Judging the Judges

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I. AN INTRODUCTION

With the emergence of the United States as the dominant superpower in the world comes a greater and more penetrating look at our legal system. Across the globe, countries are now studying the very foundation of our democracy: a strong, respected, and effective judicial system. From the recent promulgation of rules for military tribunals, to the disposition of traffic tickets, these are exciting times to be studying law in the United States. Indeed, one of law school's greatest gifts, for those who want to accept it, is the opportunity for an intellectual transformation.

By transformation, I do not mean what many law professors call "sharpen[ing] the mind by narrowing it." Instead, the intellectual transformation from student to lawyer is substantive. The student views the law as an object acting upon society. The lawyer, however, views the law from the inside out: appreciating how the law serves as the foundation for our democratic society; understanding its precious...
clockwork; and realizing how easily this clockwork can be damaged by the mere "appearance of impropriety."  

Today I am here to talk about the very essence of the law. An essence that is, perhaps, so vital and integral to our system of justice that it is not always discussed or addressed in the law school classroom. My topic is "Judging the Judges:" How do we judge the men and women of our judiciary?

I submit to you that judges are different from other political actors. The judge has a duty to uphold the sovereign will of the people, as represented in our Constitution and our laws, and not to satisfy the popular will. With this in mind, how do we better ensure that those who are selected to serve as judges possess integrity, experience, professional competence, judicial temperament, and a demonstrated commitment to justice for all? And, most importantly, how do we better ensure that those who are selected possess the spirit of judicial independence?

Think with me for a few minutes about this topic and ask with me the question: What is judicial independence? Then answer with me: Why does judicial independence matter?

II. WHAT IS JUDICIAL INDEPENDENCE?

Judicial independence has a unique meaning in our constitutional democracy. Although today we will primarily examine judicial independence within the context of state judiciaries, the American concept of judicial independence is principled on the relationship between the federal judiciary and the other branches of our federal government. Judicial independence in the United States is premised on

6. See, e.g., Heather M. Clark, Note, The Supreme Court's Indecent Proposal: Repealing the Honoraria Prohibition of the Ethics in Government Act of 1978, 87 CORNELL L. REV 1475, 1492 (2002) (noting that "[i]t is hard to imagine a situation in which a third party could make payments to a judge without creating even the appearance of impropriety.").

7. The concept of judicial independence is embodied in the United States Constitution. See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing that the independence of the judiciary is necessary to protect against legislative and executive encroachments on individual rights); Stephen O. Kline, Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad, 30 McGEORGE L. REV. 863, 953 (1999) (noting that the life tenure and salary protection provisions "cut at the very heart of judicial independence embodied in the Constitution."). Moreover, the value of judicial independence was recognized and protected by the first thirteen colonies in their selection of state judiciaries. See, e.g., Luke Bierman, Judicial Independence: Beyond Merit Selection, 29 FORDHAM URB. L.J. 851, 853 (2002) (noting that the first thirteen colonies adopted legislative or executive appointment to combat the fear of undue influence over judicial decision-making embodied in the Declaration of Independence).

understanding (1) the principle of dual sovereignty between federal and state governments, and (2) that the power of the federal government, particularly of Congress and the President, is limited by the Constitution.

We live in a nation of many sovereigns. Between 1776 and 1791, thirteen independent, though confederated, colonies existed on the eastern coast of North America. The people of these colonies desired some union, but they feared a powerful central government: a government that ruled with an iron fist from afar. The founders, fresh from a revolution with England, knew tyranny; they had a sophisticated sense of its many sources and disguises.

Consequently, the colonists created a federal government with limited powers. The Constitution is the definition of our federal

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L.J. 989, 989-90 (1996) (noting that the basis of judicial independence in the United States is found in Article III of the Constitution, which guarantees judges lifetime appointment and salary protections). Moreover, the foundations of judicial independence did not contemplate a substantial interaction between the federal judiciary and state action. In fact, until the Federal Habeas Corpus Act of 1867, a year before the enactment of the Fourteenth Amendment, the federal judiciary did not even entertain petitions by state court prisoners arguing that constitutional errors of procedure occurred during trial. Cf. William J. Brennan, Jr., Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 UTAH L. REV. 423, 426 (1961) (arguing that the federal habeas statute was a response to Reconstruction fears that the South would wrongfully imprison former slaves); accord Erwin Chemerinsky, The Individual Liberties Within the Body of the Constitution: A Symposium: Thinking About Habeas Corpus, 37 CASE W. RES. L. REV. 748, 752 (1987).

