to uphold the sexual predator law because they were courting popular opinion.<sup>45</sup> Nor were the four U.S. Supreme Court justices in dissent courting popular opinion.<sup>46</sup>

My election opponent used my dissent in the sexual predator case against me in a television advertisement in the 1999 election campaign. The ad implied that my presence on the court would allow sexual predators to prey on children. The ad exploited a victim's grief. The ad turned out, I think, to be more harmful to my opponent than to me.

I have a political philosophy about judging: Good judging *is* good politics. I am persuaded that the bar and the public will support judges whom they perceive as independent even if they do not agree with particular decisions. But judges have to talk about judicial independence and make it a campaign issue. Over the past twenty-five years, and in each of my elections, the concept of judicial independence has played a prominent role in my discussions with the public.

I recognize that in any single election the emotions of the voters may outweigh the voters' commitment to judicial independence. In 1996, the Tennessee Republican Party, including the Governor and both U.S. Senators, led a successful attack against Tennessee Supreme Court Justice Penny White based on one death penalty case. She had joined an opinion confirming the conviction but reversing the death penalty.<sup>47</sup> All the justices agreed that the case should be sent back for a new sentencing. Negative and misleading advertisements about the opinion were abundant, and they worked to defeat a person whom

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<sup>43</sup> *State v. Post*, 541 N.W.2d 115 (Wis. 1995); *State v. Carpenter*, 541 N.W.2d 105 (Wis. 1995).

<sup>44</sup> *Post*, 541 N.W.2d at 135 (Abrahamson, C.J., dissenting); *Carpenter*, 541 N.W.2d at 115 (Abrahamson, C.J., dissenting).

<sup>45</sup> See *Kansas v. Hendricks*, 521 U.S. 346 (1997) (holding, five to four, that Kansas Sexually Violent Predators Act's definition of "mental abnormality" satisfies substantive due process requirements and that Act does not violate Constitution's double jeopardy prohibition or its ban on ex post facto lawmaking).

<sup>46</sup> See *id.* at 373.

<sup>47</sup> *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996).

many believed was a good judge.<sup>48</sup> But anomalies do not condemn a system. Nor do they demonstrate that another system—appointment—is flawless.

## II

### THREATS TO JUDICIAL INDEPENDENCE BY APPOINTMENT OF JUDGES

The pressures on elected judges without life tenure are obvious. But appointed judges, even those with life tenure, are not free from outside pressures, whether in the selection process or thereafter. Those opposing judicial elections on grounds of judicial independence do not ordinarily examine issues of judicial independence that also concern appointed judges.

The judicial appointment process has become increasingly political, emphasizing the personal predilections and opinions of the nominee. The phrase “litmus test” is common parlance.<sup>49</sup>

For example, California Governor Gray Davis, a Democrat, in response to recent questions about judicial appointments, repeatedly stated that he expects his judicial appointees to more or less reflect the views he expressed during his own election campaign or resign.<sup>50</sup>

Promises that the selection or removal of particular judges will produce particular results encourage the public to perceive judges as no different from executive and legislative officeholders who make

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<sup>48</sup> For discussions of the Penny White campaign, see, e.g., Myron Bright, *Judicial Independence*, 20 U. Haw. L. Rev. 611, 614 (1998) (discussing several examples of dismissals or rejections of state judges, including that of Penny White); Bright, *Political Attacks*, *supra* note 32, at 310, 313-16 (describing campaign against Penny White as entailing irresponsible misrepresentation of White's decision); Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 *Judicature* 68 (1999) (using Penny White as example of how interest group involvement can politicize campaigns for judicial retention); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. Cal. L. Rev. 625, 627-28, 648-51 (1999) (comparing campaign against Justice White with campaigns against other justices).

<sup>49</sup> For discussions of pressures on judges created through the focus on the personal ideology and political views of candidates in the appointment process, see, e.g., Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 *Judicature* 117 (1996) (discussing overuse of political criteria to assess judicial appointments as attempt to abort judicial independence); Discussion of *Judicial Independence*, *supra* note 33, at 367-68 (presenting diverging opinions of justices regarding appointment process); Randall R. Rader, *The Independence of the Judiciary: A Critical Aspect of the Confirmation Process*, 77 Ky. L.J. 767 (1988-89) (concluding judicial independence requires Senate to refrain from scrutinizing views of candidates except in rare circumstances).

<sup>50</sup> Davis Wants His Judges to Stay in Line, S.F. Chronicle, March 1, 2000, at A3; see also Transcript of Governor's Comments on Judges, Sacramento Bee, Feb. 29, 2000, at <http://www.capitolalert.com/news/transcript.html>.

decisions heavily influenced, and properly so, by the wishes of their constituents.

The most troubling threat to the judicial independence of federal judges, according to federal judges themselves, is the personal ambition of a judge. Circuit Court of Appeals Judge Guido Calabresi, former Dean of Yale Law School, commented:

If I were to identify the single greatest threat to judicial independence today, it would be the fact that judges want to move up. District Court Judges want to go to the Court of Appeals and so they care what politicians think of them. And even Court of Appeals judges who have no chance whatsoever to go to the Supreme Court start to act funny when some idiot journalist writes, "So and so is a good judge, and ought to be on the Supreme Court."<sup>51</sup>

Flattery is a powerful influence. So is criticism.

Political and media criticism of appointed judges, no less than criticism of elected judges, can also take a toll on judicial independence.<sup>52</sup> When New York Federal District Court Judge Harold Baer,

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<sup>51</sup> Roundtable Discussion, *Is There a Threat to Judicial Independence in the United States Today?*, 26 *Fordham Urb. L.J.* 7, 26 (1998) [hereinafter Roundtable Discussion]. For similar comments about "bench climbers," see *What Is Judicial Independence?*, 80 *Judicature* 73, 81 (1996) (presenting transcript of panel discussion at American Judicature Society's 1996 annual meeting) [hereinafter *Judicial Independence*]; Roundtable Discussion, *supra*, at 12 (documenting comments of Judge Edward Becker of Third Circuit Court of Appeals).

Judge Calabresi reported that U.S. Supreme Court Justice Hugo Black was concerned that federal judges would become too dependent on Congress for funding the judicial administrative bureaucracies. Roundtable Discussion, *supra*, at 27. Judge Calabresi explained:

I have actually had a judge say to me: 'Why not take that phrase out of your opinion, you do not need it, and it might offend the Senate. And you know how that could affect the judicial budget.' That is very dangerous. We have got to be careful not to become dependent in this subtle but pernicious way.

*Id.*

Professor Resnik expresses a similar concern:

[A] common assumption is that Article III is not only the *paradigm* of independence but *the pinnacle* also of how such independence can be achieved. Yet, in terms of separation of powers, Article III looks thin. It . . . misses the institutional needs of a judiciary, functioning in an administrative state either as a branch of government or as a provider of services to the millions of litigants that seek its attention.

Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 *S. Cal. L. Rev.* 657, 668 (1999).

For a discussion of legislative actions threatening judicial independence, see generally Erwin Chemerinsky, *When Do Legislative Actions Threaten Judicial Independence?*, 5 *Civ. Just. Dig.* 4 (1998) (summarizing paper presented at 1998 Roscoe Pound Foundation Forum for State Court Judges in which author identified eight types of legislative action infringing upon judiciary).

<sup>52</sup> See *Judicial Independence*, *supra* note 51, at 75, 80-81. U.S. District Court Judge William M. Hoeveler said: "Even though we have life tenure, we're human; don't ever



Jr., suppressed evidence of drugs during the trial of an alleged drug dealer,<sup>53</sup> President Clinton suggested that the judge consider resigning. Presidential candidate Robert Dole called for the judge's impeachment. No one could force the judge to resign, and impeachment was not a real possibility. But Judge Baer, on reconsideration of his decision, changed his mind and allowed the evidence to be introduced.<sup>54</sup>

The attacks on Judge Baer were characterized as intimidation, irresponsible criticism, and distortion, going beyond legitimate criticism. Judicial independence of federal judges became the rallying cry.<sup>55</sup> Yet federal judges have life tenure: the best built-in protection for judicial independence any constitution or legal system can give.

No constitutional or statutory safeguards can guarantee judicial independence. The quality most needed in judges is courage. Those without it should neither apply nor run for the office. A judge must be able to say no to the governor, no to the legislature, and no to the people. A judge may find it easier to display courage when he or she has life tenure. The stakes are higher for elected judges who do not have life tenure, but the best judges, whatever the selection or reten-

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think we're not subject to outside pressures. The press, public approval, polls—there are a variety of forces that invade our thinking or at least try to invade our thinking." *Id.* at 75. Dr. Helen L. Morrison said: "No human being can find himself or herself vilified by the press, the public, or colleagues without having it affect him or her." *Id.* at 81. See also Louis H. Pollak, *Criticizing Judges*, 79 *Judicature* 298 (1996) (arguing that while principled criticism of judicial decisions can be invaluable corrective, partisan attacks on judges are threat to judicial independence).

<sup>53</sup> *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996).

<sup>54</sup> *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996).

<sup>55</sup> For discussions of the Judge Baer controversy, see John Q. Barrett, *Introduction: The Voices and Groups That Will Preserve (What We Can Preserve of) Judicial Independence*, 12 *St. John's J. Legal Comment.* 1, 1-4 (1996) (discussing Baer episode as encompassing issues of both individual and institutional judicial independence); Bright, *Political Attacks*, *supra* note 32, at 310-11 (discussing role of Baer controversy in 1996 presidential campaign); Francis J. Larkin, *The Variousness, Virulence, and Variety of Threats to Judicial Independence*, 36 *Judges' J.* 4, 6-7 (1970) (arguing that Baer controversy actually strengthened judiciary by alerting country to importance of judicial independence); Jennifer A. Segal, *Judicial Decision Making and the Impact of Election Year Rhetoric*, 84 *Judicature* 26 (2000) (reviewing Baer's record on crime and concluding that critiques of Baer were largely unsubstantiated).

For a discussion of how judges respond to inaccurate and critical publicity see Robert E. Drechsel, *Dealing With Bad News: How Trial Judges Respond to Inaccurate and Critical Publicity*, 13 *Just. Sys. J.* 308, 312-16 (1988-89) (reporting results of study using questionnaires administered to Pennsylvania and Wisconsin judges); cf. Task Force on the Distinction Between Intimidation and Legitimate Criticism of Judges, *Citizens for Independent Courts, Defending Justice: The Courts, Criticism, and Intimidation*, in *Uncertain Justice*, *supra* note 12, at 121 (detailing historical and current inaccurate and misleading criticism of judges).

tion system, are those who resist threats to judicial independence and actively advocate judicial independence.

The basic, underlying safeguard for judicial independence is popular support of the concept.<sup>56</sup> This, no doubt, is ironic, but I am convinced of it. When political figures or the media threaten judges or condemn them personally on the basis of particular decisions, they create a climate that undermines judicial independence. Both the judge and the public are at risk. The risk is that the judge will tailor the result of the decisions to public opinion. The risk is that the people might join the clamor, forgo their commitment to judicial independence, and support measures to limit judicial independence on the basis of disagreement with a particular decision. But robust expression, even in criticism of U.S. Supreme Court decisions, is, as Justice Brennan knew, indispensable to the intellectual integrity of the judicial process and important in the development of the law.<sup>57</sup> The response to criticism should be a continuing crusade for judicial independence.

I would argue that at least in some states, like Wisconsin, elections provide an opportunity to develop electoral support for judicial independence, and this opportunity outweighs the risks inherent in an elective system. The Wisconsin legal and political culture suggests that elections do not seriously threaten the judge's tenure, do not force her to defend her decisions in a charged political environment, and do not impose upon her the role of a partisan politician.<sup>58</sup>

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<sup>56</sup> After studying 200 years of attacks on federal court judges on the basis of their decisions, Professor Barry Friedman concluded that challenges to judicial independence almost invariably fail. Why? Because "[o]nce the citizens of this country pay attention to the debate, they are approving of judicial independence and disapproving of attacks on it." Barry Friedman, *Attacks on Judges: Why They Fail*, 81 *Judicature* 150, 150 (1998).

For further discussion, see Shirley S. Abrahamson, *Courtroom With a View: Building Judicial Independence With Public Participation*, 8 *Willamette J. Int'l. L. & Dispute Resolution* 13 (2000); Kevin M. Esterling, *Public Outreach: The Cornerstone of Judicial Independence*, 82 *Judicature* 112 (1998) (arguing that outreach to local communities preserves judicial independence by helping individuals evaluate media criticism of judges).

<sup>57</sup> See Brennan, *supra* note 2, at 225-26.

<sup>58</sup> Many factors play a role in forming the Wisconsin legal culture: the size and population of the state of Wisconsin, the relatively small media markets, the number and frequency of contested elections, the grounds for challenging an incumbent, the number of incumbents defeated, and the attitude of judges, lawyers, political parties, legislators, and various interests such as business and labor toward judicial independence.

But times change. Not all elections are the same. The country, indeed the world, gets smaller, and communities take on different ethos. National events and the national mood, as well as experiences in other states, affect the political and legal cultures everywhere.

For analyses of judicial elections in Wisconsin and the Wisconsin political and legal culture, see, e.g., David Adamany & Philip Dubois, *Electing State Judges*, 1976 *Wis. L. Rev.* 731, 738-44, 757, 765 (describing Wisconsin system as set up with intent to insulate judges from partisan influences in elections); Nathan S. Heffernan, *Judicial Responsibility*,

The independence of the judiciary appears to be a fundamental rule about which there is consensus among the judges and the people of Wisconsin.

