

JUDICIAL INDEPENDENCE AND DEMOCRATIC ACCOUNTABILITY IN HIGHEST STATE COURTS

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I

INTRODUCTION

These are troubled times for constitutional democracy in America. Among our political institutions, none are more troubled than many of our highest state courts.

It was widely foretold that our Republic, like all its predecessors, would be torn apart by mistrust and unrestrained political rivalry dismembering its institutions.¹ There were times past when this seemed to be happening and yet did not. So here we are, two centuries and more later, still a constitutional democracy. For a century, we have fought wars in its name and have propagated the idea in a hundred countries. As I write, our government is actively engaged in promoting democracy in Malaysia and Iraq.²

It is curious that such a moment of success would also be a time for bitter recrimination among our political leaders. Especially so, given that the substance of the issues dividing us seem relatively inconsequential compared to those on the public agenda in earlier times when mistrust and incivility were high, when bitterness could be explained as a reaction to external threats, severe economic conditions, or slavery and its vestiges. How do we account for the ugliness presently besetting our politics?

It is possible that our present troubles are chiefly caused by forces too deeply set in the culture to be usefully addressed by legal or political means. Thus, it seems likely that some part of the elevation of mistrust is caused by the collapse of the Soviet Union, an event depriving us of a compelling reason to trust one another.³ It also seems likely that the demise of the family is a con-

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1. *See generally* GARRY WILLS, *INVENTING AMERICA* (1978).

2. *See George Washington Rides Again*, *THE ECONOMIST*, Nov. 21, 1998, at 2.

3. Montesquieu explained the causes of the corruption of a democratic people thus:

Great success, especially when chiefly owing to the people swells them so high with pride that it is impossible to manage them. Jealous of their magistrates they soon become jealous likewise of the magistracy; enemies to those that govern, enemies they soon prove to the consti-

tributing cause, for it is associated with self-absorption seemingly infecting all our relationships, including our politics. Lawyers and judges cannot do much about such deep causes but need to have them in mind as part of the landscape of the mistrust problem we now face.

Public trust and acceptance of the deployment of government's power are the proper concern of all but are a special concern of courts and judges. At some point, lawyer jokes become a serious matter.⁴ Courts and judges are the bulwark against the disintegration of the mutual trust sustaining the life of democratic government. They are our "last best hope" that the Republic will not be overrun by the greed, mendacity, brutality, moral arrogance, prejudice, and petty hatreds, that is, the inescapable stuff of the dark side of human nature, that are on display in every courtroom every day. To fulfill that hope requires our judges to be independent. They must not be vulnerable to bribery or intimidation that would corrupt or distort their judgment on issues of law. They must not only be independent, but they must also be seen to be so.

At the same time, courts, to merit their independence, must be faithful to democratic law; they must obey the law as made by legislative bodies or set forth in reasonably explicit provisions of constitutions ratified by a democratic process. Because judges in trial and intermediate courts are accountable to highest courts, it is the latter that are responsible for keeping the faith with democratic traditions. Accordingly, this article attends almost entirely to the issues of the highest courts' independence and accountability.

Many highest state courts are institutions at risk of being engulfed in mistrust.⁵ Some of the major events marking the decline in civility and mutual trust are aspects of judicial politics, such as the Bork and Thomas confirmation proceedings. The sustained assault on the presidency of Bill Clinton that began the day of his election in 1992 was, it seems, initially animated in part by the purpose of preventing him from appointing Supreme Court Justices who would reaffirm *Roe v. Wade*.⁶ Similar local crises of judicial politics can be found in most states. To some extent, the crises may have been caused by the failure of some of the highest state courts to keep faith with democratic traditions. We have experienced an age of judicial heroism; during that time, judges were encouraged to exercise their powers in disregard of legislative prerogatives. As a consequence, many high courts are highly visible objects of political interest and concern.

tution. Thus it was the victory of Salamine over the Persians that corrupted the republic of Athens, and thus the defeat of the Athenians ruined the republic of Syracuse.

BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* bk. VIII, ch. 4 (Thomas Nugent trans., J. Nourse ed., 1750) (1748). This might also explain why personal and political attacks on judges have become common in the United Kingdom, Australia, and New Zealand. See Michael Kirby, *Attacks on Judges: A Universal Phenomenon*, 81 *JUDICATURE* 238 (1998).

4. See Marc Galanter, *The Face of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 *U. CIN. L. REV.* 805 (1998); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 *ARIZ. L. REV.* 717 (1998).

5. See *Court Evaluation Surveys*, 82 *JUDICATURE* 60 (1998).

6. 410 U.S. 113 (1973).

This has happened at the same time that our politics have been transmogrified by the media. The political advertisement inserted into commercial television reaches large audiences of persons who are not seeking political information and are in an uncritical frame of mind. If well done with art, music, and a voice sounding a little like Walter Cronkite, the advertised message "melts down" so that the viewer assimilates disinformation without being aware of its source. This medium is very expensive as well as potentially very effective. It has multiplied the cost of campaigning and made defamation a central feature of the activity. These consequences are threatening enough in their impact on other institutions, but they are potentially deadly to the dignity of highest state courts. Especially so in a time of widespread popular mistrust. The goal of this article is to confront the risks and consider the available means of reducing them.

II

THE MISFORTUNE OF ROSE BIRD

It is tempting to many citizens of eastern states to believe that most forms of moral degradation besetting our Republic germinate in the otherwise over-privileged state of California. In this case it is true; the current epidemic of distrust of state court judiciaries has spread eastward from a source on the palisades. Rose Elizabeth Bird, sometime Chief Justice of the Supreme Court of California, is the leading figure in the series of events threatening ruin for many of our highest state courts. The story of her ruin has therefore become a tale of national import. It must be said that the wounds suffered by her court were in a significant measure self-inflicted.

Bird was appointed by Governor Jerry Brown in 1977 as the first woman to serve on her court. Before appointing Bird, Brown had publicly expressed Populist disdain for the state's judiciary. He had opposed the judges' pay raise and even refused to fill judicial vacancies.⁷ Her appointment was taken by many to be a further expression of the Governor's contempt for the law and the courts.

For a high court judge, Bird was youthful and inexperienced. She was 40 years old and had entered the profession only twelve years before her appointment to the highest legal office in the state. Her professional experience consisted mainly of work as a public defender. Her most notable professional role had been her service for two years as administrator of the California Agriculture and Services Agency⁸ where she had won notice by her successful effort to secure legislation protective of the interests of migrant farm laborers.⁹

7. See BETTY MEDSGER, *FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS* 7-8 (1983).

8. See PREBLE STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* 43-44, 84-87 (1981).

9. See Alatorre-Zenovich-Dunlap-Berman *Agricultural Labor Relations Act of 1975*, CAL. LAB. CODE § 1140 (West 1989).

There was resistance to Bird's confirmation by the Commission on Judicial Appointments, some of it petty, some political, some on the ground that she was reportedly unstable and vindictive¹⁰ and, therefore, especially unsuited to an office responsible for the administration of the largest judiciary in America. She was nevertheless confirmed by that body on a 2-1 vote. Pursuant to the California constitution, she was, along with other recently appointed members of her court, required to stand for retention by the voters in the 1978 general election.

Bird became the first Justice sitting on her court since the institution of the retention election in 1934 to evoke opposition.¹¹ Because her administrative style as chief of the judicial branch was aggressive and intrusive, and perhaps disrespectful of old hands and older and possibly wiser heads, she attracted active, if subdued, opposition from many members of the state judiciary and members of the court's large administrative staff.¹²

But the larger cause of opposition to Bird was rooted in ideology. A conservative state senator raised a campaign fund, much of it from the gun owners' lobby, to challenge her moral fitness as a judge, alleging that she was soft on crime. He deployed electronic media to make a scurrilous and untruthful personal attack on her of the sort that has become a signature of contemporary American politics. His media *blitzkrieg* called attention to her share in the responsibility for her court's holding that repeated, forced insertions of a penis into the mouth of a female rape victim does not constitute a crime entailing "great bodily injury," as the jury in a celebrated case had been instructed.¹³ Bird's separate concurring opinion had emphasized what she denoted as the "plain meaning" of the controlling statute, which she perceived, not unreasonably, to enhance punishment only when a crime victim experienced enduring physical disability. One of the television ads prepared at the direction of her assailant portrayed an apparent rape victim and suggested that her rapist would soon be on the streets again if Bird were retained as Chief Justice.¹⁴

Lawyers supporting Bird advised California television stations that the ad was misleading and urged that the stations had a legal duty to refuse it or to provide them with equal free time for a response. Most thereafter refused to take the ad, and their refusal marked the end of the gun lobby campaign against her.¹⁵ While others, notably a "No On Bird" organization, continued to oppose her, they had scant financial resources and did not use electronic media.¹⁶

10. See STOLZ, *supra* note 8, at 87-93.

11. See *id.* at 58.

12. See MEDSGER, *supra* note 7, at 69-75.

13. See *People v. Caudillo*, 580 P.2d 274 (Cal. 1978). Details of the case are described by STOLZ, *supra* note 8, at 19-28.

14. See STOLZ, *supra* note 8, at 49.

15. See *id.* at 50-51.

16. See *id.* at 52.

Despite the facts that the campaign against her was far from strong and that she had the almost universal support of the press and the bar, she was retained with only 51.7% of the vote, a much lower percentage than any of her three colleagues running on the same ballot or of any predecessors on her court. A new form of political activity had been brought to life that has come to threaten the integrity of the judiciaries of many states.

The 1978 campaign was, however, only the beginning of Justice Bird's political difficulties. In 1979, the state Commission on Judicial Performance conducted an extensive but inconclusive investigation of charges that the court had withheld publication of an opinion reversing a criminal conviction until after the election for the illicit purpose of protecting the Chief Justice from the adverse political reaction certain to attend the decision.¹⁷

In 1982, a substantial effort was mounted to secure her recall from office. The effort was led by Howard Jarvis, the author of the successful initiative to slash property taxes, and was supported by the Republican candidate for Attorney General, but an insufficient number of signatures was obtained to put the issue on the ballot. Nevertheless, the Republican candidate for Governor, running against Governor Brown, made the Bird appointment a major issue in the campaign.¹⁸

Finally, in 1986, Bird and two other members of the court were defeated in another retention election.¹⁹ Capital punishment was the chief issue in that election, and the anti-retention campaign was financed with seven million dollars raised mostly in small contributions from individual citizens affronted by Chief Justice Bird's obstinacy on that issue. She and her colleagues spent over four million dollars, most of it contributed by lawyers faithful to the principle of judicial independence.²⁰

The protestations that nonretention threatened the independence of the judiciary were dismissed by the senator who had opposed Bird's retention in 1978 as "Bull Pucky."²¹ He argued that the referendum establishing the retention election in 1934 had assured the voters that it entitled them to veto the Governor's selection of a Justice "for any reason." Disapproval of several reversals of criminal convictions was in his view ample reason to unseat a member of the court.

Undeniably, the California Supreme Court had supplied its critics with an ample list of decisions reflecting the court's disregard for moral and political

17. See *id.* at 267-360.

18. See MEDSGER, *supra* note 7, at 3-4.

19. Accounts of the 1986 election are John H. Culver & John T. Wold, *Judicial Reform in California*, in JUDICIAL REFORM IN THE STATES 156 (Anthony Champagne & Judith Haydel eds., 1993); Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969 (1988); Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 S. CAL. L. REV. 809 (1986).

20. See HARRY STUMPF & JOHN CULVER, *THE POLITICS OF STATE COURTS* 43 (1992); see also Thompson, *supra* note 19.

21. STOLZ, *supra* note 8, at 51.

values widely shared by Californians. The court thus supplied the voters with many reasons to fire its members. Its confrontational approach to its work had been manifested some years before the appointment of Bird. Notably, in the years 1970-78, under the leadership of Chief Justice Donald Wright, the court had made a number of decisions of extraordinarily high salience, causing Governor Ronald Reagan, who had appointed Wright, to despise the court and his appointee.²² The Wright court had repeatedly pushed the envelope of its political role to its outer margins, and perhaps beyond.

Some of the reforms achieved by the Wright court were widely admired, but some were not recognizable as interpretations of pre-existing legal texts or traditions. The number and dimensions of the court's reforms of California law left little room for doubt that it had overtaken the state legislature as the place where state policy was most likely to be made. It had thus also displaced the right of the people through state and local government to decide for themselves what sort of place California ought to be. One member of the court crowed that he and his colleagues were using the Equal Protection Clause to remake California as an egalitarian society,²³ apparently whether the people liked it or not. Governor Brown, by his appointment of Bird, placed her in a cockpit where she was destined to draw heavy political fire.²⁴

Prominent among the court's decrees antedating Bird's appointment was a reorganization of the state's public school finance system which it found in 1971 to be inequitable and, therefore, unconstitutional.²⁵ The objectionable feature of the system was reliance on the local property tax, resulting in funding differences caused by disparities in the tax bases of different local school districts. The court ordered the legislature to bring the system into compliance with an equalizing commitment of state revenue. The legislature obeyed reluctantly, resulting in increased property taxes for many citizens and evoking the taxpayer revolt led by Howard Jarvis. The revolt took the form of a popular referendum, Proposition 13, rolling back taxation on realty and cutting deeply into the sinew of the state's previously abundant public fisc.²⁶ Proposition 13 was a serious blow from which public education and other public institutions in California, including the courts, have not recovered.

The Wright court had then ordered the state to pay fees of \$800,000 to a public legal services office that had been the prevailing counsel in the school finance case,²⁷ an order that the legislature long and defiantly refused to obey.²⁸

22. See MEDSGER, *supra* note 7, at 28-29.

23. See Stanley Mosk, *The Emerging Agenda in State Constitutional Rights Law*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 54 (1988).

24. It is ironic that the judge whose name has been most closely associated with arrogation of power was appointed by a Governor who as much as any successful politician in recent decades celebrated the virtues of participatory democracy.

25. See *Serrano v. Priest*, 487 P.2d 1281 (Cal. 1971), *aff'd*, 557 P.2d 929 (Cal. 1977); *cf.* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). For comment, see Paul D. Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227 (1973).

26. See William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & POL. 607 (1996).

27. See *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977).

This legislative contumacy reflected the annoyance of the legislature with the court's usurpation of its role and agenda. In 1981, when the legislature again refused to appropriate funds to comply with an order to pay a \$25,000 fee to an attorney who had successfully represented a claimant against the state, the court ordered the Controller to pay the sum from the operating funds of the Health Department.²⁹

In 1972, the Wright court made another large splash in the state's politics by holding that capital punishment violated the "cruel and unusual punishment" provision of the state constitution,³⁰ a position also seriously considered and then forsaken as impolitic by the Supreme Court of the United States.³¹ In part, this holding was animated by concern for a situation that had accumulated over a period of many years. There were over 150 persons on California's death row awaiting execution; the court's decision thus prevented an unseemly slaughter of prisoners. It was, however, promptly reversed by a popular initiative amending the state constitution.³² Despite this rebuke, the Bird court continued to find reasons for preventing executions, and Bird herself was forthright in expressing her unwillingness to affirm any sentence of death.³³

In 1975, the Wright court fearlessly and imprudently took on yet another political issue arousing strong passions. It did so by reinstating an order of a California trial judge directing the Los Angeles schools to initiate a desegregation plan.³⁴ The judge who had issued the order had already been resoundingly defeated at the polls, one of the few California superior court judges ever to fail of reelection.³⁵ There had been no evidence presented in the case of *de jure* segregation by the Los Angeles school board. It was unlikely, on the facts presented at trial, that any federal court enforcing the federal Constitution would have made the decision made by the defeated state judge. An organization known as Bustop had mounted stout political resistance, resulting in the non-re-election of the trial judge and a reversal of his decree in the intermediate court, only to have it reinstated by the Wright court.³⁶

The court in the 1970s also stretched the California law of torts to facilitate the compensation of previously noncompensable harms.³⁷ All forms of liability

28. It was at last paid thirteen years later. See Diana Walsh, *Parents Give Millions Luckiest Public School in the State*, SAN FRANCISCO EXAMINER, Mar. 15, 1998, at B7 (quoting Stephen Sugarman).