9. One legal historian has described the period between the end of the American Revolution and the ratification of the Constitution in this light:

The American Revolution ushered in a dramatic era in the rule of law. Building on the emerging ideas of liberty and democracy, thirteen independent colonies in America cast off the yoke of the British crown and adopted a new legal system to regulate independent states with widely different social and political views. The people who adopted the Constitution agreed that it was necessary that many rights of sovereignty had to be ceded to a central government strong enough to execute its own laws by its own tribunals.


10. THE FEDERALIST NO. 45 (James Madison) (responding to the anti-federalist critique that a strong federal government would soon resemble the tyranny of England).

11. For instance, in the Declaration of Independence, Thomas Jefferson indicted King George III with interfering with the independence of the judiciary by making judges "dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." THE DECLARATION OF INDEPENDENCE (U.S. 1776).

12. Federalist No. 45 is often cited to support the notion that the founders intended a limited federal government. In No. 45, James Madison proclaims:

The powers delegated by the proposed Constitution to the federal government are
Neither the executive nor the legislative branch can act without pointing to a specific constitutional provision justifying such action. This follows because the Constitution is the sovereign will of the people: a precondition to the very existence and power of the legislative and executive branches. The Constitution is a compromise. A compromise between the thirteen colonies that created our union and our federal government.

Within this compromise, under this Constitution, the judiciary is an intermediary between the people and the executive and legislative branches. The judiciary, as envisioned in *The Federalist,* and as reaffirmed by Chief Justice John Marshall in *Marbury v. Madison,* has the duty of protecting the people from the arbitrary and capricious acts of majoritarian rule that violate the Constitution. Accordingly, the few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State.

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government.

**The Federalist No. 45 (James Madison).**

13. See, e.g., U.S. v. Lopez, 514 U.S. 549, 552 (1995) (speaking for the majority of the court, Chief Justice Rhenquist held that Congress exceeded its authority under the Commerce Clause, noting: "We start with first principles. The Constitution creates a Federal Government of enumerated powers . . . . This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties." (citations omitted)).

14. 5 U.S. (1 Cranch) 137 (1803).

15. Alexander Hamilton noted that:

[The] independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

**The Federalist No. 78 (Alexander Hamilton).** This sentiment is particularly relevant today. After the attacks on the World Trade Center, the legislative and executive branches moved swiftly to avoid other acts of terrorism. Some of the most efficient mechanisms for stopping acts of terrorism might be legislative enactments that legalize "racial profiling." See Samuel R. Gross & Debra Livingston, Essay, *Racial Profiling Under Attack,* 102 COLUM. L.
duty of the judiciary is not to our representatives in Washington, D.C., but rather to the sovereign will of the people—the Constitution.

Thus, the founders built a stool of government supported by three equally important and powerful legs to prevent a new birth of tyranny.\(^\text{16}\) The legs of the executive and legislative branches are supported by popular election. The leg of the judiciary, however, is supported by a "judicial independence" from popular will. The founders envisioned a judicial system in a state of equilibrium with the legislative and executive branches; for if the judiciary is weakened, the stool of government falls into imbalance.\(^\text{17}\)

I return to the question: What is judicial independence? Well, judicial independence means a judiciary free from partisanship, political pressure, special interests, popular will, and, most importantly, a judiciary guided by the sovereign will of the people embodied in the United States Constitution and its Amendments. As the first canon of the Model Code on Judicial Conduct provides: "Deferece to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges ... [which] depends in turn upon their acting without fear or favor."\(^\text{18}\)

III. Why Is Judicial Independence Important?

The judiciary has enormous power. In a civilized society, we, as citizens, must trust judges with our own liberty. We promise to follow the law; we are charged with breaking a law; and between our liberty and the prison door is a judge. For your sake, you pray the judge is not biased by a political party, popular will, pressure to solve the crime, or a

\[\text{REV. 1413, 1413-15 (2002). However, these enactments, though efficient, are not necessarily constitutional. See Liam Braber, Comment, Korematsu's Ghost: A Post September 11th Analysis of Race and National Security, 47 VILL. L. REV. 451, 478-90 (2002). An independent judiciary, bound by the will of the people as expressed in the Constitution, rather than political will, is more apt to abide by constitutional law than the fear of losing an election. But see Korematsu v. United States, 319 U.S. 432 (1943) (where the United States Supreme Court upheld the practice of Japanese internment as constitutional).}\]

\[\text{16. See Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (interpreting the Federalist and the judiciary's position within the Constitution's framework as standing for the proposition that: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").}\]


\[\text{18. MODEL CODE OF JUDICIAL CONDUCT, Canon I (1990).}\]
"partisan lens" that is tough on crime. Instead, you dream of an independent judge. A judge who will listen to your arguments, your alibi, and apply the law, with its presumptions of innocence, to your case.