Wisconsin has been able, for the most part, to insulate judicial elections from partisan influences. Judicial elections are held in April, separated from the November partisan elections. Judges have no party affiliation on the ballot. The electoral coalitions that support candidates for supreme court justice are ordinarily bipartisan, and when they are not, they are likely to fail. The need for bipartisan support in an election is an incentive for judges to eschew party identification, values, and doctrines in or outside the court and to reach out to all.<sup>59</sup>

Wisconsin Supreme Court justices are elected statewide with only one justice running in any year. Campaigning is difficult but manageable. Wisconsin's population is five million. It takes about eight hours to drive from the farthest southeast corner of the state to the farthest northwest corner. The cost of campaigning, including television, is moderate, at least compared to some other states.<sup>60</sup>

### III

#### AREAS OF GROWING CONCERN WITH JUDICIAL ELECTIONS

The elective system can, I believe, be made to work under these conditions. But I readily concede that there are problems, serious problems, with the elective system generally, as well as in my home state.<sup>61</sup> The elective system faces three principal problems: (1) unin-

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Judicial Independence and the Election of Judges, 80 Marq. L. Rev. 1031 (1997) (discussing nonpartisan nature of Wisconsin system); Herbert Jacob, Judicial Insulation—Elections, Direct Participation, and Public Attention to the Courts in Wisconsin, 1966 Wis. L. Rev. 801, 819 (concluding situation in Wisconsin shows elections do not democratize judiciary); Jack Ladinsky & Allan Silver, Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections, 1967 Wis. L. Rev. 128, 166 (describing 1964 and 1965 elections in Wisconsin and concluding court appears to have remained independent of popular intervention); Moser, *supra* note 21, at 54-62 (presenting history of Wisconsin judicial electoral system and challenges to it).

<sup>59</sup> The total number of judges in Wisconsin is 250. Two-thirds of the trial judges in Wisconsin are elected in counties in which there are only one or two judges. Milwaukee, the state's most populous county, has forty-seven judges. Trial judges have six-year terms. The sixteen court of appeals judges run in four districts. Their term of office is six years. Supreme court justices run in statewide elections; the term of office is ten years.

<sup>60</sup> For a copy of the proposed campaign ethic rules for Wisconsin judges and the report of the Commission on Judicial Elections and Ethics appointed by the Wisconsin Supreme Court, see Charles D. Clausen, *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, 83 Marq. L. Rev. 1 app.A at 73-79 (1999).

<sup>61</sup> The chief justices, legislators, and citizens of seventeen of the most populous states that have elected judges met in December 2000 to discuss reforms to the elective system.

formed voters; (2) campaign financing; and (3) regulation of campaign conduct.<sup>62</sup>

First, the voters: Low voter turnout in judicial elections and inadequate information regarding judicial qualifications diminish the democratic significance of a judicial election. A relatively small percentage of the electorate votes in judicial elections. In Wisconsin, ordinarily less than twenty-five percent of the electorate participate in judicial elections, and Wisconsin is a state with one of the highest presidential election turnouts in the country.

Most people are familiar with Judge Judy and Judge Wapner but know little or nothing about the courts that have an impact on their lives. For example, a 1965 poll in Wisconsin conducted after two highly controversial judicial elections showed that less than one-half of the people were aware that state court judges are elected.<sup>63</sup> The result would probably be similar today.<sup>64</sup>

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William Glaberson, *Justices Urge Stricter Rules for Judicial Elections*, N.Y. Times, Jan. 26, 2001, at A16. This conference issued a Call to Action relating to better information for voters, modifying campaign financing for judicial candidates, and regulating campaign conduct. National Summit on Improving Judicial Selection, Call to Action, Jan. 25, 2001, at [www.ncsc.dni.us/summitcalltoaction.htm](http://www.ncsc.dni.us/summitcalltoaction.htm).

<sup>62</sup> For a discussion of these three issues, see generally Sara Mathias, *Electing Justice: A Handbook of Judicial Election Reforms* (1990); Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* (1990).

<sup>63</sup> See Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* 64-65 (1980).

<sup>64</sup> Before the April 4, 2000 election for a supreme court justice, the St. Norbert College Survey Center poll showed that forty-eight percent of state residents were unaware of the candidates for the upcoming supreme court election. Over one-third of Wisconsinites did not know the election was occurring at all. Only sixteen percent of state residents were aware of both the occurrence of the election and the names of the two candidates seeking the office. Yet a majority wanted to maintain the current elective system. E-Mail from Christopher P. Borick, Director, St. Norbert College Survey Center, to author (July 2, 2000) (on file with the *New York University Law Review*).

It appears that the people of Wisconsin continue to support elections as the means for judicial selection. A judge of the Wisconsin Court of Appeals concluded in 1982 as follows:

The determination of which system best provides the needed judicial independence coupled with the needed accountability is left to those legal scholars who can scientifically prove it. However, this writer is convinced that before populist Wisconsin changes its nonpartisan system of electing judges, such proof will have to meet the beyond a reasonable doubt standard, and even that might not be enough.

Moser, *supra* note 21, at 62. I agree with this observation.

For studies of other state judicial elections and voter information, see, e.g., Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 *Judicature* 300 (1992) (examining judicial elections in Ohio); Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 *Judicature* 28 (1989) (examining actual voting patterns in judicial election in Washington); Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Voter Knowledge, Behavior and Attitudes in Primary and General Judicial Elections*, 82 *Judicature* 216 (1999) (finding primary voters more likely to emphasize judicial independence over accountability than general election voters).

If judges are to be accountable to the people and if citizens are to vote for judges by criteria other than the voters' agreement with a judge's decisions in controversial cases, the public must have more information.<sup>65</sup>

As I see it, the time to educate the public is all the time, and not merely at elections or in times of crisis.<sup>66</sup> Judges and lawyers must be

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<sup>65</sup> [P]eople should not evaluate judges based on their decisions in particular cases. Instead, to assure judicial independence, votes should be cast against justices only if they demonstrate that they are unfit for office, corrupt, or incompetent. Any other standard risks encouraging justices to shape their decisions to curry electoral favor.

Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. Cal. L. Rev. 1985, 1985 (1988). Professor Chemerinsky concludes, however, that ideology should play a role in *selecting* judges. *Id.* at 1990.

In June 1997, Tennessee Governor Sundquist asked: "Should a judge look over his shoulder [when deciding cases to evaluate] whether they're going to be thrown out of office?" His response: "I hope so." Bright, *Political Attacks*, *supra* note 32, at 310 & n.12 (citing Paula Wade, *White's Defeat Poses a Legal Dilemma: How is a Replacement Justice Picked?*, *Com. Appeal* (Memphis, Tenn.), Aug. 3, 1996, at A1, available at 1996 WL 11059250).