29. See *Mandel v. Myers*, 629 P.2d 935 (Cal. 1981).

30. See *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

31. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflection on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

32. See CAL. CONST. art. I, § 27, approved by voters on November 7, 1972.

33. See Gerald F. Uelman, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237 (1989).

34. See *Crawford v. Board of Educ.*, 531 P.2d 28 (Cal. 1976).

35. See STOLZ, *supra* note 8, at 33.

36. See *id.* at 35-36.

37. See, e.g., *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975) (adopting comparative negligence doctrine). For contemporaneous comment, see Izhak Englard, *Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code*, 65 CALIF. L. REV. 4 (1977); Stanley A. Twardy, Jr.,

insurance became notably more expensive, and a wag waspishly described the court as having adopted the "doctrine of proximate solvency": The nearest supply of money should be tapped to compensate whatever harms any citizen might experience.

In addition, in a decision rendered shortly after Bird's appointment, the court held unconstitutional a standard clause in most of the mortgages on residential real estate in the state.³⁸ The offending clause required the mortgagor to pay off the loan on sale of the house. As a result of the court's decision, many purchasers of homes could assume existing mortgages with lower interest rates rather than acquire new mortgages that would, in the prevailing market, bear higher rates. The decision conferred an economic windfall on sellers and buyers of residential real estate at the expense of mortgagees. The secondary effect was to raise interest rates on future home loans.

In all these endeavors, the court attempted to "bring reality into accord"³⁹ with the moral and political values of a majority of its members. Values not widely shared by the people of California were forcibly read into the state's constitution. In pursuing this course, the court was perhaps striving to follow the leadership of the Warren Court. In any case, the California court was enormously overconfident of its ability to modify the beliefs and conduct of the people. The court failed to recognize the reality that few people change their morals or their politics on the instruction of senior citizens in judicial robes.⁴⁰

The court thereby sowed some of the seed of its own undoing. A secondary result of its activities was to alter the political environment in which it worked. One assessment was that:

In the fifties and beyond, controversial judicial decisions had been defended by a broad spectrum of politicians on the ground that what the courts ordered was the law and deserved support even if the substance of a decision were distasteful. As time went on, however, political leaders tended to defend particular decisions only if they agreed with the result. As a consequence, the California court became identified with the liberal side of the political spectrum, and attacking the court became easier for the extreme right as moderates tended to withdraw from the debate.⁴¹

Thus, the court in effect consumed its political base and set the stage for the triple defeat experienced in the retention election of 1986. It had forsaken even the pretense of an institution engaged in the interpretation of authoritative legal texts or traditions enacted by the people or their representatives whose votes they would need to retain their offices. Given their accountability to the electorate under the California constitution, the Justices were guilty of

Justice Roger J. Traynor and the Development of Strict Liability in Products Liability Cases, 53 CONN. B.J. 423 (1979).

38. See *Wellenkamp v. Bank of America*, 582 P.2d 970 (Cal. 1978).

39. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) ("A judge's job is to interpret [legal texts] and bring reality into accord with them.")

40. See Paul D. Carrington, *Correcting the Excessive Independence of the Supreme Court: A Proposal to Restore Vitality to State and Local Politics*, 50 ALA. L. REV. (forthcoming 1998).

41. See STOLZ, *supra* note 8, at 82. But see JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE* (1989).

poor political judgment. The consequence of that poor judgment was to make their court a political toy and seriously diminish its legitimacy as a sober and disinterested interpreter of the state's legal texts. While a valiant effort was made to support the retention of the court, it was not possible to defend its decisions as exercises of technical, professional judgment.

It bears repetition that the crisis thus emerging is centered in the highest court in California. Most of the *political* responsibility and visibility of any judiciary is vested in its highest court. Lower court judges have few opportunities to make their states over into egalitarian societies whether the people like it or not, because they are subject to the constraint of appellate review, as the highest court is not. Also, there is in California, and in most states, a substantial mechanism of judicial discipline intended to restrain and correct non-reviewable abuses of power by lower court judges. (It may be a remote consequence of the poor political judgment of the Wright-Bird court that this admirable disciplinary system may now itself have become an instrument of partisan politics.⁴²) Because it is only the highest state courts that wield substantial political power, and which are on that account arguably legitimate objects of partisan political concern, this article is attentive only to those institutions. However, because lower court judges are also elected in most states, some of the prescriptions set forth here may be equally applicable to elections to those offices.

III

ANTECEDENT EVENTS: 1790-1970

Arrogance and poor political judgment were not the only malign influences on the political environment of California or the other states in which similar developments have occurred in the years since 1978. The members of that court are not alone to blame. In part, the attacks on the Bird court were merely a reversion to earlier times when many Americans had scorned their courts and regarded them as suitable objects of unrestrained political competition. Those earlier times in America were in line with experience elsewhere; a judiciary that is free of intimidation and bribery is a rare thing in human experience. Hence, few knowledgeable observers could have been surprised by the unfortunate turn of events in California.

Since the earliest days of the Republic, judges commissioned with the power to review legislation have been accused, and often not without cause, of exceeding their authority and usurping the role of the legislative branches of state and federal governments. The people, assured of their right to self-government, have repeatedly risen to throw off the yoke of judicial oppression. Diverse means have been employed to that end.

42. See Nancy McCarthy, *Judge Faces Discipline for Opinion*, CAL. BAR J., Aug. 1998, at 1. It is not altogether clear what motivates the Discipline Commission in this matter; it may be nothing more than simple error in judgment.

To be sure, the Justices of the Supreme Court of the United States have withstood numerous challenges to their role and tenure. *McCulloch*,⁴³ *Dartmouth College*,⁴⁴ *Swift*,⁴⁵ *Dred Scott*,⁴⁶ *Pollock*,⁴⁷ *Debs*,⁴⁸ *Lochner*,⁴⁹ *Adkins*,⁵⁰ *Schechter*,⁵¹ *Engel*,⁵² *Miranda*,⁵³ and *Roe*⁵⁴ are names marking a dozen instances over two centuries in which the Court made decisions evoking powerful reactions, including nullifying defiance and evasion, court packing and the threat of court-packing, legislative withdrawal of jurisdiction, constitutional amendment, and even civil war. The Supreme Court, unlike all the hundreds of other courts around the world on whom the power of judicial review has been conferred in the last century and a half,⁵⁵ is staffed by judges who enjoy tenure for life. Thomas Jefferson was perhaps the first leader to decry that provision and to call for term limits for Justices,⁵⁶ and the thought has endured.⁵⁷ Surely some change in the tenure of the Justices would have been made long ago were the Constitution not so difficult to amend.⁵⁸

43. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). For some of the response, see JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969); JOHN TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED (Richmond, Shepherd & Pollard 1820).

44. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). For a reaction, see THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 335 (2d ed. 1871).

45. *Swift v. Tyson*, 41 U.S. 1 (1842). For a reaction, see JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 253 (Roland Gray ed., 2d ed. 1921).

46. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). For an account of the reaction, see DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

47. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). The reaction was the Sixteenth Amendment.

48. *In re Debs*, 158 U.S. 564 (1895). A brief account of the reaction is WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 192-98 (1991).

49. *Lochner v. New York*, 198 U.S. 45 (1905). For an account of the reaction, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993).

50. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

51. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The reaction was the court-packing plan of 1937. See generally WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995).

52. *Engel v. Vitale*, 370 U.S. 421 (1962).

53. *Miranda v. Arizona*, 384 U.S. 436 (1966). For a reaction, see Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998).

54. *Roe v. Wade*, 410 U.S. 113 (1973). For reaction, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 189-95 (1991).

55. See Carrington, *supra* note 40.

56. See DONALD O. DEWEY, MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF MARBURY VS. MADISON 170-74 (1970).

57. AMERICAN BAR ASSOCIATION, AN INDEPENDENT JUDICIARY: REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 23 (1997) (quoting Sen. Orrin Hatch's (R.-Utah) remarks before the Federalist Society's Tenth Anniversary Lawyers Convention held on Nov. 15, 1996).

58. I have elsewhere advocated fifteen-year, nonrenewable terms for Justices of the Supreme Court of the United States. See Carrington, *supra* note 40.

No comparable impediment forestalled political responses to the impolitic decisions of highest state courts. Indeed, in Jefferson's time, stronger passions were directed at the political power of state judiciaries than at the Marshall Court. The Republic was not a decade old before it was widely realized that those gaining high judicial office were men of common clay whose political judgment was sometimes poor and occasionally horrid, and who sometimes unrestrainedly deployed their political powers for ill-chosen purposes.⁵⁹

The earliest abusers of judicial power in state courts were elite Federalists. Chancellor James Kent, after Marshall the most eminent jurist of the age, was forced into retirement by the New York legislature in protest against certain "impact decisions" made by him as enforcer of the state constitution.⁶⁰ Among his decisions of dubious legitimacy was the invalidation of state law exercising sovereignty over the formerly royalist Kings' College, renamed Columbia by its Federalist trustees.⁶¹ Less consequential political behavior was epidemic in other states; for example, Federalist Judge Tapping Reeve in Connecticut, the founder of the famous Litchfield Law School, was indicted for sedition by a grand jury over which he presided in reaction to his comments about Jefferson uttered from the bench.⁶² At the same time, Federalist legislators manifested little concern for the independence of non-Federalist judges. Thomas Cooper, a friend of Jefferson's, lost his judgeship in Pennsylvania at the initiative of Federalists.⁶³ And a Federalist legislature expelled all the Democratic judges from the state courts in New Hampshire in 1813.⁶⁴

Democrats were not less aggressive in these matters than Federalists. The Democratic legislature elected in Kentucky in 1824 fired all members of their highest court (who were Whigs) and replaced them, as punishment for certain decisions having unwelcome impact on tenants and debtors.⁶⁵ By the 1830s, in part to secure judicial independence from irresponsible governors and legislators, Jacksonian Democrats were everywhere advocating the election of judges.⁶⁶ By the middle of the nineteenth century, judges were elected in almost every state.⁶⁷

59. A useful history is MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, *JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES* (1987).

60. See JOHN T. HORTON, *JAMES KENT: A STUDY IN CONSERVATISM* 233-35 (1939).

61. See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 564 (1993).

62. See MARIAN C. MCKENNA, *TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL* 126-35 (1986).

63. See DUMAS MALONE, *THE PUBLIC LIFE OF THOMAS COOPER, 1783-1839*, at 199 (1926).

64. See EDWIN D. SANDBORN, *HISTORY OF NEW HAMPSHIRE FROM ITS FIRST DISCOVERY TO THE YEAR 1830*, at 260-61 (1875). This event formed part of the political context for the ouster of Federalist trustees of Dartmouth College by Jeffersonians in 1817, an action reversed in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

65. See generally ARNDT M. STICKLES, *THE CRITICAL COURT STRUGGLE IN KENTUCKY, 1819-1829* (1929).

66. See FREDERICK GRIMKE, *THE NATURE AND TENDENCY OF FREE INSTITUTIONS* 444-75 (John William Ward ed., 1968) (1848).

67. See EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 92-93 (1944).

Even Francis Lieber, who was no Jacksonian, was at first persuaded that this reform was necessary.⁶⁸ While it was true, as Tocqueville observed, that American politicians were greater sycophants than European courtiers, so quick were they to profess their belief in the superior wisdom of the electorate,⁶⁹ the advocates of judicial elections seldom contended that “the people” would wisely select their judges. It was more commonly believed that elected judges would likely be no worse than those who were appointed, and the fact of their election would confer higher status on them, cause their judgments to command greater respect, make it less likely that a legislature would intrude on their proper role, and better fit them with experience useful to the political role of judicial review of legislation.⁷⁰ It was contended that the best arguments for life tenure for judges were equally applicable to legislators and executive officers. Also, when bad judges are elected, the people have themselves to blame, and, if their terms in office are limited, the people are assured of an opportunity to correct their mistakes. Thomas Cooley, the much-honored Chief Justice of Michigan, even after his own defeat for reelection in 1885, defended the practice.⁷¹ And Lord Bryce, the Tocqueville of the 1890s, although appalled at the idea of electing judges, concluded that persons elected to judicial office in America were as competent as those who were appointed and were, unlike English judges, selected from all classes⁷² and thus gained wider public trust.

Despite the fact that most nineteenth century state court judges had to stand for election, the class bias afflicting law in the federal courts was not restricted to the federal judiciary. The law of torts emerged from its origins in the common law forms of action to be fashioned by highest state courts as a shelter from liability for nascent industry.⁷³ The appointed highest state court in Connecticut in 1909 even presumed to invalidate the Federal Employers’ Liability Act,⁷⁴ a decision reversed by the Supreme Court of the United States in 1917.⁷⁵

68. See FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 238-45 (Theodore D. Woolsey ed., 3d ed. 1874).

69. See I ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 289 (Henry Reeve trans., 1837) (1835) (“It would have been impossible for the sycophants of Louis XIV to flatter more dexterously.”).

70. The best statement of the case for the election of judges may be GRIMKE, *supra* note 66, at 438-75. See also Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993). For accounts of elected judges, see Kermit L. Hall, *Constitutional Machinery and Judicial Professionalism: The Careers of Midwestern State Appellate Court Judges, 1861-1899*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 29 (Gerard W. Gawalt ed., 1984); Kermit L. Hall, *The “Route to Hell” Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920*, in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 229 (David J. Bodenhamer & James W. Ely, Jr., eds., 1984).

71. See Everett S. Brown, *The Contribution of Thomas M. Cooley to Bryce’s “American Commonwealth”*, 31 MICH. L. REV. 346, 353 (1933).

72. See 1 AMERICAN COMMONWEALTH 670-71 (1894).

73. For a sympathetic account of the restrictive doctrines then in force, see Thomas M. Cooley, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARE INDEPENDENT OF CONTRACTS (1879).