Judicial independence is vital because when it is your day in court you will look to the judge to protect your rights and not merely enforce the representations of the state. When the son of a governor or the son of a wealthy campaign contributor assaults your son or your daughter, you will seek justice. At the gates of justice you will find a judge, and you trust the judge to apply the same law to the Governor's son as the judge would apply to your son. And if the judge fails, then society fails, because you, as a reasonable victim, will seek justice by your own hand, rather than by the hand of the law. Thus, from the trial—where the judge decides restraints on individual liberty—to appellate judges—who in stealth opinions effect the rights and responsibilities of citizens far beyond the actual litigants—the decisions of the judiciary have a cumulative effect of disavowing or creating equal justice under the law.19

In the words of Supreme Court Justice Anthony M. Kennedy: "The law makes a promise—neutrality. If the promise gets broken, the law as we know it ceases to exist. All that's left is the dictate of a tyrant, or perhaps a mob."20 To be sure, judges are not expected to be Olympian gods. Trust me: Being a judge does not mean never having to say you are sorry. No one expects judges to be perfect. That is why there are mechanisms to hold judges accountable. Rulings can be appealed; laws can be changed; the Constitution can be amended; and, most importantly, illegal activities and ethical violations can be punished.

Tennessee Supreme Court Justice Adolpho A. Birch, Jr., puts it this

19. Justice Hugo Black best articulated this role of the judiciary in *Chambers v. Florida*, 309 U.S. 227 (1940), where he held:

[A]ll people must stand on an equality before the bar of justice in every American court.... Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.... No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.

*Id.* at 241.

20. Justice Anthony Kennedy, speech to the ABA Symposium on Judicial Independence (1998), in *ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE COMM. ON PUB. FINANCING OF JUDICIAL CAMPAIGNS* at iv (July 2001)).
way: "Judicial independence is the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing." The point Justice Birch makes is that judicial independence is not only consistent with a democratic system of government, but is essential to its effectiveness.

IV. WHAT THEN ARE THE GROWING THREATS TO JUDICIAL INDEPENDENCE?

A. Campaign Contributions and the Public Perception

In the last decade, and especially during the last five years, there has been a systematic infusion of money and special interest pressure into the election of state supreme court justices. The infusion of money, politics, and special interest groups into judicial elections has affected the public perception of the judiciary.

Empirical research shows a tidal wave of money flowing into judicial elections in amounts which dwarf money spent in the past. In the 2000 campaign, state Supreme Court candidates raised $45.6 million—a 61% increase over 1998, and double the amount they raised in 1994. The average state Supreme Court candidate in 2000 raised $430,529—and 16 of them raised more than $1 million.

Where does that money come from? Who has such a growing interest in affecting who is in courts? Well, half of all donations, and maybe more, "come from two sectors of society: lawyers and business interests." The simple fact is that special interest entities are spending millions to elect judges, influence decisions, and serve their narrow interests. Many people, including scholars, believe that these interests do not represent the best interests of the general public. And, as the

22. See generally William C. Cleveland III, Money and Judicial Campaigns, 68 DEF. COUNS. J. 393 (2001) (noting that nine of ten Ohio residents and 88% of Pennsylvania residents question the impartiality of judges who hear cases involving litigants who were campaign contributors and believe that judicial decisions are affected by contributions).
24. Id. at 9.
25. Id.
26. See JOHN HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS THE PUBLIC
cost of judicial campaigns skyrockets, judges are forced to raise money like politicians. The unfortunate result, as shown by a national survey, is that a majority of our citizens now believe that justice is for sale.27

It is baseball season in Milwaukee. Accordingly, a baseball analogy is appropriate. Umpires are the trial court judges of the baseball diamond. Now imagine if umpires were elected and forced to fundraise. Like lawyers, major league baseball players would have a vested interest to contribute money to the campaigns. Now, let us say your favorite player came to bat and was called out on a questionable third strike. How much confidence would you have in that call if you knew, or later discovered, that the pitcher gave $10,000 to that particular umpire's election campaign?