The American Bar Association Standing Committee on Judicial Independence proposed the following criteria in evaluating the judicial performance of a judge standing for election: experience; integrity; professional competence; judicial temperament; service to the law; and contribution to the effective administration of justice. Standing Comm. on Judicial Indep., Comm'n on State Judicial Selection Standards, *Standards on State Judicial Selection* 19 (Aug. 2000) (pre-publication version on file with the *New York University Law Review*) (providing background and rationale for "black letter" State Court Judicial Selection Standards adopted by ABA House of Delegates on July 10-11, 2000).

<sup>66</sup> Information at election time is, however, very important. One form of such information is a voters' guide. State-produced voters' guides are used in at least four states and New York City. Task Force on Selecting State Court Judges, *Citizens for Indep. Courts*, *Choosing Justice: Reforming the Selection of State Judges*, in *Uncertain Justice*, *supra* note 12, at 77, 100. By court order, the Washington Supreme Court printed and distributed 1.5 million Voters' Guides in 1996 and 1998. Telephone Interview with Judy Cryderman, Administrative Coordinator, Washington Supreme Court (Aug. 29, 2001). The total cost each year was about \$175,000. *Id.*

For a discussion of voters' guides, see Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 *Law & Contemp. Probs.* 79, 120-122 (1998); Schotland, *supra* note 13, at 127-28.

Another form of education is court-sponsored judicial performance evaluation programs. For studies on the impact of court-sponsored judicial performance evaluation programs on judicial performance and voter information in retention elections, see Kevin M. Esterling & Kathleen M. Sampson, *Judicial Retention Evaluation Programs in Four States* (1998); Kevin M. Esterling, *Judicial Accountability the Right Way: Official Performance Evaluations Help the Electorate as Well as the Bench*, 82 *Judicature* 206, 207 (1999) (concluding performance evaluations benefit both voters and judges); Jacqueline R. Griffin, *From the Bench: Judging the Judges*, *Litig.*, Spring 1995, at 5-7, 60-62 (criticizing performance evaluation commissions for lacking accountability, failing to allow for appeals, and not appreciating judicial workload); A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 *Ariz. St. L. J.* 643, 725 (1998) (commending Arizona judicial performance review program, while noting that voter apathy limits its efficacy).

community educators using a variety of tools to reach the public, the media, and the executive and legislative branches of government. Public outreach efforts promote judicial independence, because they enable citizens to evaluate critical attacks on judges and to value judicial independence. Wisconsin has been a leader in such efforts.<sup>67</sup>

The National Conference of Chief Justices and the Federal Judicial Center, representing both elected and appointed judges, have begun national efforts to reach out to communities to improve understanding of the judicial system, the function of a judge, and judicial independence.<sup>68</sup> They are also working to bring the public into the courts through such efforts as advisory committees and volunteer programs. Why? Because they know that the judicial system depends on the public to support and fight for judicial independence.<sup>69</sup>

Rather than scuttling elections because we fear voter ignorance, we should capitalize on elections as a vehicle for voter education. Judicial elections can and should serve to educate the public about what judges do on a daily basis, about case management, court powers, the

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The Alaska Judicial Council publishes judicial performance evaluation results at <http://www.ajc.state.ak.us>. The Arizona Commission on Judicial Performance Review's 2000 Voter Information Guide is posted at <http://supreme.state.az.us/jpr>.

<sup>67</sup> For examples of the Wisconsin court system's public outreach, see the Wisconsin court system's website, <http://www.courts.state.wi.us>; see also Shirley S. Abrahamson, Viewpoint: A True Partnership for Justice, 80 *Judicature* 6, 6-7 (1996) (detailing Wisconsin's judicial outreach efforts).

For activities in other states, see Bureau of Justice Assistance, U.S. Dep't of Justice, Bulletin, Criminal Courts Technical Assistance Project (Feb. 2001); Richard L. Fruin, Jr., Judicial Outreach on a Shoestring: A Working Manual (Am. Bar Ass'n 1999); Judicial Council of California, Special Task Force on Court/Community Outreach, Dialogue: Courts Reaching Out to Their Communities, A Handbook for Creating and Enhancing Court and Community Collaboration (1999).

<sup>68</sup> A summary of the conference proceedings appears on the National Center for State Courts' web site, <http://www.ncsc.dni.us/PTC/ptc2.htm>.

For a discussion of how federal courts are already reaching out to the public to improve trust, see Rebecca J. Fanning, The Federal Judiciary: Stepping Up its Commitment to Outreach, *Judges' J.*, Fall 1999, at 17-18, 44.

<sup>69</sup> In remarks on June 16, 2000 to the D.C. Circuit Judicial Conference, William H. Rehnquist, Chief Justice of the U.S. Supreme Court, concluded as follows:

I suspect the Court will continue to encounter challenges to its independence and authority by the other branches of government because of the design of our Constitutional system. The degree to which that independence will be preserved will depend again in some measure on the public's respect for the judiciary. Maintaining that respect and a reserve of public goodwill, without becoming subservient to public opinion, remains a challenge to the federal judiciary in the new millennium.

William H. Rehnquist, Reflections on the History and Future of the Supreme Court of the United States, Remarks at the D.C. Circuit Judicial Conference, 19-20 (June 16, 2000) (on file with the *New York University Law Review*).

general principles underlying court decisions, and the core value of decisional independence.<sup>70</sup>

Underlying the debate about appointed versus elected judges is a fundamental disagreement about the capacity of the voters to choose wisely. If the people need more information, it is our task to provide it. As Thomas Jefferson said: "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."<sup>71</sup>

Second, as to campaign financing: The public perception is that judges are influenced by campaign contributions.<sup>72</sup> A 1994 Ohio survey revealed that thirty-one percent of the people polled believed judges are influenced by contributions made to their election campaigns always or most of the time; fifty-eight percent believed that judges are so influenced some of the time.<sup>73</sup>

Perception in this instance is as important as reality. If voters believe that donors call the tune, they will be less willing to take part in democratic governance, and confidence in the judicial system will be eroded.

Judicial elections have become expensive—very expensive. Million-dollar judicial campaigns are being waged around the country. Candidates are putting more and more of their own money into their elections. Judicial seats may soon be limited to the wealthy. If a can-

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<sup>70</sup> Education efforts undertaken during the 1998 judicial election in California were effective to help judges retain their seats. See Thompson, *supra* note 13, at 570. The American Judicature Society has developed a multimedia curriculum entitled *Communicating with Voters: Ethics and Judicial Campaign Speech*. Cynthia Gray, *Am. Judicature Soc'y, Communicating with Voters: Ethics and Judicial Campaign Speech* (2000).