74. See *Hoxie v. New York*, 73 A. 754 (Conn. 1909).

75. See *New York Cent. R.R. Co. v. White*, 243 U.S. 188 (1917).

Elected judges in New York⁷⁶ and Montana⁷⁷ in 1911 held their states' industrial accident laws to be unconstitutional. The problem of class bias was perhaps most acute in California, where the judiciary, although elected, was widely perceived to be a subsidiary of the Southern Pacific Railroad.⁷⁸

By the end of the nineteenth century, the demerits of judicial elections were increasingly evident.⁷⁹ In rural counties, where the people knew the lawyers, such elections could perhaps be regarded as authentic democratic politics, but they intensified fears of hometown prejudice against nonresident parties. Elsewhere such elections were often marked by a very low level of information and interest among the electorate. And there were at least three more serious problems that the advocates of judicial elections had not anticipated.⁸⁰

One was the harmful role of political parties. Their nominations and support went to party regulars and contributors.⁸¹ As the urban machines acquired a bad odor in the late nineteenth century, so did the judges to whom they sold places on the ballot. Judges beholden to political parties, it was argued, could not be trusted to decide cases independently of their political masters. A notable casualty of the process was the father of Benjamin Cardozo, who was accused of being a Tammany Hall subordinate and driven from office during a moment of reform.⁸² In addition, judicial candidates wearing party labels were likely to win or lose with the ticket, Thomas Cooley being a premier example of a distinguished judge buried in a partisan avalanche. On the other hand, political organizations when competitive, because their self-interest extended beyond the outcome of a particular election, sometimes screened out grievously underqualified candidates who might otherwise have won election.⁸³

A second problem was the source of campaign funds for judicial candidates.⁸⁴ Judicial candidates receive money from lawyers and litigants appearing in their courts; rarely are there contributions from any other source. Even when the amounts are relatively small, the contributions look a little like bribes or shake-downs related to the outcomes of past or future lawsuits. A fundamental difference exists between judicial and legislative offices in this respect

76. See *Ives v. South Buffalo Ry. Co.*, 94 N.E. 431 (N.Y. 1911).

77. See *Cunningham v. Northwestern Improvement Co.*, 119 P. 554 (Mont. 1911).

78. See GEORGE E. MOWRY, *THE CALIFORNIA PROGRESSIVES* 59-60 (1951).

79. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 713-29 (1995); Hall, *The "Route to Hell" Retraced*, *supra* note 70.

80. See, e.g., *Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges: A Transcript of the Debates from the 1868 Constitutional Convention*, 70 N.C. L. REV. 1825 (John V. Orth ed., 1992).

81. This remains a feature of partisan judicial elections in numerous states. See Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 65-66 (1985). Schotland notes, for example, the refusal of the Democratic chair in Brooklyn in 1982 to allow Democratic judges to accept cross-endorsement by Republicans, for the reason that this would reduce the funding available to the party.

82. See Andrew L. Kaufman, *The First Judge Cardozo: Albert, Father of Benjamin*, 11 J.L. & RELIGION 271, 310 (1995).

83. Absent party control, the election is often decided by name recognition. For numerous examples, see Schotland, *supra* note 81, at 86-89.

84. See *id.* at 59-63.

because judges decide the rights and duties of individuals even when they are making policy; hence any connection between a judge and a person appearing in his or her court is a potential source of mistrust. For example, in a recent poll in Ohio, almost ninety percent of the citizens polled believed that judicial decisions are influenced by campaign contributions.⁸⁵ There have been celebrated occasions in other states when very large contributions were made by lawyers or parties who thereafter secured large favorable judgments or remunerative appointments such as receiverships.⁸⁶ Such events contribute to public cynicism about our courts.

The resemblance of campaign contributions to bribes becomes especially strong when the candidate finds that it is not necessary to spend all the money received on a campaign and retains some of it as a salary supplement, a practice not always forbidden by state law.⁸⁷ Or when a candidate who borrows money to fund a campaign thereafter asks lawyers to pay his or her debts.⁸⁸ Indeed, there are occasions when an implicit threat of lawyers or parties to withhold funds and to support a rival candidate would be far more intimidating to a sitting judge than, say, a mere picket on the courthouse steps who, it has been held, may be punished for contempt of court.⁸⁹

A third difficulty specific to judicial campaigns is their substantive content. Political candidates generally succeed by appealing to the prejudices of their constituents, and this is often achieved by promises bespeaking closed minds on issues of primary concern. Judicial candidates cannot make such campaign promises regarding their decisions in future cases in which the parties have not yet been heard without sacrificing the disinterest and open mind they are expected to bring to their work. While professional ethical standards may proscribe such campaign promises,⁹⁰ many have failed to practice the appropriate

85. See CITIZENS' COMMITTEE ON JUDICIAL ELECTIONS app. B (1995) (on file with author).

86. For a recent example, the Supreme Court of Alabama upheld an enormous punitive damage award after every member of the court had received sizeable contributions from counsel for the plaintiff. See *Nightline* (ABC television broadcast, Oct. 24, 1995), available in LEXIS, News Library, Abcnew File; *ABC World News Tonight: Americana Agenda Alabama Supreme Court's Largesse* (ABC television broadcast, Oct. 9, 1995), available in LEXIS, News Library, Abcnew File. Pennzoil lawyers contributed \$315,000 to members of the Texas court deciding its enormous claim against Texaco, and four of the judges receiving contributions were not facing reelection campaigns. See Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529, 555 (1991). Alabama and Texas have since modified their rules of judicial conduct to prohibit these types of contributions. See Ala. Code § 12-24-1 (1975 & Supp. 1996); TEX. ELEC. CODE ANN. § 253.155 (West 1998) (limiting contributions to judicial candidates or officeholders).

87. Salary supplementation has been provided at times without the cover of campaign contributions. Supreme Court Justice Frank Murphy, for example, received a substantial subvention from Walter Chrysler during his years of service on the Detroit Recorder's Court. See SIDNEY FINE, FRANK MURPHY: THE DETROIT YEARS 193-94 (1975). That subvention cannot be linked to any of Murphy's many judicial acts.

88. See, e.g., David Fraser, *Letter Asks Help to Cut Judge's Debt*, ARKANSAS DEMOCRAT-GAZETTE, July 16, 1994, at 1A.

89. Cf. *Cox v. Louisiana*, 379 U.S. 559 (1965).

90. See Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1059-68 (1996). The Model Code of Judicial Conduct Canon 7 was modified in

restraint,⁹¹ and it is arguable that they have a constitutionally protected right to make the promises.⁹² One elected judge confronted with the problem of finding something to say has told me that he promises each voter he meets that if they ever have a case in his court, they can count on him to be their friend.

Lawyers resisted the election of judges in the nineteenth century, and the resistance intensified after the turn of the century when the bar organizations became politically active. Roscoe Pound's famous 1906 address to the ABA⁹³ aroused a strenuous effort to find other means to select judges. Resistance to elections was generally expressed as concern for judicial independence, but also reflected concern for the social status of courts and lawyers. In the industrial age emerging in the last decade of the century, professional credentials acquired an importance they had previously lacked and the organized bar, along with other credentialed professions, gained political strength. A boom in higher education⁹⁴ led to the establishment by 1920 of the graduate professional law school as the common training ground of an elite profession very different from that led in the late nineteenth century by Thomas Cooley.⁹⁵ Governmental institutions of all kinds were increasingly conducted by technocratic professionals, and the legal profession sought to assure that judges would not be least among them.

Among Pound's allies was William Howard Taft, who ardently favored the professionalization of the judiciary. Among his most memorable public statements was his admission that he loved judges and thought of them as the sort of people he hoped to meet in Heaven "under a just God."⁹⁶ He advocated judicial law reform for the purpose of reducing cost and delay, urging that reforms of that sort would better serve the interests of disadvantaged citizens encountering difficulty in enforcing their rights than would an enlargement of their substantive entitlements.⁹⁷ What Taft, himself a social Darwinist, could not see were the reasons that many of his contemporaries were enraged with the politi-

1990 to relax the constraints. Alabama and North Carolina are two states that have recently modified Canon 7 to accommodate greater freedom of candidates to express political ideas while striving at the same time to create moral pressures on judicial candidates to abide the previous rule. See AMERICAN BAR ASS'N, SPECIAL COMM. ON JUDICIAL INDEPENDENCE, AGENDA BOOK, 1998 ANNUAL MEETING.

91. See, e.g., Schotland, *supra* note 81, at 66, 79-80.

92. See Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993); Stretton v. Disciplinary Bd. of the Supreme Court of Pennsylvania, 944 F.2d 137 (3d Cir. 1991); ACLU v. Florida Bar, 744 F.Supp. 1094 (N.D. Fla. 1990); J.C.J.D. v. R.J.C.R., 803 S.W.2d 953 (Ky. 1991).

93. See *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 20 JUDICATURE 178 (1937).

94. See generally LAURENCE R. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* (1965).

95. See generally ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

96. "I love judges and I love courts. They are my ideals. They typify on earth what we shall meet hereafter in heaven under a just God." Speech to Pocatello Chamber of Commerce, N.Y. EVENING POST, Oct. 6, 1911.

97. See Special Message of the President of the United States Returning Without Approval House Joint Resolution No. 14, H.R. DOC. NO. 62-106 (1911).

cal conduct of the judiciaries denying diverse claims of right, both federal and state.⁹⁸ As President, he invested much of his energy and political capital in resisting law reforms aiming to hold judges accountable to an electorate.

Another line of Progressive reform competing with Taft's was animated by hostility to what was decried as "Judicial Oligarchy."⁹⁹ Seven states adopted constitutional provisions for the recall of elected officers,¹⁰⁰ including judges, a proposal horrifying to political conservatives professing to cherish the independence of the judiciary from political intimidation. Because such a provision was in the draft Arizona constitution, President Taft vetoed the Arizona statehood resolution, effectively requiring deletion of the offending clause.¹⁰¹ He was supported by politically conservative senators such as George Sutherland of Utah and Elihu Root of New York.¹⁰² One response to his veto was an overwhelming vote of the people of California rejecting his position by adding to their constitution precisely the recall provision causing him to veto Arizona's.¹⁰³ In practice, these radical provisions were seldom invoked, and never so far as appears was a judge recalled for ideological reasons. Whether, as intended, it made some judges behave less like free-wheeling legislators¹⁰⁴ is unknown.

Colorado took a different step, providing in its constitution for review by referendum of judicial decisions, another plan reviled by Taft.¹⁰⁵ Theodore Roosevelt had until 1911 opposed radical structural reforms such as the recall of judges, but the decision of the New York Court of Appeals invalidating the state's mandatory workmen's compensation law sent him over the top with rage.¹⁰⁶ Disregarding social and economic data depicting the oppression of labor, the court held that employers were guaranteed the right by both federal and state constitutions to employ workers without taking responsibility for

98. See Walter F. Dodd, *The Recall and the Political Responsibility of Judges*, 10 MICH. L. REV. 79, 85 (1911).

99. See GILBERT E. ROE, *OUR JUDICIAL OLIGARCHY* (1912); see also WILLIAM L. RANSOM, *MAJORITY RULE AND THE JUDICIARY: AN EXAMINATION OF CURRENT PROPOSALS FOR CONSTITUTIONAL CHANGE AFFECTING THE RELATION OF COURTS TO LEGISLATION* (1912); J. Patrick White, *Progressivism and the Judiciary: A Study of the Movement for Judicial Reform, 1901-1917*, at 150-51 (1957) (unpublished Ph.D. dissertation, University of Michigan) (quoting Sen. Robert Owen (D.-Okla.)).

100. Recall was first adopted in Oregon in 1908, and little consideration was given to the possible exclusion of judges from that provision. See generally ALLEN H. EATON, *THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON* (1912).

101. See White, *supra* note 99, at 205. Taft later described the plan as legalized terrorism.

102. See *id.* at 198-201. For a ringing defense of the judiciary, see J. HAMPDEN DOUGHERTY, *POWER OF FEDERAL JUDICIARY OVER LEGISLATION* (1912).

103. See White, *supra* note 99, at 96.

104. See *id.* at 150. In Arizona, recall of judges was passionately supported by many mine workers as a "Declaration of Independence" from the federal territorial judges so given to strike-breaking injunctions. See *id.* at 127.

105. "The people at the polls, no more than kings upon the throne are fit to pass upon questions involving the judicial interpretation of the law." GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 213 (1994). See generally WILLIAM HOWARD TAFT, *POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE, AND ITS PERILS* (1913).

106. See White, *supra* note 99, at 349.

their work-related injuries.¹⁰⁷ “It is out of the question,” Roosevelt said, “that the courts should be permitted permanently to shackle our hands as they would shackle them by decisions such as this.”¹⁰⁸ He proposed for New York the Colorado provision allowing a right of appeal to the people through a referendum on the constitutionality of legislation.¹⁰⁹ Even Learned Hand, though a devoted follower of Roosevelt, thought ill of this idea as a perversion of the judicial role in constitutional adjudication.¹¹⁰ It was also hopelessly cumbersome,¹¹¹ and it cost Roosevelt support in the presidential campaign of 1912.¹¹² That TR was driven to advocate such a solution puts in perspective the court-packing plan proposed by FDR a quarter of a century later.¹¹³

Ohio, North Dakota, and Nebraska took a different tack to reform, amending their constitutions to require supermajority votes of their highest courts to invalidate legislation.¹¹⁴ Arizona in 1912 enacted a statute creating a novel process by which the voters of Arizona could advise a federal judge that his or her services were no longer desired in Arizona.¹¹⁵ This action reflected dissatisfaction with labor injunctions issued by federal courts.

The direct democracy movement began to fade after 1912.¹¹⁶ Meanwhile, however, the direct primary had the unintended effect of weakening the ability of party organizations to prevent the election of seriously underqualified judges.¹¹⁷ And the lengthening of the ballot to a “bed sheet” of votes further diminished the likelihood that voters were exercising knowing choices. The prospects of election for candidates with familiar names but no qualifications were thus materially enhanced by Progressive reforms.

In this environment, the organized bar sought and found compromise methods of selecting and retaining judges. Some states fashioned “nonpartisan” elections by taking judicial candidates off the partisan tickets. This weakened the influence of the parties, but made judges more vulnerable to

107. See *Ives v. South Buffalo Ry. Co.*, 94 N.E. 431, 448 (N.Y. 1911).

108. *Workmen's Compensation*, 98 THE OUTLOOK 49 (May 13, 1911); see also Theodore Roosevelt, *Introduction* to WILLIAM L. RANSOM, *supra* note 99, at 3-24.

109. See 18 WORKS OF THEODORE ROOSEVELT 244, 274 (Herman Hagedorn ed., 1920) (describing presidential speech at Carnegie Hall, New York, on Oct. 20, 1911). An account of this remarkable event is provided by Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 933-49 (1997).

110. See White, *supra* note 99, at 367.

111. See, e.g., *People v. Max*, 198 P. 150 (1921).

112. See White, *supra* note 99, at 384. It has, however, lately been revived in ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 96-122 (1996).

113. See LEUCHTENBURG, *supra* note 51, at 132-79.

114. See *id.* at 420.

115. See *id.* at 421-22.

116. See generally Patrick L. Baude, *A Comment on The Evolution of Direct Democracy in Western State Constitutions*, 28 N.M. L. REV. 343 (1998).

117. See William H. Taft, *The Selection and Tenure of Judges*, 38 REP. AM. BAR ASS'N 418, 422-23 (1913).

other influences, and further facilitated the election by mistake of candidates blessed with names made familiar by other persons.¹¹⁸

More popular with the bar was the idea of merit selection, sometimes denoted as the Missouri Plan. This scheme entrusted the nomination of judges to a group adorned with professional credentials and then subjected those chosen by this elite to retention elections, that is, elections in which there is a choice to vote yes or no on the retention of a sitting judge.¹¹⁹ The American Judicature Society was established in 1913 to improve judicial administration and soon began to foster that idea.¹²⁰ It was adopted in diverse forms in many states.¹²¹

Whether the Missouri Plan in any of its numerous variations has had significant effect on the technical competence of high court judges is at best uncertain. It seems unlikely that it materially elevated the moral and political judgment of those selected, given the uncertainty inherent in that standard of merit. The meager evidence indicates that merit-selection judges entered office with credentials substantially similar to those of elected judges¹²² and that partisan politics are not wholly suppressed, at least in Missouri.¹²³ And it may be that elected judges are, as Lord Bryce believed them to be, more in touch with "the common thoughts of men"¹²⁴ and possessed of a more "accurate appreciation of

118. See David Adamany & Philip DuBois, *Electing State Judges*, 1976 WIS. L. REV. 731; Philip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 L. & SOC'Y REV. 395 (1984); Ray M. Harding, *The Case for Partisan Election of Judges*, 55 A.B.A. J. 1162 (1969).