Most judges hold to the general philosophy that their duty is to follow the law. That is a relatively easy task in instances where the law is explicit, black-lettered, and judges are left with little discretion. But, the most important cases consistently involve issues in which the law supports both sides of a controversy. In these cases, the judge's independence from the litigants and special interests is integral to the integrity of the administration of justice. Indeed, it is the rare case, particularly on the appellate level, that does not present law and facts reasonably supporting a decision in favor of either side. Our system is an adversary system. A system based on the idea that all litigants have a story to tell. The one-sided case, the case that leaves the judge with little discretion, is the rare case. Consequently, judicial character, quality, and independence are vital.

Now, I have been a judge for more than a decade. I have been involved in four statewide partisan elections. In 1990, I was elected to fulfill an unexpired term. In 1992, I was elected for a full eight-year term on the North Carolina Court of Appeals. In 1998, the Governor appointed me to the Supreme Court of North Carolina. That same year, I narrowly lost an election to retain my Supreme Court seat and was reappointed to the Court of Appeals. In 2000, I won another eight-year term on the North Carolina Court of Appeals. Contemporaneously, in 1999 and again in 2000, I was nominated for the Fourth Circuit United States Court of Appeals. But as most of you know, the Senate never

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27. See THE NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS 8 (1999) (finding that 78% of survey respondents believed that the decisions of judges are influenced by campaign fundraising).
acted on my nominations.

As you can see, I know personally the exasperation of running in a state elective system and seeking a federal judicial appointment. Most importantly, those experiences reaffirm my belief that most judges work hard to be fair and impartial. But when Justice at Stake, a national partnership dedicated to keeping courts fair and impartial, commissioned a national public opinion poll, some of the results were chilling. In particular, the poll indicates that about three out of every four Americans believes that contributors to judges' campaigns get special treatment in court. And get this—one in four judges agrees.

Quite simply, the issue is not whether judges are actually influenced by special interests. Rather, the fundamental issue is whether people believe that judges, sworn to protect their constitutional and statutory rights, are making decisions with one eye on campaign donors and special interests. The issue is the public's confidence in the judicial system. The issue is the public's belief in the integrity of the judicial system. The issue is the public's trust and respect for the decisions made by our judges.

B. The Dirty Politics of Judicial Campaigns

Big money is flowing into judicial elections. Where does the money go? Well, most of the money goes into the tools of the modern political campaign: advertising, media, and consultants schooled in sound bites and attack ads. Some legal writers have commented that, in a few states, big money has transformed judicial races into dirt-ball political campaigns. Empirical research also supports this position. The Justice At Stake National Survey of Judges Frequency Questionnaire, which was commissioned by Justice at Stake, a national public opinion poll, indicates that about three out of every four Americans believes that contributors to judges' campaigns get special treatment in court. And get this—one in four judges agrees.

Some scholars have argued that the concept of "judicial independence" is based on public perception rather than "actual independence." See, e.g., Jack Van Doren, Is Jurisprudence Politics by Other Means? The Case of Learned Hand, 33 New Eng. L. Rev. 1, 6 (1998) (citing Marvin Schick, Learned Hand's Court 186 (1990)).

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30. Some scholars have argued that the concept of "judicial independence" is based on public perception rather than "actual independence." See, e.g., Jack Van Doren, Is Jurisprudence Politics by Other Means? The Case of Learned Hand, 33 New Eng. L. Rev. 1, 6 (1998) (citing Marvin Schick, Learned Hand's Court 186 (1990)).
32. See Adam R. Long, Keeping Mud Off the Bench: The First Amendment and Regulation of Candidates' False and Misleading Statements in Judicial Elections, 51 Duke L.J. 787, 788-89 (2002). Long gives an example where, in a Louisiana Supreme Court election, a candidate ran a newspaper advertisement stating:

JOHN DIXON DOESN'T THINK 20 STAB WOUNDS ARE ENOUGH . . . . On appeal to the Louisiana Supreme Court, six Justices agreed with the death sentence. ONLY JOHN DIXON DIDN'T . . . . HE DIDN'T THINK MORE THAN 20
at Stake Survey polled almost 2500 judges. The majority of America's state judges say the tone and conduct of judicial campaigns has been getting worse. And I can tell you, they are right.