<sup>71</sup> Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in John Bartlett, *Familiar Quotations* 344-45 (Justin Kaplan ed., 16th ed. 1992).

<sup>72</sup> See, e.g., Editorial, *Campaign Contributions Corrupt Judicial Races*, *USA Today*, Sept. 1, 2000, at 16A (advocating change in electoral process for state judgeships because of appearance of impropriety); Mark Kozlowski, *The Soul of an Elected Judge*, *Legal Times*, Aug. 9, 1999, at 15 (arguing that judges' need for campaign contributions undermines integrity of justice system).

In *Southern Christian Leadership Conference v. Supreme Court of Louisiana*, 61 F. Supp. 2d 499 (E.D. La. 1999), the plaintiffs challenged a new Louisiana Supreme Court rule limiting law practice by legal clinics staffed by law students. The new rule was supported by businesses and business groups during a supreme court judicial election campaign. Federal District Court Judge Eldon E. Fallon upheld the new rules but acknowledged that the allegations of political pressure on the supreme court were not inconsequential. The judge concluded, however, that plaintiffs' "energies would more properly be focused on the political rather than the legal system." *Id.* at 513.

<sup>73</sup> Inst. for Policy Research, *Univ. of Cincinnati, Ohio Poll* (Oct. 1994) (unpublished poll results on file with the *New York University Law Review*).

didate is not wealthy, the campaign has to raise substantial sums of money.<sup>74</sup>

Judicial candidates are forbidden in many states to solicit or accept campaign contributions personally.<sup>75</sup> That's good. But then campaign committees must raise the funds. From whom? From lawyers? They appear before the court. From nonlawyers? They may have cases before the court.

It is hard to prove a relation between campaign contributions and a judge's decisions, although some writers examining campaign and court records claim that decisions of courts and judges do seem to favor the major contributors.<sup>76</sup>

A January 10, 2000, *National Law Journal* article declares that "everyone is asking the same question: Is justice for sale?"<sup>77</sup> U.S. Supreme Court Justice Stephen Breyer is quoted as decrying the likely influence of judicial campaign contributions on deciding cases.<sup>78</sup> Justice Anthony Kennedy remarked that "the law commands allegiance

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<sup>74</sup> See Stuart Banner, Note, Disqualifying Elected Judges from Cases Involving Campaign Contributors, 40 Stan. L. Rev. 449, 452-55 (1988) (noting volume of money needed to win judicial election has increased dramatically since 1960s); Sheila Kaplan & Zoë Davidson, The Buying of the Bench, *The Nation*, Jan. 26, 1998, at 11-14 (detailing example of Pennsylvania appellate judge whose self-imposed spending limits resulted in him being outspent seven to one by opponent, and subsequently defeated).

For discussions of financing judicial campaigns, see generally Task Force on Lawyers' Political Contributions, *supra* note 12; Kyle Cheek & Anthony Champagne, Money in Texas Supreme Court Elections 1980-1998, 84 *Judicature* 20 (2000); James Eisenstein, Financing Pennsylvania's Supreme Court Candidates, 84 *Judicature* 10 (2000); Ernest A. Finney, Jr., Comment, 61 *Law & Contemp. Probs.* 55 (1998); Schotland, *supra* note 13, at 96-132.

The appointment process can also cost money. There was an expensive national campaign in support of Clarence Thomas during his Senate confirmation hearings for the U.S. Supreme Court. Harold See, Comment, Judicial Selection and Decisional Independence, 61 *Law & Contemp. Probs.* 141, 146-47 (1998).

<sup>75</sup> The Wisconsin Code of Judicial Conduct provides, for example, that "[a] judge or candidate for judicial office shall not personally solicit or accept campaign contributions." Wisconsin Supreme Court & Wisconsin Court of Appeals, Wisconsin Supreme Court Rules—2000 and Internal Operating Procedures, SCR 60.06(4) (West 2000).

<sup>76</sup> See, e.g., Eric Hellend & Alexander Tabarrok, Exporting Tort Awards, 23 *Regulation* 21, 26 (2000) (arguing that judges chosen by partisan elections are biased against out-of-state defendants); T.C. Brown, Majority of Court Rulings Favor Campaign Donors, *The Plain Dealer* (Cleveland, Ohio), Feb. 15, 2000, at 1-A (reporting that Ohio Supreme Court ruled for client of top twenty attorney-contributors sixty-eight percent of time); Mary Flood, Doctor's Orders: Medical Lobby Becomes a Powerhouse in Austin, *Wall St. J.* (Texas J. section), May 19, 1999, at T1; Dan Lambe, Pocketbook Justice: No, Average Texans are Losers, *Hous. Chron.*, May 23, 1999, at 1.

<sup>77</sup> Joy, *supra* note 32, at A19.

<sup>78</sup> Justice Breyer warned elected judges: "Independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts. [The] law and the facts do not include deciding according to campaign contributions." *Id.*



only if it commands respect. It commands respect only if the public thinks the judges are neutral.”<sup>79</sup>

From childhood on we are told that money talks. The question is the extent to which money talk is protected speech under the First Amendment. The U.S. Supreme Court, in *Buckley v. Valeo*,<sup>80</sup> recognized First Amendment protections for campaign financing. I summarize the decision in three sentences for our purposes: (1) Campaign contributions may be limited to prevent corruption and the appearance of corruption;<sup>81</sup> (2) Campaign expenditures may not be limited because these limitations would represent substantial restraints on the quantity and diversity of political speech;<sup>82</sup> (3) Limits on contributions and spending limits are permitted if they are a condition on voluntary acceptance of public financing.<sup>83</sup>

Earlier this year the U.S. Supreme Court followed *Buckley*, holding in *Nixon v. Shrink Missouri Government*<sup>84</sup> that Missouri may limit campaign contributions.<sup>85</sup> Six members of the Supreme Court called for *Buckley* to be overruled or reexamined, although for divergent reasons and to reach different ends.<sup>86</sup>

Some commentators urge that regulation of campaign financing is unwise and invalid.<sup>87</sup> Others support government regulation but view *Buckley* as resting on flawed assumptions and as a prime example of the law of unintended consequences.<sup>88</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> 424 U.S. 1 (1976).

<sup>81</sup> *Id.* at 58.

<sup>82</sup> *Id.* at 58-59.

<sup>83</sup> *Id.* at 90-108.

<sup>84</sup> 528 U.S. 377 (2000).

<sup>85</sup> *Id.* at 381-82.

<sup>86</sup> Justices Stevens, Breyer, and Ginsburg are open to reexamining *Buckley*. See *id.* at 399 (Stevens, J., concurring); *id.* at 405 (Breyer and Ginsburg, JJ., concurring). Justices Kennedy, Thomas, and Scalia would overrule *Buckley*. See *id.* at 409-10 (Kennedy, J., dissenting); *id.* at 410 (Thomas and Scalia, JJ., dissenting).