119. Proposed by Albert Kales in 1914, it was first adopted in Missouri in 1940. See Maura Ann Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839 (1994). Its virtues have recently been celebrated in Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK LITTLE ROCK. L. J. 281 (1995). See also Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509 (1978).

120. See generally MICHAEL R. BELKNAP, *TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY* (1990); STUMPF & CULVER, *supra* note 20. The idea was also approved by the American Bar Association in 1937. See Schoshinski, *supra* note 119, at 847.

121. Thirty-four states and the District of Columbia have some form of commission. A summary of the variations is provided in Polly Price, *Selection of State Court Judges*, in *STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES* 16-19 (Roger Clegg & James D. Miller eds., 1996).

122. See PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 13-17 (1980); HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 138-39 (2d ed., 1998); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 724 (1995); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228 (1987); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1 (1995). Three studies have attempted to measure the relation of selection methods to substantive outcomes: DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL SELECTION METHOD ON STATE SUPREME COURT POLICY: INNOVATION, REACTION, AND ATROPHY* (1995); Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25 (1979); Gerald S. Gryski et al., *Models of State Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143 (1986);

123. See STUMPF & CULVER, *supra* note 20, at 42.

124. [W]e fail to appreciate the dignity of our profession if we look for it either in profundity of learning or in forensic triumphs. Its reason for being must be found in the effective aid it renders to justice and in the sense that it gives of public security through its steady support of public order. These are commonplaces, but the strength of law lies in its commonplace char-

the requirements of the community”¹²⁵ than merit-selected judges, qualities that may be especially important for judges sitting on the high courts.

The retention election was adopted by some states that did not adopt merit-selection for their highest courts.¹²⁶ And Japan adapted the idea for use in its constitutional court, whose members are selected by the cabinet, then promptly stand for election once without opposition.¹²⁷ In the Japanese form, it might be aptly described as a confirmation election.

As originally envisioned by the retention election’s proponents, it was expected that the professional judge running without opposition would be retained in the absence of scandalous misconduct.¹²⁸ It was a device to satisfy the voters’ appetite for self-governance without risk that they would have any improper influence on judges or cause the electoral process to impose improper pressures upon them. For decades it worked, and no judge standing for retention failed to achieve it. While the prospect of a retention election could be a restraint and even somewhat intimidating,¹²⁹ the institution has been popular with most judges who have experience with it.¹³⁰

These successive waves of reform mean that the doctrine of separation of powers expressed in the Constitution of the United States has acquired diverse forms in the varied state constitutions. The differences are numerous. For example, highest state courts in several states have a constitutional power to enact procedural rules for use in inferior courts,¹³¹ a power that was not conferred on the Supreme Court of the United States until 1934 and that is subject always to the overriding power of Congress.¹³² Some state courts have gone so far as to hold that procedural matters are beyond the kin of legislatures and are their own exclusive responsibility.¹³³ In some states, the power to enforce standards of judicial conduct is vested within the judicial branch; in others, it is reserved to the legislature or to the voters.¹³⁴ Courts in many states have successfully in-

acter; and it becomes feeble and untrustworthy when it expresses something different from the common thoughts of men.

Thomas M. Cooley, *Address, in A RECORD OF COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED FIFTIETH ANNIVERSARY OF HARVARD COLLEGE* 95 (1887).

125. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 166 (1881) (describing Chief Justice Lemuel Shaw).

126. See generally SUSAN B. CARBON & LARRY C. BERKSON, *JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES* (1980).

127. JAPAN CONST. art. 79, reprinted in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 20 (Albert P. Blaustein & Gisbert H. Flantz eds., 1990).

128. See Larry T. Aspin & William K. Hall, *Political Trust and Judicial Retention Elections*, 9 *LAW & POL’Y* 451 (1987).

129. See Joseph R. Grodin, *supra* note 19.

130. See Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 *JUDICATURE* 306 (1994).

131. See, e.g., WYO. CONST. art. V, §2.

132. See Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2071 (1994)).

133. See, e.g., *Winberry v. Salisbury*, 74 A.2d 406 (N.J. 1950).

134. See Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 *LAW & CONTEMP. PROBS.* 59 (Summer 1998).

voked their inherent power to compel legislatures to provide funds needed for their operation, a power never claimed by the federal courts.¹³⁵ The issue of independence or accountability is therefore a somewhat different issue in each state, and different for any state court than for the federal judiciary.¹³⁶ It may be acceptably democratic that *elected* judges take actions and exercise powers that would be regarded as illegitimate if taken by judges selected by a merit panel or serving with life tenure.

The meritocratic reforms initiated by Taft and Pound may have been inherently unstable. They expressed and reinforced the formalist or technocratic tendencies of the courts to which they were applied. In this respect, they fit the tendency of some legal educators in the late nineteenth century, led by Christopher Columbus Langdell, to persuade the bar and the public that law and politics are distinct universes.¹³⁷ They were part of a formal moment in American law. That formalism quickly came under attack, for it was obvious, as it had been to the generation that revolted against British rule and to Jacksonians and Populists, that courts of last resort exercising the power of judicial review are political as well as legal institutions and cannot disavow politics however much they might wish to do so.¹³⁸ The Legal Realists of the 1920s were most outspoken in their attack on this formalism. The New York Court of Appeals led by Benjamin Cardozo reflected this more sophisticated (and more traditionally American) jurisprudence,¹³⁹ as did the Supreme Court of California led by Roger Traynor in the post-World War II era.¹⁴⁰ But even those courts were politically cautious and did not venture far from the legal texts and traditions used to explain their decisions, and their notable decisions seldom dealt with politically sensitive issues. Karl Llewellyn, a hard-core Legal Realist, was able to write in 1960 that the judges of our highest state courts were remarkably professional and their decisions "reckonable" by one familiar with the controlling

135. See Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993).

136. See James M. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219 (1998); Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997).

137. See Paul D. Carrington, *Hail! Langdell!*, 20 L. & SOC. INQUIRY 691 (1995).

138. In contrast, "Canadians are not conditioned to think of courts as part of the political system. . . . The role of the judiciary is perceived as being essentially technical and non-political; it is there to apply the laws made by the political branches of the government." PETER RUSSELL, *THE JUDICIARY IN CANADA: THE THIRD BRANCH OF GOVERNMENT* 3 (1987). That began to change with enactment of the Canadian Charter of Rights and Freedoms in 1982, but Canadian judges are still more cautious than their American counterparts. See Mark C. Miller, *Judicial Activism in Canada and the United States*, 81 JUDICATURE 262 (1998). A similar process may have been set in motion by the Australian Constitution Act of 1995. See P. H. Lane, *Constitutional Aspects of Judicial Independence*, in JUDICIAL COMMISSION OF NEW SOUTH WALES, *FRAGILE BASTION: JUDICIAL INDEPENDENCE IN THE NINETIES AND BEYOND* 53 (1997).

139. See ARNOLD KAUFMAN, *CARDOZO* 199-451 (1998).

140. See generally John W. Poulos, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643 (1995).

texts and traditions.¹⁴¹ It was almost foreseeable that courts failing to observe such caution (such as the Wright-Byrd court) would be returned to the political maelstrom from which Taft and Pound had delivered them.

IV

THE CURRENT CRISIS

The Supreme Court of California in the years after the appointment of Chief Justice Wright in 1970, by its lack of self-restraint and disregard for the legislative process, departed from professional traditions that were only a half-century old. And its rash deployment of political power after 1970 was not unique to California. Other highest state courts also began to assert themselves; new parameters and new principles were discovered in state constitutions.¹⁴² In some measure, this movement seems to have been inspired by the role model of the Warren Court,¹⁴³ which seemed for a generation of lawyers to have demonstrated that anything legislatures can do, courts can do better.¹⁴⁴ The result is that courts in states other than California have by their heroic deeds weakened their political bases. They have sometimes conflated the idea of judicial “independence” from extrinsic intimidation and control with the post-modern idea of independence as the right of judges to decide cases without regard for the legal texts they supposedly interpret and without respect for the expectations of the citizens they serve.

State constitutional law had been a subject of signal importance in the nineteenth century. Thomas Cooley’s magisterial work on that subject¹⁴⁵ is generally conceded to have been the best American law book of the time. What happened in the 1970s was thus a rediscovery of a political role more familiar to the nineteenth century than to the mid-twentieth century. Highest state courts opened what has been described as a forum-shopping opportunity “for liber-

141. See generally KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

142. See Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065 (1998). For contemporaneous comment, see Justice Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). Peters is formerly the Chief Justice of Connecticut; Linde was at the time of writing a member of the Oregon Supreme Court. See also Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989 (1996); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996); Clifford Taylor, *Who Is In Charge Here? Some Thoughts on Judicial Review*, 77 MICH. BUS. L.J. 32 (1998). Justice Taylor is a member of the Supreme Court of Michigan.

143. See William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). On Brennan’s influence, see Peters, *supra* note 142, at 102.

144. The premier statement of this principle is Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). On its influence, see Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM. 647 (1988).

145. See A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Boston 1868).

als."¹⁴⁶ Or, as former Justice Grodin of California has described, there was a discovery that state constitutions guaranteed happiness and safety for all.¹⁴⁷

Some state courts, in rediscovering their states' constitutions, tended to track the holdings of the Warren Court, but some were more autonomous.¹⁴⁸ For several reasons, the interpretation of state constitutions is a materially different professional task than is the interpretation of the federal Constitution. One reason is that most highest state courts are more accountable to the electorate than is the Supreme Court of the United States. Another is that a state constitution is everywhere more easily amended if the highest court should misinterpret it;¹⁴⁹ this may tend to justify a more free-wheeling, common law type of judicial creativity.¹⁵⁰ A third is that most state constitutions are more elaborate, or less cryptic, than the federal Constitution.¹⁵¹ To the extent that a state court is enforcing an explicit provision of a state constitution, no issue of judicial usurpation arises. It is the use of broad constitutional terms as the basis for the appropriation to the courts of power over heavily contested political issues that invites impairment of judicial independence by the threat of political retaliation. While much of what the highest state courts have done in recent decades through novel interpretations of constitutional language can be defended as humane and perhaps even wise on the political merits, there has been a foreseeable reaction threatening to the independence of the courts involved.

One obvious field for the endeavors of newly exhilarated courts was a restructuring of tort law. Where their predecessors had erected defenses, modern courts followed California in expanding liability, and even went so far as to immunize some of what they had done from legislative reconsideration by declaring the rights they created to have constitutional roots. For a recent example, in 1997, the Supreme Court of Illinois set aside elaborate tort reform legislation that was the product of prolonged political debate and deliberation, holding that caps on general damages are unconstitutionally discriminatory against those suffering the most.¹⁵²

There were also numerous holdings enforcing previously unknown rights of welfare clients having no federal counterparts.¹⁵³ The Supreme Court of Alaska

146. See Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 464 (1996). "Liberal" in this context must be taken to mean increased constitutional protection for the interests of the poor, women, and minorities.

147. See Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1 (1997).

148. See Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 197 (1998).

149. For examples, see G. Alan Tarr & Robert F. Williams, *Foreword to Western State Constitutions in the American Constitutional Tradition*, 28 N.M. L. REV. 191, 194-95 (1998).

150. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

151. See Tarr & Williams, *supra* note 149, at 192-93.

152. See *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997).

153. See Helen Hershkoff, *Rights and Freedoms Under the State Constitutions: A New Deal for Welfare Rights*, 13 TOURO L. REV. 631 (1997); Risa E. Kaufman, Note, *The Cultural Meaning of the*

found a right of privacy that included the right to possess and use marijuana at home.¹⁵⁴ The Supreme Court of Hawaii raised the possibility that same-sex marriages are constitutionally protected.¹⁵⁵ The latter decision set off a storm of reaction that included legislation by Congress and the state of Maine¹⁵⁶ and constitutional amendments in 1998 in Hawaii and Alaska, all designed to prevent recognition of same-sex marriages.¹⁵⁷ Meanwhile, the Hawaii legislature sensibly enacted a statute creating a new legal relationship called "reciprocal beneficiaries."¹⁵⁸

The Supreme Court of New Jersey led the way in invalidating exclusionary standards imposed by suburban zoning boards.¹⁵⁹ In doing so, the court created complex standards to be enforced by private claimants.¹⁶⁰ These were in due course displaced by the New Jersey Fair Housing Act, which relies on building contractors for enforcement. Whether the court's role in this development was beneficial or not is a matter that remains in dispute. Two members of the court responsible for the decision encountered serious resistance in a retention election, and even very sympathetic observers have been critical. Charles Haar, long an opponent of exclusionary zoning, limited his criticism to the court's efforts at public relations.¹⁶¹ But it is by no means clear what the court could have done, consistent with its role, to promote better public understanding of the issue. And John Payne, a New Jersey lawyer no less opposed to exclusionary zoning than Haar, found the court's holding to be too complex, too arbitrary, and too counterintuitive to be comprehensible to the public.¹⁶² As Payne observed, the root of the problem is that New Jersey had unwisely empowered zoning commissions having constituencies that were too small and too homogeneous; the court might have corrected that legislative blunder by less heroic means than it employed.

"Welfare Queen": *Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301 (1997).

154. See *Ravin v. State*, 537 P.2d 494 (Alaska 1975); cf. *State v. Kantner*, 493 P.2d 306 (Haw. 1972). But see *State v. Erickson*, 574 P.2d 1 (Alaska 1978) (cocaine distinguished).

155. See *Baehr v. Lewin*, 852 P.2d 44 (Haw.), modified, 852 P.2d 74 (Haw. 1993).

156. ME. REV. STAT. ANN. tit. 19-A, §§ 650 & 701(1-A), (5) (West 1998). See Jennifer Wriggins, *Maine's "Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages": Questions of Constitutionality Under State and Federal Law*, 50 ME. L. REV. 347 (1998).

157. The Alaska amendment was partly in response to *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska 1998).

158. 31 HAW. REV. STAT. ANN. § 572C (Michie Supp. 1998).

159. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

160. See generally CHARLES HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES* (1996); DAVID KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995).

161. See HAAR, *supra* note 160, at 50.

162. See John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685 (1998).

In addition, numerous state supreme courts followed the California court's lead in undertaking to reorganize the school finance systems of their states.¹⁶³ The New Jersey court, for example, soon followed California in requiring statewide equalization of revenue available to schools¹⁶⁴ and went beyond the California court in the means deployed to enforce its policy when the legislature was unable to agree on a suitable financial scheme.¹⁶⁵ Other state supreme courts followed.¹⁶⁶ Members of the Vermont and New Hampshire courts were under political attack in 1998 for such decisions bearing on school finance.¹⁶⁷

Few persons knowledgeable about public education would deny that local finance of public schools is problematic: Differentials in tax bases of local districts are reflected in the financial resources available to schools and thus result in inequalities in the educational services provided. Jonathan Kozol, who has made a career expressing humanitarian, if sometimes ill-considered, ideas about public education, toured America to tell us in painful detail that schools with less money have fewer facilities and provide fewer services than those with more money.¹⁶⁸ His work persuaded many high court judges that they should intervene to correct this inequity. In doing so, they ignored strong evidence that there is meager correlation between the social and economic status of the families of schoolchildren and the abundance of the tax base of their local schools. And equally strong evidence that there is little connection between the size of public school budgets and the educational outcomes they produce.¹⁶⁹ Moreover, local taxation is linked closely to local control of the public schools, a tradition reflecting the reality that schools are an extension of, as well as a surrogate for, the family. The best schools tend to be those in which parents take the most interest. It would be a better world if parents most concerned with the education of their children would take a serious interest in the learning of children afflicted with a disadvantage, such as being the child of a single, working parent, but they do not. The most we can realistically expect is that they will take an interest in the children in their immediate vicinity. For this reason, in state after state, when the issue has been put to voters, they have voted for local control and against statewide equalization, and that preference

163. See Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 B.Y.U. EDUC. & L.J. 1; Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072 (1991).