When a state becomes a judicial battleground, television advertisements are the weapon of choice. In the 2000 campaign, for instance, the citizens of Alabama, Michigan, Ohio, and Mississippi were subjected to unprecedented "air wars" featuring more than 22,000 airings of campaign commercials. Many of these commercials are produced by the candidates, and they frequently focus on the candidate's background and qualifications. Fair enough.

However, almost half of these ads came not from the candidates, but from political parties and special interest groups who want appellate courts sympathetic to their ideology or financial interest. These outsider ads focused less on the candidate's qualifications and more on slick sound bites and nasty attacks. In fact, 80% of special interest advertisements attack judicial candidates. And even though judges are not allowed to promise results in advance, most outside advertisements try to signal candidate positions on issues, especially tort reform, crime control, and family values.

Although judicial campaigns are "nastier, noisier and costlier," the money explosion has not reached every state. But when the tidal wave hits, it hits hard. Just ask the people of Alabama, where one supreme court candidate raised more than $1.7 million.

So, here we are. Judicial independence is an important value
embodied in the Constitution. In the last decade, judicial campaigns have resembled political campaigns. Americans believe judicial independence is compromised with the interaction of the political and judicial systems. Without public trust in the integrity and independence of our judiciary, the stool of our constitutional democracy falls into imbalance. Consequently, we must work towards dispelling the notion that there are two systems of justice—one for the connected and powerful, and one for the ordinary citizen who has little contact with judges. We must attack the notion that justice is for sale.

V. WHAT ARE THE SOLUTIONS TO COMBATING THE ENEMIES OF JUDICIAL INDEPENDENCE?

Fortunately, there are a wide variety of reforms open to citizens and legislators who want to help keep their courts fair and impartial. First, some scholars want to eliminate judicial elections. These academics point to the United States Constitution and the Federalist Papers, which gave and supported the President's power to appoint judges for life tenure upon confirmation by the Senate. The original thirteen states also chose to pick judges through appointment, though the appointments were sometimes made by the legislature. However, although sound in reason, this argument is not even a part of the current political debate.

In fact, the notion of appointing the state judiciary died with the rise of Populism and in the era of Andrew Jackson's democratic rhetoric. Through the lenses of the populist reaction against elites as remnants of British aristocracy, judicial appointments were increasingly viewed as an insider's buddy system; an undemocratic, if not corrupt, entrenched

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46. THE FEDERALIST NOS. 78-83 (Alexander Hamilton).

47. Judicial Appointments, supra note 44, at 356–57 (noting the constitutional debates over appointment and the decision of the first thirteen colonies to appoint judges through either the executive or legislative branch).


49. Judicial Appointments, supra note 44, at 358.
system of power. To combat the entrenched political elite, populists believed majoritarian elections were the answer.

Moreover, the move away from appointing and to electing state judges coincided with the rapid growth of the American republic. By 1860, twenty-four out of thirty-four states elected at least some of their judges, and between 1846 and 1912 every new state adopted elections for choosing some if not all of their judges.

During the populist era, the election of judges took on a partisan nature. According to some scholars, the populists believed that partisan elections were the best way to get populist judges on the bench. Nevertheless, by the end of the century the new Progressive movement and an increasingly organized bar joined together in opposition to partisan elections. The progressives saw elections as turning judgeships over to Tammany Hall-like political machines, which held judges accountable only to the machine’s leadership. The bar, including the new American Bar Association, worried that forcing judges to engage in party politics compromised judicial independence.

Many states responded by adopting nonpartisan elections, but of course judges still had to campaign for votes. This provoked a further

