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# INDEPENDENCE V. ACCOUNTABILITY: FINDING A BALANCE AMIDST THE CHANGING POLITICS OF STATE-COURT JUDICIAL SELECTION\*

THE HONORABLE DIANE S. SYKES\*\*

This year's contest for a pivotal seat on our state supreme court was unusual for Wisconsin, and not just because, for the first time in forty-one years, an incumbent justice was unseated. The election was predominated—some might say overwhelmed—by millions of dollars in saturation advertising on television, much of which was crass, misleading, and at times utterly inconsistent with the judicial role. Most of these ads were sponsored by third-party interest groups operating independently for or against the candidates, although one particularly base and deceptive attack ad was sponsored by the campaign of the victorious challenger. The candidate debates were generally unilluminating because the questions tended to focus on the subject of the negative advertising, as did much of the newspaper coverage of the race. Justice Louis Butler, who was defeated by Burnett County Circuit Judge Michael Gableman, did not himself engage in this sort of advertising, to his credit and the credit of the judicial office he will soon relinquish.

This election, together with last year's (which had some of the same characteristics), has set off a debate about whether our system of judicial selection is broken, and if so, what should be done to fix it. Some—including all seven sitting justices of the supreme court—have strongly advocated campaign finance reform, including substantial public funding of supreme court campaigns.<sup>1</sup> Others suggest doing away with judicial elections altogether. The *Wisconsin State Journal* editorialized in favor of replacing supreme court elections with so-called “merit selection” of supreme court justices.<sup>2</sup> The *Milwaukee Journal Sentinel* also endorsed the appointment of

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\* This speech was presented during the Eastern District of Wisconsin Bar Association's annual meeting on April 17, 2008, in Milwaukee, Wisconsin. It has been updated for publication.

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1. See Letter from Chief Justice Shirley S. Abrahamson et al., Supreme Court of Wis. (Dec. 10, 2007), <http://www.wicourts.gov/news/archives/2007/docs/campaignfinanceletter.pdf>.

2. Editorial, *For Supreme Court: Merit Reform; The Butler-Gableman Campaign Has Demonstrated How Money and Politics Have Tainted Wisconsin's Supreme Court Elections*, WIS. ST. J., Mar. 23, 2008, at B3.

justices after taking up the “elect or appoint” debate in the Sunday opinion section.<sup>3</sup> In a forum in the paper’s “Crossroads” section, State Representative Fred Kessler promoted his proposal for a constitutional amendment that would replace supreme court elections with a system based on the federal model, only somewhat modified; he proposed that justices be appointed by the governor, confirmed by the state senate, and automatically reappointed after a ten-year term unless a supermajority of the senate votes against reappointment.<sup>4</sup> Representative Kessler argued that shifting to an appointed supreme court would curb the “outlandish amounts of money” spent by outside interest groups on high-court elections and preserve the public’s confidence in the impartiality of the judiciary.<sup>5</sup>

Marquette Law School Professor Rick Esenberg argued the other side.<sup>6</sup> He maintained that judicial elections are imperfect but preferable to the alternatives and ought to be retained.<sup>7</sup> He acknowledged that an appointment system may better serve the interest of impartiality, but said protecting that interest would come “at the expense of accountability.”<sup>8</sup> He also noted that appointment doesn’t eliminate the politics, “it just moves it from the campaign trail to the hearing room and, of course, the back room.”<sup>9</sup> The pitched partisan battles over nominees to the United States Supreme Court—and some lower federal-court nominees as well—are evidence of that.

It is not my purpose nor is it appropriate for me to comment more specifically on the results of the recent supreme court election or the calls for campaign finance reform that have come in its wake. However, I do have substantial personal familiarity with both the appointment and election models of judicial selection, having navigated a contested countywide circuit court race, a gubernatorial appointment to a mid-term vacancy on the state supreme court, a contested statewide election for a full term on the court, and the federal nomination and confirmation process for my present position on the Seventh Circuit Court of Appeals. After my campaign for the supreme court in 2000, I gave a series of speeches to law students and civic groups defending judicial elections. It has become increasingly difficult to do so, but

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3. Editorial, *Appointing Justices: After Two Nasty Campaigns that Have Harmed the Credibility of Wisconsin’s Highest Court, It’s Time to Change the Way that the State Selects Justices*, MILWAUKEE J. SENTINEL, Apr. 16, 2008, at 10A.

4. Frederick P. Kessler, Op-Ed., *Elect or Appoint? To Maintain Integrity, Appoint Justices*, MILWAUKEE J. SENTINEL, Apr. 13, 2008, at 1J.

5. *Id.*

6. Rick Esenberg, Op-Ed., *Elect or Appoint? Judicial Elections Are an Imperfect, Best Option*, MILWAUKEE J. SENTINEL, Apr. 13, 2008, at 1J.

7. *Id.*

8. *Id.*

9. *Id.*

as Professor Esenberg observed, the alternatives have their flaws too. If we are about to have a public discussion on the subject of judicial selection—and I think we should—a little historical perspective might be useful.