164. See *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

165. See *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976). See generally G. Alan Tarr, *Robinson v. Cahill and the New Judicial Federalism*, 59 ALB. L. REV. 1753 (1996).

166. See, e.g., Opinion of the Justices, 624 So. 2d 107 (Ala. 1993); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *McDuffy v. Secretary of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997). See generally Peter Enrich, *Leaving Equity Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995).

167. The website of Citizens for Independent Courts is available at (visited Jan. 28, 1999) <<http://www.faircourts.org>>.

168. See SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

169. See WILLIAM A. FISCHER, SCHOOL FINANCE LITIGATION AND PROPERTY TAX REVOLTS: HOW UNDERMINING LOCAL CONTROL TURNS VOTERS AWAY FROM PUBLIC EDUCATION 30 (Lincoln Institute of Land Policy Working Paper No. WP98WF1, 1998).

has been shared by voters in school districts having scant financial resources, who (wisely or not) seem generally to prefer local control to additional revenue that must come with the string attached of greater state involvement.¹⁷⁰ It appears that the chief advocates for state finance and control are the teachers' unions. At a time when public faith in the institutions of public education seems to be declining despite relatively high expenditures, and many families are withdrawing their children from public schools either by keeping them at home or by electing to pay private school tuitions, centralization of public schools may be precisely the policy that is not needed.¹⁷¹ Whatever may be the most prudent method of financing locally controlled schools, it seems undebatable that the issue is one best resolved by state legislatures who are in touch with the desires of the local electorates, who care most about their schools, and who are equipped to compromise the conflicting values and to correct their mistakes.¹⁷²

In addition to these overt acts of highest state courts, legislatures and executive officers of states have become accustomed to using the courts as lightning rods to absorb political anger. An excellent example is provided by the 1998 settlement of the cigarette wars. All states had long taxed the sale of cigarettes, and many a highway had been paved with the proceeds. A justification for such taxation had been that cigarettes are harmful to health, a fact well-known for centuries. At any time, any state could have raised its tax, and could have spent the proceeds on public health initiatives, including renewed efforts to discourage teen-age smoking. In lieu of such forthright policy-making, bogus cases were filed in state courts by states' attorneys general and then settled for billions of dollars to be paid over a period of twenty-five years, in substance as an additional tax on the product, with much public beating of breasts by the attorneys general. The transaction was an effort of tobacco companies to resolve a mounting political and legal crisis by co-opting the attorneys general and some members of the private bar well-known for their representation of personal injury plaintiffs who have been rewarded with mind-boggling fees paid by tobacco companies for agreeing to resolve all future claims by state or local governments.

Although many involved with public health have mounted an ambitious effort to eliminate the use of tobacco (much as we have previously eliminated the use of alcohol, marijuana, and cocaine!),¹⁷³ it is not clear that they have the support of the electorate or of state legislatures. Gubernatorial candidates in Massachusetts and Minnesota who actively supported the anti-smoking campaign

170. See Colin D. Campbell & William A. Fischel, *Preferences for School Finance Systems: Voters Versus Judges*, 49 NAT'L. TAX. J. 1 (1997).

171. See generally FISCHEL, *supra* note 168.

172. See Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991).

173. On the prospects for effective regulation, see Joni Hersch, *Teen Smoking Behavior and the Regulatory Environment*, 47 DUKE L.J. 1143 (1998).

were defeated in 1998 elections.¹⁷⁴ A troublesome feature of the initiative is its conflict with the spirit of individual responsibility suffusing many of the judicial heroics of recent decades. Cigarette smokers are the group having the most direct interest in the issue, and although abashed, they are not without political influence sufficient to prevent the election of a gubernatorial candidate hostile to their interests. The effect of the 1998 settlement was to direct their anger at the courts. The secondary message is that smokers and anti-smokers must contest for control over the highest state courts rather than the legislatures.

Just as tobacco settled, the cities of New Orleans and Chicago sued the makers and sellers of handguns for the cost of treating gunshots in public emergency rooms. The cities likely have legislative authority to regulate and perhaps even forbid the sale of handguns within the cities, but neither has authority to enact tort law, especially tort law favoring itself, however wise the imposition of liability may be from the perspective of those, including this author, who deplore the availability of such weapons. But there can be little doubt that the political ramifications are enormous, and almost certainly beyond the capacity of any state's judicial system to manage. The passion and political power of gun owners is all too visible. Using the courts to circumnavigate the influence of gun lobbies is a recipe for political disaster. As the editors of *The Economist* remarked, "[i]f America is ever to get its priorities right on tobacco, guns or any other issue, it will do so only in the debating chamber of democratically elected legislatures, not through threats of mass litigation."¹⁷⁵

While unwelcome political decisions by highest state courts and by other public officers have contributed to the present environment of mistrust, there are also decisions of the Supreme Court of the United States that have made highest state courts more inviting targets of political intervention. One cause of intense judicial campaigns is the decision of the Court requiring regular reapportionment of both state and federal legislative districts.¹⁷⁶ Reapportionment plans are now a frequent object of litigation, and the issues are ultimately brought to rest in highest state courts.¹⁷⁷ Thus, by controlling a highest state court, a party or interest group can materially influence the composition of a congressional delegation and their state's legislature. This seems the most likely motive of recent efforts to replace certain members of the Supreme Court of Tennessee.

An additional complexity of judicial politics in some states was created by the Court's recent interpretation of the Voting Rights Act of 1965.¹⁷⁸ It was not

174. See Sam Howe Verhovek, *The 1998 Elections: The States—Initiatives; From Same-Sex Marriage to Gambling, Voters Speak*, N.Y. TIMES, Nov. 5, 1998, at B5.

175. *When Lawsuits Make Policy*, THE ECONOMIST, Nov. 21, 1998, at 18.

176. See *Baker v. Carr*, 369 U.S. 186 (1962).

177. See, e.g., *Sheff v. O'Neil*, 609 A.2d 1072 (Conn. 1996); *Jensen v. Kentucky State Bd. of Elections*, 959 S.W.2d 771 (Ky. 1997); *Hlava v. Nelson*, 528 N.W.2d 306 (Neb. 1995); *Elliott v. Richland County*, 489 S.E.2d 195 (S.C. 1997).

178. Voting Rights Act of 1965, 42 U.S.C. § 1973 (1994).

until 1991 that the Court held the Act applicable to judicial elections.¹⁷⁹ It is not yet clear what, if any, changes will be needed to bring systems of once-segregated states into full compliance with the Act's requirements.¹⁸⁰ What is clear is that some method must be found to assure participation in the judiciary of minorities who were excluded by reason of past discrimination. In this article, I will not attempt to address the issues thus presented, in part because they are somewhat different in each of the fifteen states affected. It is mentioned here in part to observe that federal legislation, as well as the Constitution of the United States, bears on the choices open to states in selecting their judges. This was not true until recent times. When Taft and Pound and their contemporaries were considering the issues now before us, there was no applicable federal law to consider. It is also important to note that any change in the method of judicial selection in the affected states must be approved by the Department of Justice.¹⁸¹

Also, the decision of the Supreme Court in *Roe v. Wade* is having a continuing secondary effect on the politics of state courts. A substantial portion of the population continue to regard that decision as profoundly evil and illegitimate. Because of the extra-legal and sometimes violent reaction of some persons of that persuasion, it may be more difficult to get an abortion in 1998 than it was in 1972.¹⁸² More gentle persons of that same persuasion have directed their hostility at state court judges having no responsibility for what the Supreme Court did. In 1998, two members of the California court were challenged for retention despite the fact that both are conservative Republicans.¹⁸³ They gave offense to the religious right by adhering (as they believed) to precedent established by the Court with respect to the right of adolescent females to abort without the consent of their parents.¹⁸⁴ A current and strenuous effort to gain political control over the Florida court is animated by the same purpose.¹⁸⁵

In response to all this highly visible judicial behavior, many other political interest groups and parties began about 1980 to take a heightened interest in

179. See *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney General*, 501 U.S. 419 (1991); *Clark v. Roemer*, 500 U.S. 646 (1991). See generally Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, 62 U. CIN. L. REV. 823 (1994).

180. 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, 1335-66 (1997); see also Anna M. Scruggs et al., *Recent Voting Rights Act Challenges to Judicial Elections*, 79 JUDICATURE 34 (1995); Michael B. Wallace, *The Voting Rights Act and Judicial Elections*, in STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 93 (Roger Clegg & James D. Miller eds., 1996).

181. See 42 U.S.C. § 1973c (1994).

182. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 325-26 (1996); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 189-95 (1991).

183. See Gail Diane Cox, *Ouster of Two Calif. Justices Sought*, NAT'L L.J., June 29, 1998, at A8.

184. See *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997).

185. See David Nitkin, *Religious Right: Rein in Judges Saying the Judiciary Has Run Amok, Groups Such as the Christian Coalition of Florida Want Big Changes*, ORLANDO SENTINEL, Apr. 20, 1998, at C1.

judicial elections. In some states, tort and insurance law moved to the top of the political agenda for judicial elections. By 1980, local groups of personal injury lawyers were organized to secure the election of judges favoring their clients. For a time, they seemed to control elections to the Supreme Court of Texas.¹⁸⁶ Their success, however, evoked a response from insurance companies and others whose financial interests were threatened by a "plaintiffs' court," and in recent years, "habitual defendants" have been more successful in securing election of judges thought to favor their interests.¹⁸⁷ A similar series of events has occurred in Alabama,¹⁸⁸ and less visibly in several other states.¹⁸⁹

In such an environment, the Taft-Pound reforms are endangered. "Merit selection" is seen by many as a masquerade to put political power in the hands of the organized bar and other members of the elite. It was overwhelmingly defeated in 1987 in a ballot initiative in Ohio supported by the bar and the League of Women Voters, but opposed by the AFL-CIO.¹⁹⁰ The religious right is presently attacking the existing merit selection system in Florida,¹⁹¹ and their attack may be on track to secure the support of Florida voters. The Alaska constitutional provisions for merit selection are also under attack.¹⁹² An effort to introduce a merit selection scheme in Texas¹⁹³ might have a chance of success as an alternative to the election of trial judges in populous counties.¹⁹⁴ It is also under consideration in numerous other states. While proposals to reform judicial articles of state constitutions are under study in many states, those seeking to diminish the role of the electorate in controlling the membership of highest state

186. See Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 90 (1986).

187. See Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146 (1988); Orrin W. Johnson & Laura Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525 (1992).

188. For an account of recent events in Alabama, see Glenn C. Noe, *Alabama Judicial Election Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215 (1998).

189. For the Wisconsin experience, for example, see Shirley S. Abrahamson, *Remarks Before the American Bar Association Commission on Separation of Powers and Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT. 69 (1996); Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031 (1997). For the Michigan experience, see Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby Out With the Bath?*, 44 WAYNE L. REV. 367 (1998).

190. See John D. Felice & John C. Kilwein, *Strike One, Strike Two: The History of and Prospect for Judicial Reform in Ohio*, 75 JUDICATURE 193 (1992).

191. See Nitkin, *supra* note 185.

192. See William T. Cotton, *Legislative Confirmation of Judges?*, ANCHORAGE DAILY NEWS, Mar. 28, 1998, at B8.

193. See *Judicial Selection: Options for Choosing Judges in Texas*, HOUSE RESEARCH ORGANIZATION SESSION FOCUS (Texas House of Representatives, Mar. 10, 1997) (on file with author); THE TEXAS COMMISSION ON JUDICIAL EFFICIENCY, GOVERNANCE OF THE TEXAS JUDICIARY: INDEPENDENCE AND ACCOUNTABILITY (1997).

194. See Libby Avery, *Most Texans Back Election of Judges*, CORPUS CHRISTI CALLER TIMES, Mar. 28, 1997, at 31 (reporting that of those voters having an opinion on the matter the ratio was almost 4 to 1, as measured by a Harris-Hanks Poll). *But see* 1995 Judicial Selection Poll, Tarrance Group, Houston, Tex.; 1990 Poll of Texas Democrats, Shipley & Assoc., Inc., Tex.; *Texans Want a Different Way to Vote for Judges*, AUSTIN AMERICAN-STATESMAN, Feb. 12, 1989, at B3. Texas trial judges are presently elected in county-wide districts; a voter in Harris County may be asked to vote on as many as 70 judicial races.

courts face a steep uphill struggle. While the aim to depoliticize courts may be fully warranted with respect to courts and judges that are subject to appellate review by higher courts, the people are rightly reluctant to confer on a professional elite the responsibility for deciding such questions as whether there is a right to live or a right to die. In some form, judicial elections are here to stay. We cannot have it both ways: If we are going to use courts to decide whether there is a right to live or a right to die and to set the level of taxation for schools or on cigarettes, then some accountability to the people is required.

V

PUBLIC CYNICISM AND THE MEDIA

As the foregoing discussion suggests, the wounds suffered by the state judiciaries, like those in California, are often in some measure self-inflicted recurrences of long-standing issues. But it would be wrong to place primary responsibility for the present unrest with our judicial system on the judges of highest state courts. As noted at the outset, some of the causes of public mistrust lie deep in the culture. And there is another major external cause of the political problem faced by our courts.

A powerful and unanswered argument has been made that a significant cause of public cynicism is the current state of our journalism.¹⁹⁵ The journalism profession now maintains a reward system directed primarily at revealing alleged misdeeds of public persons and to punish any of its members who speak well of public persons.¹⁹⁶ There are several identifiable causes of this phenomenon. One is Watergate; another is *New York Times v. Sullivan*,¹⁹⁷ which virtually eliminated defamation law as a disincentive to attacks on public figures by requiring them to prove malice; another is the advent of competition from the gutter press sold in grocery stores and purveyed on the Internet. For all these reasons and perhaps others, journalists increasingly tend to exploit any opportunity to infer and imply, for example, that a judge accepting a campaign contribution is tailoring his or her decisions to reward supporters.¹⁹⁸ Press coverage of Congress, for example, has moved from skepticism to cynicism,¹⁹⁹ and political coverage generally has undergone a fundamental change in the distribution of media coverage, from issue-based stories to ones that emphasize who is ahead and behind and the strategies and tactics of campaigning necessary to position a candidate to get ahead and stay ahead.²⁰⁰

195. See generally JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, *SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD* (1997).

196. See *id.* at 30-33.

197. 376 U.S. 254 (1964).

198. See e.g., *60 Minutes: Justice for Sale?* (CBS television broadcasts, Dec. 6, 1987 and Nov. 1, 1998).

199. See Mark Rozell, *Press Coverage in Congress*, in *CONGRESS, THE PRESS AND THE PUBLIC* 109 (Thomas E. Mann & Norman J. Ornstein eds., 1994).