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51. See infra notes 54--55 and accompanying text.
55. Peter D. Webster, Selection and Retention of Judges: Is There One "Best" Method?, 23 FLA. ST. U. L. REV. 1, 11 (1995) (citing Anthony Champagne, The Selection and Retention of Judges in Texas, 40 Sw. L.J. 53, 64 (1986)). Proponents of judicial elections and the populist method argue, however, that the populists chose judicial elections because it struck the right balance between judicial independence and judicial accountability. See id. at 17 n.80. Moreover, the partisan nature of these elections has been justified on the grounds that a candidate’s political party is an information cue, giving voters an idea about the candidate’s ideology. Id. Furthermore, because the judicial candidate was required to have "party support," some scholars have suggested the partisan nature of judicial elections provided a "screening process," guaranteeing more qualified judges. See Judith L. Maute, Selecting Justice in State Court: The Ballot Box or the Backroom?, 41 S. TEX. L. REV. 1197, 1204 (2000).
57. See id.
58. Michael W. Bowers, Judicial Selection in the States: What Do We Know and When Did We Know It?, in 2 RESEARCH ON JUDICIAL SELECTION 4--5 (2002).
reaction from legal luminaries like Roscoe Pound, President William Howard Taft, John H. Wigmore, and Albert Kales, all of whom argued it was time to reconsider the practice of appointing judges. Pound argued partisan elections had reduced respect for the bench because judges were no longer admired as being above the political battle. Accordingly, the debate had come full circle: from Alexander Hamilton in The Federalist to Roscoe Pound in the American West.

From these legal thinkers, the most fundamental reform to the way states select the judiciary was born: the Missouri Plan. In 1940 Missouri adopted a scheme whereby a commission, comprised of lawyers, judges, and lay people, nominated a slate of three judicial candidates to fill each vacancy. The governor then appointed one nominee from the list to the bench. Once in office, the judge was required to run in an unopposed retention election during the next general election: the voters simply decided whether or not to retain the judge. According to many legal scholars, the Missouri Plan created the delicate balance necessary between judicial independence and accountability. Today, nearly half the states use some form of merit selection to pick at least some of their judges.

As by now you can deduce, the debate over how to select state judges is not new. The arguments, from Hamilton, Madison, and Jay to Roscoe Pound and President Taft, have been the same. But as the threat to judicial independence worsens, as litigants feel cheated in court by the appearance of impropriety, as citizens and legislators wonder what can be done, many believe that it is time to debate these ideas yet again.

VI. HOW DO WE MEET THE CHALLENGES TO JUDICIAL INDEPENDENCE?

For decades, anyone trying to replace a system of contested judicial
elections has faced a stiff challenge. Although judicial elections do not exactly capture the popular imagination, people are consistently swayed by the argument: "[D]on't take away the right to vote." Yet, in some states, turnout in judicial elections is as low as 13\%.

Voters often complain that they do not know enough about the candidates.

Nonetheless, the simple fact is this: today, 226 years after America's founding, about 87\% of all state judges must stand for election. Accordingly, the task for those concerned about the rising threat to fair and impartial courts is not to eliminate judicial elections, but to make judicial elections better.

A. Proposals for Improving Judicial Elections

1. Improving Public Perception

Many judges, academics, and commentators have suggested revisions and reforms to the existing process of electing state judiciaries. These reforms traditionally include the following: (1) making judicial elections nonpartisan; (2) lengthening the term of judges; (3) creating public financing for judicial candidates; and (4) reforming various methods of campaign finance.

Many legal commentators argue the move to "nonpartisan" judicial elections is the first step in reform. Presently, seventeen states select some of their judges through partisan elections. Partisan elections encourage judicial candidates to curry favor with party leaders in order to secure the nomination, and also encourages elected judges to resolve political disputes in favor of their party. Empirical research supports this position and suggests that judges elected under partisan systems render decisions exhibiting a partisan tendency that cultivate their constituency.

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68. Id.
70. See, e.g., Charles S. Trump IV, The Case in Favor of the Non-Partisan Election of the Supreme Court of Appeals of West Virginia, 2000 W. VA. L. REV. 24 (May 2000) (identifying the arguments against partisan judicial elections).
71. Alabama, Illinois, Indiana, Kansas, Louisiana, Missouri, New Mexico (after initial gubernatorial appointment), New York, North Carolina (recently the state legislature eliminated partisan judicial elections. See infra note 81), Pennsylvania, Texas, and West Virginia have partisan elections. Although Michigan and Ohio have a nonpartisan ballot, judicial candidates are nominated through political parties.
Partisan judicial elections are clearly violative of the notion of judicial independence. The idea that a judge should identify himself or herself through the lens of a party platform is repugnant. As we have discussed thoroughly today, the responsibility of a judge is not to popular will, but rather to the sovereign will embodied in our Constitution. I concur in the sentiment that nonpartisan judicial elections are a requirement and a precondition to any meaningful judicial reform.