<sup>87</sup> See, e.g., Bradley A. Smith, A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul, 30 Conn. L. Rev. 831, 850 (1998) (concluding that current campaign finance reform proposals threaten First Amendment freedoms); Bradley A. Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 Yale L.J. 1049, 1049-50 (1996) (arguing that campaign finance regulation conflicts with accepted notions of equality); Bradley A. Smith, Some Problems With Taxpayer-Funded Political Campaigns, 148 U. Pa. L. Rev. 591, 628 (1999) (arguing that reformist “[g]overnment financing plans which include limits on contributions and spending . . . are doomed to failure”). But see E. Joshua Rosenkranz, Faulty Assumptions in “Faulty Assumptions”: A Response to Professor Smith’s Critiques of Campaign Finance Reform, 30 Conn. L. Rev. 867 (1998) (arguing that Professor Smith obscures distinction between “voting constituencies” and “cash constituencies”).

<sup>88</sup> See E. Joshua Rosenkranz, Report of the Twentieth Century Fund Working Group on Campaign Finance Litigation, *Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* (1998); C. Edwin Baker, Campaign Expenditures and Free

State legislatures, state courts, the American Bar Association, and numerous commentators are offering various proposals to remedy the problems in financing judicial elections.<sup>89</sup> Wisconsin is the only state that provides at least partial public financing of supreme court justices' races. The Wisconsin legislature has been considering full public financing for supreme court elections.<sup>90</sup>

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Speech, 33 Harv. C.R.-C.L. L. Rev. 1, 2 (1998) (arguing that *Buckley* was wrong but that wrong questions were asked in case).

For discussions of campaign finance reform generally, see, for example, Elizabeth Daniel, *Subsidizing Political Campaigns: The Varieties & Values of Public Financing* (Brennan Ctr. for Justice at N.Y.U. Sch. of Law Campaign Fin. Reform Series, 1998); Glenn Moramarco, *Regulating Electioneering: Distinguishing Between "Express Advocacy" & "Issue Advocacy"* (Brennan Ctr. for Justice at N.Y.U. Sch. of Law Campaign Fin. Reform Series, 1998); Burt Neuborne, *A Survey of Existing Efforts to Reform the Campaign Finance System* (Brennan Ctr. for Justice at N.Y.U. Sch. of Law Campaign Fin. Reform Series, 1997); Burt Neuborne, *Campaign Finance Reform & the Constitution: A Critical Look at *Buckley v. Valeo** (Brennan Ctr. for Justice at N.Y.U. Sch. of Law Campaign Fin. Reform Series, 1997); Burt Neuborne, *The Values of Campaign Finance Reform* (Brennan Ctr. for Justice at N.Y.U. Sch. of Law Campaign Fin. Reform Series, 1997); Kenneth Weine, *The Flow of Money in Congressional Elections* (Brennan Ctr. for Justice at N.Y.U. Sch. of Law Campaign Fin. Reform Series, 1997); Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. Chi. Legal F. 111; Symposium, *Can Law Equalize Money in Elections?*, 77 Tex. L. Rev. 1673 (1999); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999); David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. Chi. Legal F. 141.

<sup>89</sup> The American Bar Association Model Code of Judicial Conduct was amended in 1999 to address concerns with campaign contributions. The amendments passed: (1) restrict a judge from appointing a lawyer who has contributed certain amounts to the judge's election campaign; (2) require a judge to disqualify herself when the judge's impartiality might reasonably be questioned, including when the judge knows or learns that a party or a party's lawyer contributed to the judge's campaign; and (3) require a judicial candidate to instruct her campaign committee to limit the aggregate campaign contributions from an individual or entity. See Model Code of Judicial Conduct, Canons 3C(5), 3E(1), 5C(3) (1999).

The American Bar Association Model Rules of Professional Conduct were amended Feb. 14, 2000, to add a new Rule 7.6 prohibiting political contributions meant to obtain government legal engagements or appointments by judges. Model Rules of Prof'l Conduct R. 7.6.

See also Task Force on Lawyers' Political Contributions, *supra* note 12, at 19-60 app. 1 (recommending amendments to Model Code of Judicial Conduct relating to campaign contributions and campaign financing).

<sup>90</sup> Polls in Wisconsin show significant support for full public funding of judicial elections. Wisconsin Citizen Action, *supra* note 8, at 16. Nevertheless, many Wisconsin taxpayers do not, and over the years have not, checked off on their state income tax returns to support public financing of election campaigns. Thus, often only a small sum is available for supreme court candidates. For example, for the election of a supreme court justice in April 2001, each eligible candidate was allowed to receive about \$13,000 in public funding and had to agree to abide by a spending limit of \$215,625. If campaigns for Wisconsin Supreme Court candidates were to be fully publicly funded, the public funding would apparently have to come from general revenue, aside from the campaign finance check-off.

I have accepted public financing in each of my elections, and I generally favor public financing as a means of avoiding the problems inherent in raising money in judicial campaigns. Public financing helps obviate the problem of the large contributor having undue influence. The devil is in the details of any public financing plan, and those details will, in all likelihood, be subject to constitutional challenge before federal courts and state supreme courts.<sup>91</sup>

In addition to public financing, other proposals are being made to regulate campaign finance. These proposals include disqualification of judges from cases when the lawyer or litigant made a campaign contribution in excess of a certain amount,<sup>92</sup> voluntary spending and

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One proposal in Wisconsin is for supreme court candidates to agree to take no private funding and to rely on public funding from general-purpose tax revenues. Under this plan, candidates would qualify for funding by accumulating a specific number of \$5 qualifying contributions and signatures showing they are serious candidates with a broad base of support. Candidates would receive full funding (that is \$300,000 for the election of supreme court candidates, with \$100,000 for the primary election). If an opponent is privately funded or if there is independent financing, the supreme court candidate taking public financing would get state funds beyond the grants described above to equalize funding. *Id.* See also S.B. 181, 1999-2000 Leg. (Wis. 1999) (proposing increased public campaign funding).

The Joyce Foundation has given \$360,000 to build public support for near-total taxpayer financing of Wisconsin Supreme Court campaigns. Michael Zahn, *Foundation Gives \$360,000 to Build Public Support for Taxpayer Funding of State Supreme Court Campaigns*, Wis. Opinions, Aug. 30, 2000, at 8.

The Wisconsin Counties Association supported an advisory referendum question in the November 2000 election on campaign finance reform. The question read: "Do you support legislation to reform the state campaign finance system that would limit campaign spending, require stricter campaign contribution limits and require full and prompt disclosure of election-related activities?" This question appeared on the ballot in fifty-six counties representing ninety percent of the state population. Press Release, Wisconsin Counties Ass'n (Sept. 20, 2000) (on file with the *New York University Law Review*). The referendum passed with more than ninety percent of the vote. Telephone Interview with Jennifer Sunstrom, Legislative Associate, Wisconsin Counties Ass'n (Aug. 29, 2001).