200. See CAPPELLA & JAMIESON, *supra* note 195, at 33; see also THOMAS PATTERSON, *OUT OF ORDER* 20 (1993).

This genre of journalism has in recent years spread to provide coverage of courts and lawyers. The *National Law Journal* and *The American Lawyer* have local counterparts in several cities. A corps of reporters now cover the Supreme Court of the United States, providing a body of journalism unlike any existing only a few decades ago. Much of this reportage is, in Jamieson's term, "strategic," that is, focussed on the unstated motives of lawyers and judges.

On top of and partly underlying all the previously noted causes is the technology of television. Twenty-four hour newscasts are insatiable in their need for alarming and scandalous information about public matters, the courts included. Never mind the effect of Court TV and the penetration of cameras into courtrooms, where we are afforded the unedifying experience of watching our sausages being made. The O. J. Simpson trial, whatever else it may have been, was only the most dramatic of the unsuccessful public relations ventures of state courts.

Moreover, television reinforces not only the more destructive impulses of journalists, but also facilitates the mutual destruction of politicians, including judges. As Rose Bird's career was among the first to reveal, media campaigning has greatly magnified the demerits of judicial elections. The threat of a media *blitzkrieg* is now a weapon of nuclear dimension. This is so because of the effectiveness of "negative campaigns" conducted with spot advertisements on commercial television. While a blitz of attack ads does not assure victory and can backfire, the availability of the nuclear weapon has transformed our public life.

The technology of the media blitz has been developed to a high level by paid media consultants. Indeed, a whole art form (or is it merely a business?) has taken shape around the purpose of ridiculing, mischaracterizing, belittling, and disflattering with photography political adversaries with a one minute (or less) electronic exhibition resembling the evening news that can be inserted between innings or between conversations in a soap opera when the viewer is captive and uncritically attentive. When well done by professionals, accompanied with appropriate music, such art penetrates our uninterest, leaving a deposit of disinformation. Social psychologists explain the phenomenon as a meltdown.²⁰¹ Unwittingly, we assimilate the negative information insinuated by the spot ads much as if it had been given to us by Walter Cronkite or Jim Lehrer. This process of assimilation can be impeded if at all only by means of a prompt and vigorous response employing the same technology.²⁰² Promptness requires a measure of anticipation, but if an attack can be anticipated and the intended victim is adequately funded, then the attack ad may be turned against the assailant.²⁰³ These conditions were present in Georgia and Tennessee in the

201. See KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY* 123-35 (1992).

202. See *id.* at 102-20.

203. See Jeanne Cummings, *Candidates Learn to Defuse Outside Groups' Attack Ads*, WALL ST. J., July 20, 1998, at A20.

summer of 1998 in sufficient measure to turn back efforts in those states to unseat high court judges by means of the media blitz. But those conditions will often be lacking, especially perhaps in judicial campaigns.

To harm, indeed to devastate, a candidacy by post-modern methods of campaigning, it is not always necessary to make a substantive accusation; it may be enough to transmit repeatedly an unflattering image of the target.²⁰⁴ A seemingly effective device in common use in North Carolina in recent years has been the malicious use of the movie camera: A candidate is filmed at length, until an unattractive expression crosses his or her face, the film is frozen on that frame, which is then broadcast every few minutes on the most-watched channels. Given post-modern technologies for altering images, motion picture film is not needed: The sneer or sappy look can now readily be superimposed on the face of the target candidate. Or an insignificant fact may be made to seem significant by frequent repetition; thus, a news flash that a congressional candidate had, as a state legislator, once voted for a tax increase, was made into the central issue in a 1997 election on Staten Island by means of relentless repetition on Manhattan television, achieved at great cost to the Republican National Committee.²⁰⁵ Or a candidate's misdeed may be trumpeted without disclosure of the fact that it was committed by the candidate decades ago when adolescent. We have recently learned, for example, that a distinguished Congressman had an illicit liaison thirty years ago. A well-funded political adversary can effectively use this datum to put in his constituents' minds the perception that the Congressman has a continuing relationship with a woman of the evening.

This technology is likely the major factor in the degradation of our politics. If members of Congress must devote much of their time to fundraising, the public is not wrong to sense that "special interests" are in control of democratic politics.²⁰⁶ And the journalists are not entirely wrong to think that members of Congress are primarily engaged in that line of work.

This technology continues to improve. The techniques for using "focus groups" to test the effects of the dramatic presentations are improving daily. So are the techniques for polling; for sufficient compensation, pollsters can now persuade and dissuade voters by asking them questions proceeding from false premises that must be assumed in order to frame a response.²⁰⁷ Best or worst of all, it is now feasible, although costly, to target audiences with amazing specificity. A candidate with enough money can put his or her message on the fences of Yankee Stadium or Chavez Ravine as they appear on the television screens of voters watching ball games in a particular electoral district anywhere, messages that are quite invisible to those in the ball parks or watching the game

204. For a review of some of the contentless forms of political defamation, see JAMIESON, *supra* note 201, at 64-101.

205. See *Newshour: Money Talks* (PBS television broadcast, Nov. 7, 1997).

206. See Lars-Erik Nelson, *Democracy for Sale*, N.Y. REVIEW OF BOOKS, Dec. 3, 1998, at 1 (reviewing CHARLES LEWIS, *THE BUYING OF THE CONGRESS: HOW SPECIAL INTERESTS HAVE STOLEN YOUR RIGHT TO LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS* (1998)).

207. See Jonathan S. Fox, *Push-Polling: The Art of Political Persuasion*, 49 FLA. L. REV. 563 (1997).

on sets outside the target area.²⁰⁸ All of these improvements are, of course, most useful as instruments of a style of campaigning that some voters might reasonably regard as fraudulent.

For judicial campaigns, as the Bird experience suggests, criminal law and capital punishment tend to be the winning issues. In 1992, Justice James Robertson was driven off the Mississippi Supreme Court by a campaign directed against one of his opinions expressing the view that the federal Constitution prohibits capital punishment for rape where there was no loss of life.²⁰⁹ In such a campaign, for a price Mississippi voters can be provided with the likeness of the Mississippi rapist in the background of ball games played in Los Angeles, suitably portrayed to reveal the rapist's malevolent personality; and the likeness of his victim, suitably presented with exposed private parts to dramatize the horror of his offense; and even the likeness of the judge, suitably portrayed to confirm his callous disregard of her suffering. All supported by a professional voice who sounds like the evening news, punctuated with the appropriate music by Beethoven or Wagner.

The sort of attack mounted against Rose Bird's retention has now been mounted against judges in numerous states. A successful attack in 1996 on Justice Penny White of the Supreme Court of Tennessee is especially notable. It centered on one opinion of the court in which she joined; the court set aside a death sentence imposed on a notorious murderer on the ground that the convict had a right to put on mitigation evidence at the sentencing hearing.²¹⁰ The campaign for a "No" vote against her was funded by the Tennessee Conservative Union and the Republican Party of Tennessee, neither of which has an institutional commitment to capital punishment, but both of whom generally disapproved of Justice White's politics and shared a hope of controlling the reapportionment process in Tennessee. A similar campaign was mounted in 1998 against Justice White's remaining Democratic colleagues.²¹¹ One resigned, and the other, Alfonso Birch, narrowly survived.²¹²

Republican Governor Don Sundquist explained his position by expressing the hope that judges "will look over their shoulders [when making decisions] to see if they're going to be thrown out of office."²¹³ No doubt other members of the Tennessee court, and of other courts, will in the future, as the Governor

208. See William Power, *The Virtual Ad: On TV You See It, At Games You Don't*, WALL ST. J., July 30, 1998, at B1.

209. See generally *Citizens for Independent Courts* (visited Jan. 29, 1999) <<http://www.faircourts.org>>.

210. See 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, 310 (1997).

211. In 1998, the "issue advocate" called itself Tennessee Justice, included police groups, and attacked Justice Birch as insensitive to victims' rights. See Kirk Loggins & Duren Cheek, *Activists Target Tennessee Judge*, TENNESSEAN-NASHVILLE, July 9, 1998, at 1A.

212. See *Citizens for Independent Courts* (visited Jan. 29, 1999) <<http://www.faircourts.org>>.

213. Paula Wade, *White's Defeat Poses a Legal Dilemma: How Is a Replacement Justice Picked?*, MEMPHIS COM. APPEAL, Aug. 3, 1996, at A1.

hoped, examine their cases more closely for political risk. But campaigns such as his against the Democratic members of the Tennessee Supreme Court have other effects. All judges participating in the adjudication of criminal cases must at times conclude that the evidence adduced by the prosecution is insufficient; as trial judges, they must dismiss cases or set aside verdicts, and, as appellate judges, they must cast votes favoring reversals of convictions or favoring sentences less severe than the maximum permitted by law. Many such votes can be the material for an effective media campaign such as that waged against Penny White, for they can be reduced to spot ads redolent of the familiar and infamous Willie Horton ads used to defame Governor Dukakis in the 1988 presidential election.²¹⁴

While the costly media blitz such as that employed by Governor Sundquist and his political allies is transmogrifying our politics in races from the presidential elections down to most congressional or state-wide elections and some local ones, its effect is acutely unwelcome in judicial elections. Because judicial elections arouse relatively little interest, voters in such elections are especially vulnerable to high-tech media manipulation, and disinformation about judicial candidates is especially likely to “melt down.” What is food for geese is also food for ganders; few judges are invulnerable. While criminal law and capital punishment are the most useful issues today, one ought not discount the ingenuity of the new profession of media consultants to devise other means for destroying a judicial career. Judicial candidates cannot effectively respond to attack ads with “positive” campaigns because of the necessary restraints on their freedom to make promises with respect to the outcome of future cases. A sitting judge under attack is thus left to boast of the number of executions he or she has approved, or as one Ohio Supreme Court justice did, of his judgment preventing a hike in utility rates.²¹⁵

Although the number of successful campaigns against the retention of a judge is small,²¹⁶ sitting judges may with increasing frequency be sitting ducks. The retention election devised as part of the Missouri plan has become, as a result of the advent of the negative spot commercial, a potential nightmare; candidates for retention in high judicial office can be especially vulnerable to electronic attack because they cannot reciprocate in kind against an adversary. But the impulse to use the tactic pervades contested elections as well and loads the election process in favor of candidates with the most money to spend in this way.

Bad as these direct effects of media campaigns against judicial candidates are, the secondary effects are worse. First, the poison of relentless negativity, while harmful enough in its effect on the other branches of government, is es-

214. For an account of the Willie Horton episode, see JAMIESON, *supra* note 201, at 16-42.

215. See Scott D. Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 197-99 (1996).

216. See Larry Aspin, *Campaigns in Judicial Retention Elections: Do They Make a Difference?*, 20 JUST. SYS. J. 1 (1998).

pecially grave for the judiciary. A closely contested election degrades both rival candidates so that whoever is elected is likely to be disesteemed and distrusted by losing parties. It is made to seem that we might do better to choose our judges by lot, as we do our jurors.

Secondly, the media blitz exponentially increases the cost of campaigns. While the level of expenditures on legislative and executive political campaigns is troubling enough,²¹⁷ high-priced judicial elections are a public disaster. The cost of such campaigns has been doubling almost every biennium²¹⁸ so that judicial candidates in several states are regularly spending millions, much of it on spot advertising on commercial television prepared by highly paid craftsmen skilled in the art of disparaging public persons. Funds sufficient for such races cannot be raised by small individual contributions but only by contributions of sufficient size to confirm the widely shared suspicion that the donor expects something in return. Also, the time and effort expended by judges in fundraising can be a serious distraction from the work of the court that the judge is employed to perform.

As polling data confirm, such contributions might well appear to disqualify the judge from sitting on cases in which any contributor has an interest.²¹⁹ Over sixty years ago, the Supreme Court of the United States held it to be a denial of due process of law for judges to adjudicate matters in which they have a financial stake.²²⁰ Many legal issues are now resolved in highest state courts by judges who, although they have no direct stake in the outcomes, have received substantial campaign support from persons or groups having direct interests in the issues they decide. What is a litigant in such a case to think of the disinterest and open-mindedness of a court whose members were financed by his or her adversaries? In 1995, a plaintiff in a Texas medical malpractice case sought to disqualify high court judges on the basis of a videotape widely presented to the electorate by the Texas Medical Association in which the judges in question appeared. Justice Gammage recused himself; Justice Enoch did not.²²¹ While the due process cases can be distinguished because the compensation to the judges is paid in advance and is not conditioned on the result in a particular

217. See Sen. Joseph Lieberman, *The Politics of Money and the Road to Self-Destruction*, 16 YALE L. & POL'Y REV. 425 (1998).

218. For example, it is reported that the largest judicial campaign fund in Pennsylvania prior to 1985 was \$350,000; in 1997 that was regarded as a minimal amount needed to secure election to the trial court in that state. See JAMES F. MUNDY ET AL., REPORT OF THE SPECIAL COMMISSION TO LIMIT CAMPAIGN EXPENDITURES 20 (1998) (on file with author). It is reported that almost \$11 million was spent on three campaigns for the Texas court in 1994 and that \$4.3 million was spent on one race in Alabama in 1996. See Dean Starkman, *Ohio Effort to Cap Election Spending in Judicial Races Triggers Challenge*, WALL ST. J., May 27, 1997, at A20.

219. See Stuart Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 (1988); Mark Andrew Grannis, *Safe Guarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382 (1987).

220. See *Tumey v. Ohio*, 273 U.S. 510 (1927).

221. See *Rogers v. Bradley*, 909 S.W.2d 872 (Tex. 1995).

case,²²² these are formal distinctions unconvincing to those suffering adverse judgments, nor do they even settle the consciences of those judges who received the contributions. Justice Gammage perceived that to be a sufficient reason for his recusal; Justice Enoch took the motion as an occasion to deplore political selection of judges.

I personally have no doubt that most judges can, most of the time, disregard the sources of their campaign funds when the time comes to decide cases involving the interests of their supporters or of those who supported their competitors. Moreover, most lawyers and litigants who contribute to campaign funds are, in their own minds, not trying to bribe judges but want only to secure a judiciary that is not hostile to their interests. But it asks entirely too much of citizens to expect them to believe that there is no connection between who wins and who pays. Texas judges rightly protest a disparaging publication entitled "Payola Justice,"²²³ yet the appearance of corruption to which that publication and others like it seek to call attention is difficult to erase when large sums are raised and invested in judicial campaigns.

Finally, there is the secondary effect on the willingness of able persons to seek judicial office. If one must start by raising large sums of money from lawyers and litigants who will be appearing in one's court, and must reckon on being the object of scurrilous personal abuse in the media, and be obliged to participate in a game of competitive defamation, many of those lawyers who ought to be judges will disdain the office.

VI

PRESCRIPTIONS

Francis Lieber, as wise as any nineteenth century American observer, noted with wonder that the ancients were wholly unable to produce an independent judiciary and that we are unable fully to appreciate its value.²²⁴ Roger Traynor observed some years ago that there is no unobjectionable way to decide who shall judge or to judge those who do.²²⁵ We cannot hope for a perfect solution to an enduring problem associated with the human condition, but it is clearly time to rethink, in light of the advent of vicious and expensive electronic media, our state constitutional provisions bearing on the selection and retention of judges, especially those sitting on courts of last resort. It is imperative that our judges be rescued from the mounting moral and political disaster of multi-million dollars campaigns featuring high-tech name-calling.

222. See, e.g., *River Road Neighborhood Ass'n v. South Tex. Sports, Inc.*, 673 S.W.2d 952 (Tex. Civ. App. 1984) (en banc); *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. Civ. App. 1983) (en banc).