One of the most oft stated and powerful proposals for judicial election reform is lengthening the term of elected judges. By facing fewer elections and enjoying more time between them, judges can feel less special interest and fundraising pressure on the job. Moreover, some commentators argue that lengthening judicial terms actually increases accountability, as well as judicial independence, by creating a "judicial record" to aid voter awareness. Some states provide terms of ten, twelve, or fifteen years. Massachusetts and New Hampshire provide tenure until age seventy, and Rhode Island judges serve for life, although judges in these three states are not elected to office in the first place.

Public financing of judicial elections is also a common proposal for mitigating many of the problems associated with special interest pressure. As of the date of this lecture, Wisconsin is the only state...
that provides the choice of public financing to judicial candidates.\textsuperscript{80} Public financing mitigates a judicial candidate’s need for private funding, and therefore substantially mitigates the appearance of impropriety.\textsuperscript{81} Moreover, because public financing is part and parcel of "spending limits and ceilings," it reduces the amount of money available in judicial elections, thereby substantially reducing the amount of money spent on television advertisements and "dirty campaigning" tactics. However, in Wisconsin this system has suffered from two procedural limitations. First, voters are required to check a box if they want their tax dollars to fund judicial elections.\textsuperscript{82} Second, some candidates have opted out of the public financing.\textsuperscript{83}

Judicial campaign finance reform is yet another method of mitigating some problems associated with special interest pressure.\textsuperscript{84} In sixteen states there are no limits on how much one donor can contribute to a judicial candidate. Even in the states with limits, the restrictions allow for large contributions to judicial campaigns. For example, in North Carolina each individual may contribute $4000 to a candidate for the primary and another $4000 for the general election.\textsuperscript{85} His wife may contribute a separate $8000 and so may each of his children. If contribution limits were tightened, a single donor would less likely be perceived as influencing the work of a particular judge.

Another approach is to improve the disclosure requirements of judicial campaign contributions.\textsuperscript{86} Legal academics argue that disclosure of a candidate’s campaign contributors will apprise the electorate of the candidate’s possible biases.\textsuperscript{87} Moreover, disclosure will expose large contributors to "the light of day" and accordingly mitigate the negative effect judicial elections have on the public perception of fairness in the


\textsuperscript{81} See ABA COMM. ON PUB. FINANCING OF JUDICIAL ELECTIONS (2001) (noting that public financing eliminates the appearance of impropriety).

\textsuperscript{82} Id. at n.174 (noting that the ABA commissioned a study which revealed that "[t]axpayer participation . . . declined from 19.9% in 1979, to 8.7% in 1998.").

\textsuperscript{83} Id. at n.176.

\textsuperscript{84} See generally Symposium, Judicial Elections and Campaign Finance Reform, 33 U. TOL. L. Rev. 335-51 (2002).

\textsuperscript{85} North Carolina judicial election law has recently been amended, and now places a limit of $1000 on individual contributions. See supra note 79.


\textsuperscript{87} Id. at 758.
judiciary. However, collecting campaign finance information can be a matter of sorting through thousands of pages of documents—many of which are vague about precisely how money is spent or by whom. "Timing is the greatest problem, as many states do not release information until after the election is complete." Some day, I hope sooner rather than later, this data should be provided to the public in an easily searchable format, such as an interactive web site, that gives voters complete and timely information on contributors.

In yet another variation, some states use judicial performance evaluations as a mechanism of informing voters of a judge's past performance. Judicial performance evaluations survey people who use the courts, including attorneys, litigants, police officers, jurors, and court personnel. Alaska, Colorado, Utah, and Arizona use evaluations and seem to believe that these individuals are in the best position to measure each judge's performance in areas such as integrity, impartiality, legal knowledge, and administrative skills. In 1985, the American Bar Association adopted guidelines for evaluating judicial performance under this system. However, this method has not been widely adopted or applied.

Proponents of judicial elections also point to a collateral problem: in many states where judges are elected, a significant number of incumbents retire between campaigns. Consequently, governors end up picking large numbers of judges instead of the electorate. Given that the turnout in judicial elections is often low, and that so many judgeships are at issue, special elections may not be useful or cost-effective. Instead, it might be useful to create a permanent selection mechanism for interim appointments, so that vacancies can be filled

88. Id.
89. GOLDBERG ET AL., supra note 23, at 20.
91. Id.
93. See ABA SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE II (1985).
94. See Bowers, supra note 58, at 6–7.
quickly with high quality nominees.