We have been debating the issue of judicial selection for more than 200 years. At the Constitutional Convention in Philadelphia in 1787, there was a debate over the establishment of inferior federal courts, including the subject of who should appoint the judges of the lower federal courts—Congress or the President.<sup>10</sup> James Wilson of Pennsylvania argued in favor of presidential appointment, as with the Supreme Court, in order to avoid the “intrigue, partiality and concealment” that would attend appointment by the legislative body.<sup>11</sup> John Rutledge of South Carolina strongly disagreed, arguing that “[t]he people . . . will think we are leaning too much towards monarchy.”<sup>12</sup> Catherine Drinker Bowen, in her classic *Miracle at Philadelphia*, describes how the impasse was broken:

As the debate mounted, Dr. Franklin interposed mildly. Only two modes of choosing the judges, he said, had so far been mentioned; it was a point of great moment and he wished other modes might be suggested. He would like to mention one which he understood was practiced in Scotland. He then [according to an account contained in James Madison’s notes], “in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves.” Here in America, on the other hand, it was the interest of the electors to make the best choice.<sup>13</sup>

The author continues:

[W]hen this particular old man told a story it was impossible not to be diverted. Madison moved that in the ninth Resolve the words “appointment by the legislature” be struck out, and a blank left “to be hereafter filled on maturer reflection.” In [the] Committee of the Whole the states voted, approving nine to two.<sup>14</sup>

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10. See CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at 65 (1966).

11. *Id.*

12. *Id.*

13. *Id.* at 66.

14. *Id.*

The framers of the Federal Constitution, of course, opted for presidential appointment for all federal judges, with the advice and consent of the Senate, and lifetime tenure in good behavior. This was thought to be the mode of judicial selection most conducive to the independence of the judiciary and the preservation of the rule of law. Alexander Hamilton described the rationale for presidential appointment and lifetime tenure in *The Federalist No. 78*:

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This 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. . . .

. . . .

That inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or [the] legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.<sup>15</sup>

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15. THE FEDERALIST NO. 78, at 230–31, 232 (Alexander Hamilton) (Roy P. Fairfield ed., 2d.

At the time of the ratification of the Federal Constitution, most state-court judges were appointed by one of two methods: legislative appointment or gubernatorial appointment subject to legislative confirmation.<sup>16</sup> The latter method was similar to the federal model, although it was considered to be substantially more democratic since at that time neither the President nor the Senate was directly elected.<sup>17</sup>

By the time of Andrew Jackson's presidency, however, concern for judicial independence was being replaced by concern for judicial accountability.<sup>18</sup> Jacksonian populism, and its preference for direct democracy, took hold.<sup>19</sup> Insulating judges from political accountability was seen as antidemocratic and likely to produce an aristocratic, arbitrary, and unresponsive judiciary.<sup>20</sup>

Mississippi became the first state to provide for the direct election of appellate judges in 1832.<sup>21</sup> Between 1846 and 1860 there were sixteen state constitutional conventions; all but two provided for the popular election of both appellate- and inferior-court judges.<sup>22</sup> By the Civil War, most states had converted to direct election of state supreme court and lower court judges.<sup>23</sup> With the admission of Missouri in 1832 and continuing through 1958, every state that entered the Union provided by constitution for an elected judiciary,<sup>24</sup> some partisan, some nonpartisan.

Wisconsin, of course, was among these, achieving statehood in 1848.<sup>25</sup> Our entire state judiciary is elected and nonpartisan. However, Alexander Stow, one of the first justices of the Wisconsin Supreme Court, was utterly opposed to an elected judiciary and accepted the position with the promise that he would not run for a second term.<sup>26</sup> He kept his word and left the bench after two and a half years of service.<sup>27</sup>

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ed. 1966).

16. Stephen B. Presser et al., *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 356 (2002).

17. *Id.* at 356–57.

18. *Id.* at 358.

19. *Id.*

20. *Id.* at 359.

21. *Id.* at 358.

22. *Id.*

23. *Id.*

24. *Id.*

25. PORTRAITS OF JUSTICE: THE WISCONSIN SUPREME COURT'S FIRST 150 YEARS 1 (Trina E. Gray et al. eds., 2d ed. 2003).

26. *Id.*

27. *Id.*

At least one observer of American democracy saw some danger in the shift toward elected judiciaries. Alexis de Tocqueville noted:

Under some [state] constitutions the *judges* are *elected* and subject to frequent reelection. I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates' independence, not judicial power only but the democratic republic itself has been attacked.<sup>28</sup>

The Progressive reform movement of the early twentieth century saw the development of yet another method of judicial selection, the so-called "merit selection" process.<sup>29</sup> Motivated by a desire to protect the judiciary from the extreme partisanship, cronyism, and corruption that tended to pervade the other branches of government, Progressive reformers in bar associations and "good government" groups pushed a proposal first developed in 1914 by a professor at Northwestern University School of Law.<sup>30</sup>