For an argument supporting public financing, see Richard Briffault, *Public Funding and Democratic Elections*, 148 U. Pa. L. Rev. 563 (1999) (advocating public funding of political campaigns).

<sup>91</sup> For cases discussing the First Amendment implications of state campaign financing laws or court rules, see, for example, *Daggett v. Commission on Government Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000); *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998); *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996); *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994); *Suster v. Marshall*, 121 F. Supp. 2d 1141 (N.D. Ohio 2000); *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000).

For discussions of constitutional issues in campaign finance reform, see, for example, Jason Miles Levien & Stacie L. Fatka, *Cleaning up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 Mich. L. & Pol'y Rev. 71 (1997) (arguing that critical interest in maintaining independence and integrity of judicial system demands limitations on candidates' free speech rights).

<sup>92</sup> See, e.g., Task Force on Selecting State Court Judges, *Citizens for Indep. Courts, Choosing Justice: Reforming the Selection of State Court Judges*, in *Uncertain Justice*,

contribution limits,<sup>93</sup> and limitations on the period of contribution solicitation.<sup>94</sup>

Campaign financing reform is a thicket. Any proposal must pass constitutional muster as well as pass a reality check. It isn't reform unless it achieves the desired consequences in the election process in that jurisdiction.

Third, as to campaign conduct, more specifically regulation of a judicial candidate's speech, the question is just what may a judge or judicial candidate talk about?<sup>95</sup>

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supra note 12, at 87, 95-97; Task Force on Lawyers' Political Contributions, supra note 12, app.1 at 64; Carrington, supra note 66, at 115-16; Thomas R. Phillips, Comment, 61 *Law & Contemp. Probs.* 127, 130-32 (1998); Banner, supra note 74, at 478-89.

The American Bar Association Model Code of Judicial Conduct, as adopted in 1999, requires a judge to disqualify herself when her impartiality might reasonably be questioned, including when the judge knows or learns that a party or a party's lawyer contributed in certain amounts to the judge's campaign. Model Code of Judicial Conduct, Canon 3E(1)(e).

<sup>93</sup> See, e.g., Carrington, supra note 66, at 117-18. Canon 5C(3) of the Model Code of Judicial Conduct requires a judicial candidate to instruct the campaign committee to limit the aggregate campaign contributions from an individual or entity.

<sup>94</sup> See Model Code of Judicial Conduct, Canon 5C(2) (1999) (limiting time during which campaign committee may solicit funds). But see *Zeller v. Fla. Bar*, 909 F. Supp. 1518 (N.D. Fla. 1995) (declaring restrictions on time for soliciting campaign contributions invalid).

For other proposals regulating campaign financing, see, for example, Task Force on Lawyers' Political Contributions, supra note 12, app.1 (concerning regulation of lawyers' political contributions); Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby Out with the Bathwater?*, 44 *Wayne L. Rev.* 367, 386-92 (1998) (recommending alternative funding mechanisms); Justin A. Nelson, *The Supply and Demand of Campaign Finance Reform*, 100 *Colum. L. Rev.* 524, 550-57 (2000) (proposing disclosure, public financing, and free air time).

<sup>95</sup> Canon 5(3)(d) of the 1990 American Bar Association Model Code of Judicial Conduct regulated the speech of judicial candidates as follows: Candidates shall not

- (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

Model Code of Judicial Conduct Canon 5(3)(d) (1990).

For guidelines to assist judicial candidates in campaign and political activities, see Judicial Ethics Advisory Comm., Fla. Office of the State Courts Administrator, *An Aid to Understanding Canon 7* (July 2000).

The Alabama Supreme Court has strengthened strictures on judicial campaigns and created a judicial campaign oversight committee to ensure that judicial candidates follow the rules. *A.B.A. J.* 26 (Nov. 1999).

An initiative attempt in Oregon to allow candidates for judicial office to state their positions on matters that are likely to come before the court has been viewed as a threat to judicial independence. See David B. Frohnmayer, *Who's to Judge? Oregon Style Judicial Independence Could Be Headed for Rough Sailing*, 58 *Or. St. B. Bull.* 9 (1997); Ross Shepard & David Terry, *Judicial Independence Is Threatened*, 58 *Or. St. B. Bull.* 21 (1997).

While there are valid reasons for limiting what a candidate can say, restrictions on the judicial candidate's ability to speak implicate free speech rights guaranteed under the First Amendment.<sup>96</sup> Traditional First Amendment analysis requires that there be a compelling state interest that supports the need to regulate speech. The need for an impartial judiciary may be such a compelling interest. The second

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For discussions of permissible campaign speech and speech for judges generally, see, for example, Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* 355-83 (2d ed. 1995); Erwin Chemerinsky, *Is It the Siren's Call?: Judges and Free Speech While Cases Are Pending*, 28 Loy. L.A. L. Rev. 831 (1995); Amy M. Craig, Comment, *The Burial of an Impartial Judicial System: The Lifting of Restrictions on Judicial Candidate Speech in North Carolina*, 33 Wake Forest L. Rev. 413 (1998); Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 Tulane L. Rev. 611 (1987); Frohnmayer, *supra*, at 9-10; Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 Syracuse L. Rev. 1181 (1985); Cynthia Gray, *When Judges Speak Up: The Code of Judicial Conduct and Public Education*, 38 Judges' J. 6 (1999); Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 Tex. Tech L. Rev. 811 (1998); Evan Richman, *Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law*, 16 Cardozo Arts & Ent. L.J. 667 (1998); Shepard, *supra* note 31; Jack B. Weinstein, *Limitations on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn*, 36 Ariz. L. Rev. 539 (1994); Jack B. Weinstein, *Limitations on Judges Learning, Speaking and Acting: Part II Speaking and Part III Acting*, 20 Dayton L. Rev. 1 (1994); Editorial, *What Judicial Candidates Can Say*, 84 Judicature 4 (2000); Note, *The Ethical Dilemma of Campaigning for Judicial Office: A Proposed Solution*, 14 Fordham Urb. L.J. 353 (1985-86).

Other campaign conduct of judges that might be regulated includes endorsing judges or others for public office, soliciting and publicizing endorsements, participation in political events, and contributions to political parties.