Merit selection supporters, of course, believe that retention elections—where an incumbent stands without an opponent and voters decide whether to retain the incumbent—offer public accountability with less hardball politics. Certainly, without an opponent, the opportunity for mud-slinging, personal attacks, and dirty campaigns is reduced. But many voters already avoid judicial elections, because they say they do not know enough about the candidates to make an informed decision. Without the contrast that a contest between two or more candidates can provide, how is a member of the public supposed to decide whether or not to keep a judge whose work is rarely a matter of public attention?

2. Making Campaigns Cleaner

What about the judges themselves? How do we keep them from running campaigns that tarnish our justice system? Like the candidate in Texas who said: "If you elect me, I will never, ever, vote to reverse a capital murder case." Or the Illinois justice who ran a television ad that said: "Courts under Judge X sent innocent men to death row, while killers walk the streets"—even though there was no evidence that Judge X had any role in the wrongful convictions.

Most judges try to run clean campaigns. It seems to me, though, that the local canons of judicial conduct need to be better promoted and enforced. Citizen groups and the state and local bars could play an effective watchdog role in holding judges to the standards they have been sworn to obey.

VII. THE CONCLUDING ANSWERS: A FEAST OF REFORMS

There is much more that can be said, but the central fact is clear: there is a growing threat to the perception and actuality that American courts are fair and impartial. This threat, or perception, however you are inclined to view it, is based on an infusion of money, special interest pressures, and political campaigning in judicial elections. The threat has

98. JUSTICE AT STAKE SURVEY, supra note 28, at 9.
100. Id.
not reached every state yet, and I hope it will not, but the nature of special interest pressure is that it works to fill a power vacuum. Over the last ten years, state judicial elections have become the battlefield of choice for powerful special interest lobbies looking for new ways to advance their political and ideological agendas.

There is nothing wrong with wanting particular policies or working to see them enacted. There is nothing inherently wrong with contributing to the candidate of your choice. There is nothing wrong with working for what you believe is right. It is the American way. However, the cumulative impact of special interest pressure on the public's perception of judicial independence should signal to law students and lawyers alike that something is wrong. Special interests are lining up to enforce their visions of justice. More and more judges are feeling the pressure. Fairness and impartiality are at stake. Justice is at stake.

Unlike judges, legislators, presidents, and governors represent the will of the people. Legislative and executive elections are designed to match candidates with voters who share their views. Promises are made, votes are exchanged, and accountability is secured by faithfulness to the promises and a fear of unemployment. Judges are different. Courts are different. They are created to arbitrate disputes without favor to one side's wealth, viewpoints, or political connections. Given that the role of the courts is different, should not judicial elections be different?

Some argue that popular elections keep judges, like executives and legislatures, accountable. With an election, a citizen can check abuses of power, ensure that the judiciary is operating within the mainstream of jurisprudence, and exercise a right inherent in representative government. To this sound argument I say: but do we hold elections to decide who should win in court? Are there not other means of refining the judiciary if necessary, such as constitutional amendment and impeachment? Which system greater ensures an independent judiciary?

Before I close, I'd like you to consider the oath of office that every federal judge swears to uphold:

I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me according to the best of my abilities and understanding, agreeable to the Constitution, and laws of the United States. So
help me God.\textsuperscript{101}

And here in Wisconsin, judges promise to "support the constitution of the United States and the constitution of the state of Wisconsin, and faithfully to discharge the duties of their respective offices to the best of their ability."\textsuperscript{102} These words, it seems to me, provide a recipe for the kind of judicial independence most Americans want.

There is a growing threat to fair and impartial courts. But fortunately, there is a feast of reforms available to protect the courts that protect our rights. My sense is that people of good will are coming together, and not a moment too soon.

For in coming together on the importance of judicial independence, we can hope to preserve what Chief Justice Rehnquist calls "one of the crown jewels of our system of government"—a system of courts that is fair, impartial, and independent.\textsuperscript{103} Ultimately, the public's confidence in and respect for the fairness and integrity of the judiciary will be greatly enhanced when they "Judge the Judges."

\textsuperscript{101} The Judiciary Act of 1789, § 8, available at \url{http://air.fjc.gov/history/landmark afrm.html}.

\textsuperscript{102} WIS. CONST., art. IV, § 28.