223. TEXANS FOR PUBLIC JUSTICE, *PAYOLA JUSTICE: HOW TEXAS SUPREME COURT JUSTICES RAISE MONEY FROM COURT LITIGANTS* (1998); Sheila Kaplan & Zoe Davidson, *The Buying of The Bench*, THE NATION, Jan. 26, 1998, at 11.

224. See FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 363 (1838). He likewise expressed concern that 19th century Americans insufficiently valued judicial independence.

225. *Who Can Best Judge the Judges?*, 53 VA. L. REV. 1266 (1967).

A. Appointment of Judges

The obvious remedy for the malignancy of judicial elections is to stop electing judges. The best of the various unsatisfactory ways of selecting high court judges is probably that prescribed in the Constitution of the United States. By involving both the executive and the legislature, the Founders assured a dialogue among political leaders. Those appointed by that method will tend to reflect the political preferences of governors and legislators who have been elected by the people, and by the political parties who selected them. They are likely to be persons in the middle range of political opinions and are therefore more to be trusted not to impose idiosyncratic, demagogic, or elitist moral judgment on the community. Moreover, citizens who disapprove the selections know which elected politicians to blame for appointments they disapprove and can punish them if they stand for reelection. Also, while political appointees are likely to have acquired preferment by performing political services, only a few here and there have bought their appointment in the medieval manner by contributing money to the campaigns of governors and legislators. No politically appointed judge is likely to have to raise a large personal campaign fund to secure judicial office. While political confirmation can be rough, the appointee need not expose himself or herself to the hazards of competitive defamation. While political appointment has these advantages, it is not saleable in most states. Given the present disdain of the people for virtually everyone holding public office, it will be very difficult in most states to persuade them to confer any new authority on either the governor or the legislature, or any elite group, to control the membership of a high court exercising substantial political power.

There is still talk among lawyers of merit selection.²²⁶ Meritocratic appointment of lower court judges has much to be said for it and may be saleable to voters in some states, but such a method of selecting judges for high courts is in most states an option that is not available for the reasons stated in the preceding paragraph. Indeed, as noted, even the device of the retention election, as part of a merit system, may no longer be politically viable with respect to highest state courts and is now possibly, for reasons stated, the worst kind of election to conduct for judges who have been sitting for long enough to acquire a record that can be mischaracterized on major league outfield fences.

One method of securing public consent to the appointment of judges has not been tried in the United States. It is the Japanese method of requiring appointees to stand in a confirmation election to be held *before they take office*. That method assures the public of a role, and reminds those appointed that they serve all the people as well as individual litigants, and can be conducted without affording an opening for political intimidation of judges. This device

226. See, e.g., Samuel Latham Grimes, "Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?, 76 N.C. L. REV. 2266 (1998); Linda Strout, *Selecting Judges: Time for A Change?*, KING COUNTY BAR ASS'N, Nov. 1998, at 2.

might serve in some states to gain public support for political or “merit” appointments.

B. Disqualification Rules

A more saleable response hoping to limit the corrupting effects of expensive media campaigns is a revision of provisions in ethical standards governing the relation of judges to campaign contributors. A state might require disclosure of contributions to judicial campaigns and disqualify a judge from sitting on a case in which any large contributor is a party or has a significant economic stake in an issue coming before the court.²²⁷ A Task Force of the ABA has made a recommendation along these lines, allowing lawyers to make limited contributions without triggering a disqualification.²²⁸ The aim would be to eliminate serious fundraising and thus force judicial candidates to return to the humble practices of the past when low-cost campaigns featured handbills, posters, and calling cards as the primary media of communication.

In addition to administrative difficulties and costs to parties associated with the creation of an additional step in the litigation process when a judge is disqualified, there is the problem with this approach that it does not readily reach “issues advocates.” Like squirrels finding the weak spot on the bird feeder, persons interested in spending money to influence the selection of judges could spend through organizations masking their identities and aims. An example is provided by the Tennessee Conservative Union that destroyed the judicial career of Penny White. If one is to believe all that one reads in the opinion of the Court in *Buckley v. Valeo*,²²⁹ such organizations may have a constitutionally protected right to spend without limit as long as they are not controlled by a candidate. They need only appear to take an interest in a substantive issue such as capital punishment or public school finance, and perhaps refrain from speaking too directly in opposition to a named candidate.²³⁰

Indeed, it appears possible that an organization such as the Tennessee Conservative Union cannot be made to reveal the sources of its funds. It can claim the same right to anonymity that the NAACP has enjoyed.²³¹ And the Court has recently pronounced the right of a citizen to pass handbills without putting her name on them;²³² arguably this decision extends to the right to conduct an anonymous media blitz aimed at the destruction of the career of a sitting judge. Such cases can be read to protect the right of personal injury lawyers or insur-

227. See Banner, *supra* note 219; Grannis, *supra* note 219. For further consideration of this approach, see AMERICAN BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, PART TWO, at 34-44 (1998); CITIZENS' COMM. ON JUDICIAL ELECTIONS, *supra* note 85 (Ohio report); MUNDY ET AL., *supra* note 218 (Pennsylvania report).

228. See AMERICAN BAR ASS'N, *supra* note 227, at 23-34.

229. 424 U.S. 1, 15, 21, 47 (1976).

230. See Michael D. Leffel, *A More Sensible Approach to Regulating Independent Expenditures: Defending the Constitutionality of the FEC's New Express Advocacy Standard*, 95 MICH. L. REV. 686 (1996).

231. See NAACP v. Button, 371 U.S. 415 (1963).

232. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

ance companies to band together for the purpose of conducting such an anonymous blitz on sitting judges who have been resistant to their arguments on the law of torts. Such a blitz could say nothing about torts but could focus on, say, public school finance and the unsightly sneer on the judge's face. If such a reading is correct, and such a group does have a right to mount such an anonymous attack, then the imposition of disqualification rules is a bad idea that will burden honest candidates and facilitate the efforts of those seeking to subvert our courts with money.

Hopefully the Court may come to share the popular wisdom favoring disclosure,²³³ at least in circumstances involving the funding of a media blitz on a defenseless judicial candidate.²³⁴ Without disclosure, any requirement of recusal is futile. One possible approach would be to allow anonymous contributions to interest advocacy organizations, such as the Tennessee Conservative Union, by individuals who are not lawyers or litigants. Such an exception would, however, create an obvious and serious enforcement problem.

C. Regulating Campaign Tactics

As noted, most states have enacted codes of judicial conduct bearing on judicial campaigns.²³⁵ Many have modified those provisions in recent years, under pressure from judicial candidates demanding the constitutional right to express their opinions on public issues. The North Carolina court has recently loosened its rule to allow political campaigning, but has adjured candidates to abstain from the practice.²³⁶ These laws are, however, still sometimes effective. For example, a candidate for the Supreme Court of Georgia was recently constrained from an unseemly attack on a sitting judge.²³⁷ But the restraints are threatened by expansive views of the First Amendment.

This form of regulation is another that cannot be effectively applied to "issue advocates" who are not under the direct control of the candidates. For example, in North Carolina, a group created for the purpose of engaging in judicial politics emerged for the 1986 general election. Its funding sources are not known. They organized press conferences for the victims of criminals or alleged criminals whose rights had been enforced by a candidate for Chief Justice. Under the existing North Carolina law, the candidate, who was a sitting member of the court, could not explain his decisions. His adversary, the in-

233. See AMERICAN BAR ASS'N, *supra* note 227, at 19-23.

234. See Malcolm A. Heinicke, *A Political Reformer's Guide to McIntyre and Source Disclosure Laws for Political Advertising*, 8 STAN. L. & POL'Y REV. 133 (1997).

235. See generally PATRICK M. MCFADDEN, *ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS* (1990). See also Ellen Langill, *Levi Hubbell and the Wisconsin Judiciary: A Dilemma in Legal Ethics and Non-Partisan Judicial Elections*, 81 MARQ. L. REV. 985 (1998).

236. See AMERICAN BAR ASS'N, *supra* note 90, at 3.

237. See Jonathan Ringel, *Campaign Attack Tests New Rules*, FULTON COUNTY DAILY REP., June 19, 1998, at 1.

cumbent Chief Justice, felt called upon to disown this scurrilous assault.²³⁸ Nevertheless, such advertising has become a feature of our judicial politics.²³⁹

D. Expenditure Limits

The Supreme Court of Ohio recently adopted a provision in its Code of Judicial Conduct limiting expenditures in judicial campaigns.²⁴⁰ A similar proposal is being advanced in Pennsylvania.²⁴¹ The Ohio law has been successfully challenged in the United States Court of Appeals.²⁴² The best argument for limits on campaign expenditures is the effect of large sums on the conduct of candidates; not only do large contributions sustain the relentlessly negative campaigns for which spot advertising is so effective, but the need for large sums requires judicial candidates, if through surrogates, to raise large sums for which there will be a quid pro quo, imagined if not real. However, while the Court of Appeals decision may very well be erroneous, expenditure limits are subject to the same objection as the disqualification rule in that they do not prevent independent "issues advocates" from making judges dependent upon them.

It is also the case that spending limits, such as those promulgated in Ohio, are unnecessarily inclusive. There is very little harm to the integrity of the courts caused by extravagant expenditures on handbills, billboards, mail, and newspaper advertising. All these forms of campaigning depend on the written word and do not rely on artificial means of capturing the attention of readers. They are not musically scored, and artistic flourishes have scant consequence. Even advertising on television is not especially objectionable so long as the communication is being presented to an audience that is tuned in for the purpose of acquiring information for use in voting, as in a debate. It is the professionally crafted spot ad on commercial television that so degrades our politics and our institutions.

To make spending limits effective to constrain the abuse of commercial television, it would be necessary to restrain issues advocates. Otherwise, large contributors to judicial campaigns will find a way of satisfying their desires to corrupt the process by passing their money through an anonymously funded organization. Absolute restraints on issues advocates almost certainly cannot be sustained, given the Supreme Court's extensions of the First Amendment. If "issues advocates" advance or oppose a particular individual candidacy, it is possible that they may be constrained. The Court might allow a state to create

238. See Grimes, *supra* note 226, at 2288-93.

239. See James C. Drennan, *Judicial Reform in North Carolina*, in *JUDICIAL REFORM IN THE STATES* 19, 28 (Anthony Champagne & Judith Haydel eds., 1993).

240. See OHIO CODE OF JUDICIAL CONDUCT Canon 7(c)(6) (1998).

241. See Administrative Office of Pennsylvania Courts, *Pennsylvania Supreme Court Commission Announces Recommendations to Reform Judicial Campaigns* (visited Feb. 22, 1999) <<http://www.courts.state.pa.us/pub/commleg/prrel416.html>>. The report of the Pennsylvania Special Commission to Limit Campaign Expenditures was issued in February.

242. See *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998); see also *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998).

a campaign period in which only the competing candidates using their own campaign funds would be permitted to use commercial television in opposition to one another. If issue advocates could be so constrained for six or eight weeks immediately before election day, then expenditure limits might be worthy of serious attention as a response to the crisis of politically generated mistrust.

Hopefully, the Supreme Court might in the not too distant future modify its holding in *Buckley* and take a more charitable view of spending limits, at least in judicial campaigns. For this to happen, someone would have to develop a persuasive Brandeis brief informing the Court of the realities of campaign spending and fundraising. The Court would have to be persuaded of what I here suggest, that the practice of spending large sums of money on a political campaign is inextricably associated with the appearance of corruption, and the reality of defamation and fraud, that degrades the courts. Again, the grave problem of spot advertising on commercial television is that it "melts down" to influence an unwilling audience who are not on guard against disinformation. Hopefully, when the Court next considers these issues, it will be better informed about the gravity of that problem. It might even be demonstrable that, as more money is available to screen more spot ads crafted by professional media consultants and to deploy more "push pollsters," the less respect our judicial institutions can command, and the less likely are qualified candidates to seek judicial office. It might also be demonstrable that the activities of judges in raising large sums is equally degrading. As Judge Avern Cohn aptly noted in a recent concurring opinion, *Buckley* rests on dubious factual assumptions made by the Court and not effectively challenged in subsequent cases.²⁴³

E. Extending Term Limits

A more saleable and clearly constitutional, albeit imperfect, reform would be to extend the terms of most state court judges. The reader may have noted that my remarks favoring the federal method of selecting judges said nothing about the terms of their appointment. As noted, no state and no foreign country has opted for life tenure for judges having the power of judicial review of legislation. Everyone who has considered the question as an open one has chosen term or age limits. Frederick Grimke, who thought about these issues as deeply as anyone in antebellum times and favored the election of judges, recommended that judicial terms should be no longer than necessary to induce good lawyers to give up their practices to seek the office.²⁴⁴ New York gives its high court judges fourteen-year terms.²⁴⁵ The District of Columbia's judges serve fifteen-year terms.²⁴⁶ Twelve-year terms are not uncommon for lower court judges in many states.

243. See *Kruse*, 142 F.3d at 924.

244. See GRIMKE, *supra* note 66, at 457.

245. See N.Y. CONST. art. 6, § 2.

246. See D.C. CODE ANN. § 11-1502 (1981).

Six- and eight-year terms for highest courts are more common. The longer terms for high court judges have several virtues. One is that they reduce the real cost of campaigning by spreading that cost over more years. Another is that many, perhaps most, members of a court serving terms of such length will not seek reelection. Some European constitutions do not provide for reappointment,²⁴⁷ and German law forbids it.²⁴⁸ Consideration should be given to adopting that practice in the United States, for that would make sitting judges less vulnerable to political attack. The down-side of forbidding reappointment or reelection is that it elevates the chances that a sitting judge will be influenced by the need to secure employment after his or term is complete. Even if twelve-year judges are permitted to seek second terms, the prospect is pushed far enough into the future term that it poses a meager threat for most of the period of service. The risk of political intimidation of a court is almost eliminated. Longer terms for highest state courts also stabilize the law of a state by reducing turnover. For these reasons, the minimum term for a high court judge, however he or she is selected, should be at least ten years.

F. Reducing the Number of Electoral Rounds: Preferential Voting

A similar step to alleviate the problem of costly campaigning would be to remove judicial elections from primary ballots. This would almost halve the cost of campaigning for many judicial candidates. In addition, there might be no run-offs. These effects can be achieved by allowing voters to rank their preferences among competing candidates. A majority approval can then be achieved by reassigning the votes of last place candidates to the second choice of each voter. Given the low level of voter interest in judicial elections,²⁴⁹ one round of voting seems enough.

To emphasize the different character of judicial elections, the vote might be taken on a separate ballot. Perhaps that ballot might be distributed to voters who cast votes in the general election, to be returned by mail, in the Oregon manner,²⁵⁰ a week or so later.²⁵¹ The defect in this idea is that it would magnify the power of special interests able to turn out a vote in a low-visibility election.

247. See GRUNDGESETZ [Constitution] art. 94 (F.R.G.). See generally DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 149-71 (1994). For a compilation, see *European Commission for Democracy Through Law*, in *THE COMPOSITION OF CONSTITUTIONAL COURTS* (1997).

248. See CURRIE, *supra* note 247, at 158-59.

249. See JACK LADINSKY & ALLAN SILVER, *POPULAR DEMOCRACY AND JUDICIAL INDEPENDENCE: ELECTORATE AND ELITE REACTIONS TO TWO WISCONSIN SUPREME COURT ELECTIONS* 132 (1966), *quoted in* Croley, *supra* note 79, at 732 n.132.