<sup>96</sup> For judges' speech and First Amendment cases, see, for example, *ACLU v. Florida Bar*, 999 F.2d 1486, 1494-95 (11th Cir. 1993) (allowing pre-enforcement challenge to constitutionality of Code of Judicial Conduct prohibiting judicial candidates from publicly discussing truthful information about opponents); *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 231 (7th Cir. 1993) (striking down court rule governing campaign speech as unconstitutional); *Stretton v. Disciplinary Board of the Superior Court of Pennsylvania*, 944 F.2d 137, 138 (3d Cir. 1991) (limiting construction of court rule governing campaign speech); *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1343-44 (N.D. Ga. 2000) (striking down Code of Judicial Conduct restricting judicial campaign speech under overbreadth doctrine); *Beshear v. Butt*, 863 F. Supp. 913, 917-18 (E.D. Ark. 1994) (striking down Code of Judicial Conduct that prohibited judicial candidates from discussing their views on disputed legal or political issues); *Deters v. Judicial Retention & Removal Commission*, 873 S.W.2d 200, 205 (Ky. 1994) (affirming public censure of judge for pro-life advertisements when abortion issue was likely to come before court); *In re Chmura*, 608 N.W.2d 31, 33 (Mich. 2000) (striking down Code of Judicial Conduct restricting judicial campaign speech under overbreadth doctrine); *In re Sanders*, 955 P.2d 369, 370 (Wash. 1998) (holding that justice's comments at pro-life rally were protected by First Amendment and did not violate Code of Judicial Conduct).

State judicial candidates are often subject to discipline for using misleading campaign advertisements, but court rulings have curbed efforts to rein in judicial campaign conduct. See William Glaberson, *Court Rulings Curb Efforts to Rein in Judicial Races*, N.Y. Times, Oct. 7, 2000, at A9; William Glaberson, *States Rein in Truth-Bending in Court Races*, N.Y. Times, Aug. 23, 2000, at A1.

element of the analysis is that the restriction must use the least restrictive means possible.

In an Illinois case, a judge became a candidate for the Illinois Supreme Court.<sup>97</sup> He circulated literature stating that he consistently ruled to protect the civil rights of working people on key issues of health, housing, and employment and that he consistently ruled to protect and expand women's rights in the areas of health, domestic relations, and sexual assault. An Illinois Supreme Court rule regulating judicial conduct provided that judges should not make pledges or promises of conduct in office other than to perform their judicial duties faithfully, and they should not announce their views on disputed legal or political issues.<sup>98</sup> This judge was charged with violating that rule and challenged its constitutionality under the First Amendment. Judge Richard Posner, writing for the Seventh Circuit Court of Appeals, declared the Illinois rule overly broad.<sup>99</sup>

The Court of Appeals for the Third Circuit took a different tack, saving a similar Pennsylvania rule by narrowing it to restrain judges from commenting only on issues likely to come to the court.<sup>100</sup>

As Judge Posner wrote, beyond stating that the principle of impartial justice allows the government to restrict freedom of speech and that campaign speech is not completely outside the protection of the First Amendment, "the cases do not provide much guidance."<sup>101</sup> Expect more litigation on this subject.

I recognize the problems of voter disinterest, increasing campaign expenditures, and the difficulties of regulating campaign speech. The

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<sup>97</sup> *Buckley*, 997 F.2d at 225. For discussions of the *Buckley* case and campaign speech, see Robert M. Brode, *Buckley v. Illinois Judicial Inquiry Board* and *Stretton v. Disciplinary Board of the Supreme Court: First Amendment Limits on Ethical Restrictions of Judicial Candidates' Speech*, 51 Wash. & Lee L. Rev. 1085, 1087 (1994) (arguing that Canon 5 of 1990 ABA Model Code of Professional Conduct does not address all concerns of *Buckley* Court); Neil K. Sethi, *The Elusive Middle Ground: A Proposed Constitutional Speech Restriction for Judicial Selection*, 145 U. Pa. L. Rev. 711, 716 (1997) (proposing amendments to Canon 5 of 1990 ABA Model Code of Judicial Conduct).

<sup>98</sup> 110A Ill. Ann. Stat. § 67B(1)(c) (West 1992). This rule was substantially the same as Canon 7B(1)(c) of the 1972 American Bar Association Model Code of Judicial Conduct that provided:

(1) A candidate, including an incumbent judge, for a judicial office . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

Model Code of Judicial Conduct, Canon 7B(1) (1972).

<sup>99</sup> *Buckley*, 997 F.2d at 230-31.

<sup>100</sup> *Stretton*, 944 F.2d at 138. The Seventh Circuit was unwilling to give the rule a similar saving construction by confining it to issues likely to come before a judge in his or her judicial capacity. See *Buckley*, 997 F.2d at 230.

<sup>101</sup> *Buckley*, 997 F.2d at 231.

solution to problems of judicial elections in a state like Wisconsin is not to scuttle judicial elections but to do public outreach, to foster better campaign finance rules, and to promote the development of clear and reasonable rules for judicial campaign behavior.

### CONCLUSION

I end as I began by turning to Justice Brennan, the appointed judge. Justice Brennan recognized the great potential of state courts. In a 1977 *Harvard Law Review* article, he called upon state court judges to be guardians of individual liberties.<sup>102</sup> "State constitutions, too," he wrote, "are a font of individual liberties, their protections often extending beyond those required by the [U.S.] Supreme Court's interpretation of federal law."<sup>103</sup> Justice Brennan knew that state courts' recognition of more rights than those afforded by the U.S. Constitution, especially for criminal defendants, might not be popular with the electorate. In his 1986 James Madison Lecture on Constitutional Law here at this law school, Justice Brennan was pleased to observe that "the state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by the decisions of the Supreme Court majority."<sup>104</sup>

But Justice Brennan also expressed concern that elected judges could not withstand popular pressure.<sup>105</sup> In the same 1986 James Madison Lecture, Justice Brennan said, "It cannot be denied that state court judges are often more immediately 'subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts.'"<sup>106</sup>

We must keep in mind both the hopes and fears Justice Brennan expressed about elected state court judges. I think Justice Brennan would join me in endorsing these words uttered in the public debate of the proposed Wisconsin state constitutional provision for electing judges: "[W]e should look with more of hope and confidence than of doubt and apprehension to the working of an elective judiciary."<sup>107</sup>

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<sup>102</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977).

<sup>103</sup> *Id.*

<sup>104</sup> William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 549 (1986).

<sup>105</sup> Justice Brennan wrote: "When prosecutors and judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous." *Wainwright v. Witt*, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting).

<sup>106</sup> Brennan, *supra* note 104, at 551 (quoting Note, *Michigan v. Long: Presumptive Federal Appellate Jurisdiction over State Cases Containing Ambiguous Grounds of Decision*, 69 Iowa L. Rev. 1081, 1096-97 (1984) (footnote omitted)).

<sup>107</sup> *The Movement for Statehood 1845-1846*, *supra* note 24, at 202.

“[T]he people will support [judges] who oppose their wishes on the bench when such opposition is exercised conscientiously. Boldness men admire, even when opposed to their wills . . . .”<sup>108</sup>

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<sup>108</sup> The Struggle over Ratification 1846-1847, *supra* note 24, at 495.