250. See OR. REV. STAT. § 254-470 (1991).

251. To make this work, it would appear to be necessary to place a moratorium on other forms of campaigning during that week, and perhaps for a few days before. Such a constraint could be analogized to the customary constraints on electioneering at the voting place.

G. Public Funding: The Voter's Guide

The key to any comprehensively effective solution to the problem of judicial elections is to provide modest public funding. Federal money is used in presidential campaigns, albeit with no great success in constraining excessive expenditures, the appearance of corruption, and abusive campaign practices.²⁵² However, Maine and Vermont have recently enacted "Clean Election Laws" establishing public funding of legislative and gubernatorial campaigns.²⁵³ And, in 1998, voters in Arizona and Massachusetts approved public-funding referenda.²⁵⁴ A 1996 Roper Poll found that almost two-thirds of the respondents favored full public financing of all political campaigns, while only one in four opposed it.²⁵⁵ The reason most people favor public funding is obvious, and so is the chief reason for resistance to the idea. People and organizations hoping to control our politics, and our courts with their money oppose it. Six out of seven Americans believe that all our governments are controlled by the people and organizations who fund election campaigns.²⁵⁶ Most despair of improvement; by a margin of forty-six to thirty-one, they think it more likely they will see Elvis than that they will see genuine campaign finance reform.²⁵⁷ It is almost certainly the fact, as many believe, that all the elections in America could be publicly financed from the savings of public subsidies that no disinterested person would favor and that exist only because those who are interested spend a lot of money getting the right people elected.

As Roy Schotland has urged,²⁵⁸ partial public funding of judicial campaigns might take the form practiced in many California counties²⁵⁹ of a publication of a voter's guide distributed at county expense. In Los Angeles County at the present time, judicial candidates must pay as much as \$50,000 to place a 200-word ballot statement in the County's official voter's guide. States enacting a Clean Courts Law could publish at public expense an official guide in which judicial candidates are allowed to present such a statement limited in length.

252. See Sen. Russell D. Feingold, *Representative Democracy versus Corporate Democracy: How Soft Money Erodes the Principle of "One Person, One Vote"*, 35 HARV. J. LEGIS. 377 (1998).

253. ME. REV. STAT. ANN. tit. 21-A, §§ 1121-1128 (West 1997); VT. STAT. ANN. tit. 17 §§ 2851-2856 (1997); see Michael E. Campion, *The Maine Clean Election Act: The Future of Campaign Finance Reform*, 66 FORDHAM L. REV. 2391 (1998).

254. See *The Voice of the Voters*, BOSTON GLOBE, Nov. 8, 1998, at D6; Ruben Navarrette, Jr., *Listen Up, Lawmakers: Voters Rule*, ARIZONA REPUBLIC, Nov. 4, 1998, at A9.

255. See 1996 Roper Center Public Opinion Online No. 0270818, Question 027, available in LEXIS, Market Library, Roper File.

256. See 1997 Roper Center Public Opinion Online No. 0269927, Question 001, available in LEXIS, Market Library, Roper File.

257. See *id.* at No. 0276120, Question 011. Legislators seem to take comfort in the fact that campaign finance reform never ranks high on the list of laws people want enacted; a review of scores of Roper polls on the matter suggests to me that the reason poll respondents are not excited about such reform is that they are convinced that it will not be done in an effective way. The cynicism level on this issue is off the charts.

258. See Schotland, *supra* note 81, at 127-28.

259. See Joseph Cerrell & Hal Dash, *Issues in Judicial Election Campaigns*, in STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES at 39, 47 (Roger Clegg & James D. Miller eds., 1996). Other western states now also make general use of this device.

Even given the number of registered voters to whom the guide would be mailed, such a subsidy would not require a vast expenditure of public funds.

The Supreme Court of the United States has held that public funding can be conditioned on a candidate's submission to reasonable constraints on receipts from other sources.²⁶⁰ Thus, if such a guide were publicly funded and distributed, it would be possible to exact from judicial candidates accepting the opportunity to make a statement in the guide some commitments regarding their election conduct. A state might, for example, require instantaneous reporting by Internet on contributions received by the candidate and that funds be received before they are expended, with a final report on receipts and expenditures set forth in the guide. In the alternative, it might require that all contributions be received anonymously through a blind bank account.²⁶¹ It might require candidates participating in the voter pamphlet to forgo borrowing and to abstain from payments to political parties or to interest groups to subsidize the distribution of "slate mailers" identifying a list of candidates approved by an organization.²⁶² It might require participating candidates to turn over to the public fisc any funds received as campaign contributions and not expended in the campaign. Possibly, it might also require participating candidates to agree to the ethical standards traditionally imposed on judicial campaigns and to limitations on the contributed funds they could expend. It might, for example, require participating candidates to forgo negative television advertising. Candidates not performing the required conditions would still be listed on the ballot and in the voter pamphlet, but they would not be permitted to make their personal statement in the pamphlet.

The official guide could also include information gathered by a Judicial Evaluation Commission, such as that created in Tennessee in 1994. That Commission is responsible for polling fellow judges, lawyers, and court personnel, and reports judge's performance evaluations, along with a brief record of their legal education, professional experience, and service to the profession.²⁶³ The report is published by the state of Tennessee but is not distributed to every voter. It includes statements by the candidates, which for the most part are descriptions of their community service.

The Tennessee report stops short of providing political information of the sort that a voter might reasonably want to have in choosing a judge for a highest state court. For a reasonable fee deferring part of the cost of the guide, political parties and other established interest groups could also be allowed to publish in it, but their statements would be limited to a very brief account of

260. See *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976).

261. I am indebted to Ian Ayres for this suggestion.

262. Slate mailers may be most highly developed in California, where interest groups, like political parties, are known to charge the cost and more to candidates whom they endorse. See Schotland, *supra* note 81, at 69-72.

263. See, e.g., TENNESSEE JUDICIAL EVALUATION COMMISSION, TENNESSEE APPELLATE JUDGES EVALUATION REPORT (1998). See generally Susan Keilitz & Judith W. McBride, *Judicial Performance Evaluation Comes of Age*, STATE CT. J., Winter 1992, at 4.

the nature of the organization and a listing of a slate of endorsed candidates. Candidates could seek effective endorsements from influential groups by any means other than paying for them. Political parties and participating interest groups would, like the candidates, also have to submit to reasonable constraints on other campaign activities in order to have their slate identified in the guide. They might be required to forgo “spot” advertisements on commercial television in judicial campaigning and to make financial disclosures just as candidates must.

The Supreme Court has never considered a campaign finance case involving a judicial election. It has acknowledged the legitimate public interest in avoiding the appearance of corruption, and it seems likely that the Court would recognize that interest as especially acute in the context of judicial campaign finance. Accordingly, I am cautiously optimistic that the Court would uphold a Clean Courts Law providing for a controlled voter’s guide such as I have proposed.

Some states may be unable or unwilling to appropriate any funds for such a Clean Courts Law. Perhaps some or all of the money needed could be raised by a tax on the state’s license to practice law. Given that the scheme would serve to relieve the pressure on lawyers to contribute to judicial campaigns, this could be a bargain for many lawyers. And all lawyers would receive the moral benefit of being known as officers of clean courts.

Public funding such as that proposed here would place greater pressure on the integrity of the commission or agency responsible for the administration of judicial elections. Groups willing to spend millions on the media may also be willing to spend millions to influence the commission to put a thumb on the scales. Acknowledging that risk, I again concede that no system is perfect. It would seem that the risk of some skullduggery in the commission is a hazard much smaller than those we now face.

H. Blitz Insurance

In addition, as part of a scheme of modest funding, the state might follow Maine’s lead by providing candidates operating within its rules with media blitz insurance.²⁶⁴ Such a scheme would authorize the use of public funds by the Judicial Election Commission to neutralize the effect of negative advertising on commercial television against an announced candidate for judicial office by anyone other than a rival candidate who takes personal responsibility for the contents of the ad. It would be the duty of the Commission to release funds to a candidate who was the object of an electronic attack by “issues advocates”; the distribution to be equal to the amount expended in the attack. The hope would be that the availability of such funds would further chill the desire of issues advocates to employ personal attack advertising on commercial television

264. See ME. REV. STAT. ANN. tit. 21-A, § 1125(a) (West 1997).

in judicial campaigns. If successfully prophylactic, this device would also cost very little.

There is an imaginable hazard that a judicial candidate might enlist an anonymous issue advocate to make an attack in order to secure the blitz insurance. This hazard could be reduced to manageable size if the Commission can be relied upon not to overreact. Also, because it would chill the speech of issue advocates, it might encounter First Amendment difficulty. Perhaps that might be avoided by limiting the insurance to a sixty- or ninety-day period immediately preceding election day.

I. Reviving Tort Law

Also worthy of consideration would be legislation to restore the law of torts as an inhibition on election practices having adverse effects on the integrity of the judicial system. Such a law might deal forthrightly and specifically with the most urgent problem of expensive, insidious, derogatory spot campaign advertisements inserted into commercially programmed television. It would, however, encounter the other horn of the constitutional dilemma created by the Supreme Court's modern enlargements of the First Amendment.

A law restoring the principles of defamation law to our judicial politics would need to be crafted as narrowly as possible to constrain only the most destructive forms of defamation. It could be made inapplicable to traditional forms of campaigning, including handbills, public speeches, even televised debates, and perhaps not even to radio advertising, noncommercial cable television, or the Internet, all of which are inexpensive and lack the insidious power of the advertisement spotted during a time-out or between innings when the viewer is off guard. The law would be supported by legislative findings that such ads spotted in commercial programs "melt down" in the manner described by Dean Jamieson.²⁶⁵ It would express a presumption that any utterance or depiction (1) contained in a paid spot on commercial television, (2) regarding an identifiable, announced candidate for judicial office within, say, ninety days of the election, and (3) presented without the candidate's permission, is disinformative and a fraud on the right of the people to participate in an honest election unless the person or organization responsible for the utterance provides the candidate with equal time in which to reply. The new law would apply not merely to rival candidates, but also to issue advocates such as the Tennessee Conservative Union who are engaged in "express advocacy" by naming or otherwise identifying a candidate as their target.

Such a Fraudulent Disparagement Law might be enforced by a Judicial Election Commission by injunction and by an action for damages. The damages might be measured by the amount spent on the offending advertisements, and the proceeds would be used by the Commission to counteract their effects. A Fraudulent Disparagement Law would cost little public money and might be

265. See JAMIESON, *supra* note 201.

effective to discourage issue advocacy organizations from spending on retention elections as a means of gaining control of a court.

In the alternative, enforcement might be put in the hands of an aggrieved and unsuccessful candidate. Such a plaintiff might be afforded a right to demand a jury trial on the truth of a political ad on commercial television. A verdict that such an ad was false or seriously misleading would result in the election being cancelled and the winning judge being unseated, unless the victor could show that he or she had no responsibility for the ad and made a timely disavowal of it. Such a law would take a lot of the fun out of attack ads.

Obviously, such proposals encounter constitutional difficulty with the doctrine of *New York Times v. Sullivan*²⁶⁶ protecting utterances against public figures from liability in the absence of proof of malice. The right of citizens to defame public officials is now so widely recognized that it has become ingrained in our legal culture.²⁶⁷ That said, I can express my agreement with Justice Byron White that his vote in *Sullivan* was the most serious mistake of his thirty-year career.²⁶⁸ Of course, the Court could not have allowed Alabama in that case to suppress the *New York Times* by means of a large punitive damages award, but its opinion went far beyond the requirements of the case and has had grave effects on the quality of our public discourse.

There is reason to hope that *Sullivan* can be successfully distinguished on four grounds. First, print media lack the insidious effect of the high-tech spot television advertisement inserted in commercial programming that attracts audiences who are not on guard against political deceit. Second, printed defamations, which are read only by those whose interest is sufficient to cause them to read the material, are not only much less effective, but can be rebutted at far less expense. Third, *Sullivan* and its progeny were decided outside the realm of political campaigns in which the time for reply to derogatory utterances and depictions is defined by an election date. Finally, *Sullivan* did not involve an effort to protect the public from fraud and conserve the public trust in judicial institutions, a factor meriting some consideration in weighing First Amendment imperatives, given that the underlying sovereign aim of the First Amendment is to protect the channels of political discourse. For these reasons, it is imaginable that the Court would uphold a statute narrowly drawn to discourage the use of attack advertisements spotted on commercial television during judicial campaigns.

266. 376 U.S. 254 (1964).

267. Astonishingly, some American judges have now become so persuaded of the fundamental right to nonmaliciously malign public figures that they have refused to enforce English judgments applying the contrary principle that is the law in England and the rest of the world. See *Bachchan v. India Abroad Pubs., Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992); *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997).

268. See DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 421-22 (1998).

J. A Role for the Organized Bar

As a weaker alternative to the proposals just stated, an organized bar can deploy its moral and financial resources to conduct a similar program.

Minnesota is a state in which moral sanctions are now employed to control harmful election practices.²⁶⁹ Candidates who do not sign and perform a clean election pledge are treated as pariahs. I suspect that moral restraints are still operative in many other states with respect to judicial elections; that is, candidates would be shamed if they spent vast sums to secure judicial office and used negative spots in a campaign; judicial candidates are widely importuned by bar groups to behave. A well-organized state bar can strengthen this effect, exacting pledges from candidates for judicial office and advertising against those who fail to sign or who dishonor their pledges. Indeed, some bar organizations have initiated such programs and backed them up with funds gathered from members of the bar.²⁷⁰

A state bar could also establish a program of modest subvention of judicial elections comparable to that proposed above. It could provide a semi-official brochure available to candidates and organizations willing to play by its reasonable rules. It could imaginably finance a program of negative advertising insurance with a modest dues increase that would attract candidates into its scheme of semi-official regulation of electoral conduct and correspondingly forbid lawyers to contribute to judicial campaigns or to “issue advocacy” organizations spending on such campaigns. It could also spend funds so acquired to deter such organizations operating outside the campaigns of judicial candidates.

Or, in the alternative, a state bar might provide substantial funds to a Rapid Response Campaign Oversight Committee to enable such a group to react strongly and in kind to foul practices. Such a committee might be able to negotiate retractions in some situations. There is an obvious risk that such a committee, if improperly motivated, could abuse its role. And the prospect that many state bars could pursue a broadly effective program of this sort may be remote at the present time. On the other hand, it is difficult to imagine a more appropriate object of concern for the bar than the integrity of its judicial system.

VII

CONCLUSION

While the foregoing is not quite a complete review of every idea ever proposed for handling political campaigns for highest state courts,²⁷¹ it covers all that I could find in the literature that seem to me worthy of consideration by

269. The Minnesota Compact is described in CAPPELLA & JAMIESON, *supra* note 195, at 244-46, 275-79.

270. See Schotland, *supra* note 81, at 96-107.

271. See *id.* at 121-32.

state legislatures or bar associations at this time as responses to the crisis of integrity in their courts. None of them is perfect, but almost any of them would be an improvement on a system entailing privately financed, multi-million dollar campaigns for high judicial office.

However highest state court judges are selected, and whatever the terms of their employment, the outcome will reflect the condition of the social and political order from which they come. It will also depend on a measure of luck. It is a comfort to reflect that our Republic has over two hundred years enjoyed sufficient luck in these matters to suggest the intervention of Providence, even if, alas, not all our judges are the sorts of persons we might hope with President Taft to meet in Heaven.