The proposal called for judicial nominations to proceed from a committee of experts, mostly lawyers selected by the organized bar, or some combination of the organized bar and the appointing authority (typically the governor).<sup>31</sup> The committee would screen candidates and develop a list of finalists for the governor, who would then fill judicial vacancies by appointing someone from the selection committee's list.<sup>32</sup> The appointee would take office, subject only to an up-or-down retention election in the next general election cycle and periodic retention elections thereafter.<sup>33</sup> In theory, the process would be nonpartisan, impartial, and merit based, maximizing the role of legal professionals who, it was thought, were better equipped than politicians or the general public to evaluate the qualifications of potential judges.<sup>34</sup> The retention-election feature of the system was designed to afford some level of public accountability.<sup>35</sup>

Missouri was the first state to adopt the so-called merit-selection method of judicial selection in 1940.<sup>36</sup> For a while no other state followed suit.<sup>37</sup>

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28. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 247 (J. P. Mayer & Max Lerner eds., George Lawrence trans., 1966).

29. Presser et al., *supra* note 16, at 361.

30. *Id.* at 360–61.

31. *Id.* at 361–62.

32. *Id.* at 362.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

Then, between 1958 and 1976, nineteen states converted to this method of judicial selection.<sup>38</sup> In addition, several others adopted some form of merit selection in combination with other methods.<sup>39</sup> So today, Benjamin Franklin's mischievous suggestion at the constitutional convention that the *lawyers* should choose the judges has in a sense come to pass in approximately half the states. Twenty-one states continue to select judges by partisan or nonpartisan direct election.<sup>40</sup> The rest adhere to the gubernatorial- or legislative-appointment model.<sup>41</sup>

The debate over state-court judicial selection has been rekindled by recent trends in state supreme court elections around the country, which have come to resemble legislative- and executive-branch elections in their rhetoric and expense. High-court races in many states have become multimillion-dollar propositions, with legislative-style rhetoric to match. Campaigns are increasingly run on exaggerated crime-and-punishment templates, to the exclusion of any broader discussion of legal philosophy. Special-interest organizations that used to involve themselves only in legislative- or executive-branch races have become intensely interested in state high-court politics and are prepared to spend enormous amounts of money to influence these races.<sup>42</sup>

Judicial campaigns in Wisconsin have historically suffered from a different sort of problem: Most were low-interest affairs in which the candidates had relatively modest budgets and limited opportunities to communicate with voters about their qualifications, experience, and judicial philosophy. The media paid little attention. Lawyers and bar associations, elected officials, labor organizations, and civic groups like the Rotary, Kiwanis, and local men's, women's, and senior-citizen clubs were the typical stops on the campaign trail. Paid advertising was important too, but it generally stuck to touting the candidate's experience and endorsements—especially endorsements from sheriffs and law-enforcement groups, prized for their ability to validate the candidate's law-and-order credentials, which most voters look for in a judge. These ads were typically illustrated by footage of courtrooms, gavels, handcuffs, jail cells, and pictures of the candidate talking with police officers—not terribly illuminating on the qualities necessary in a good judge, but at least not harmful to the public's understanding of the judicial function. It could reasonably be argued that these old-style judicial

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37. Michael DeBow et al., *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, 33 U. TOL. L. REV. 393, 395 (2002).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 278 (2002).

elections provided so little information to the voting public as to make judicial elections nothing more than meaningless contests over name recognition.

We are now experiencing the opposite extreme. Throughout the 1990s, we saw increasingly expensive and hard-fought supreme court races characterized by sharp rhetoric on hotly contested legal issues and greater participation by third-party interest groups. Still, we managed to avoid the bruising, big-money battles over control of our supreme court that many other states were experiencing. Now they have arrived, and I suspect they're probably here to stay.

This development, I think, is a predictable byproduct of the increased litigiousness of our society, the legislative responses to it, and the expanding use of the courts to bring about public-policy change. Special-interest combatants in the legislative process increasingly look to the courts to block disfavored legislation or to impose their public-policy preferences through litigation when they fail to accomplish their objectives through legislation. More fundamentally, these costly and rhetorically excessive high-court campaigns are a reaction to the struggle going on in state supreme courts around the country—ours included—over the proper role of the judiciary and the method of legal interpretation best suited to maintaining the balance of power between the judiciary and the other branches of government.

Broadly speaking, it is a struggle between conservative or textualist and liberal or purposivist judges. Labels are tricky, but to generalize, the former look to neutral principles and sources of interpretation that operate to limit judicial discretion: the text, structure, and history of the state and federal constitutions and laws; precedent; and traditional rules of legal interpretation. This approach tends to be more restrained in the use of judicial power and therefore more sensitive to separation of powers and the prerogatives of the other branches of government. On the other side of the philosophical divide are those who subscribe to a more expansive view of the judicial role and see the law as a malleable instrument through which judges should try to achieve the “right” or “best” or “just” result. These judges are more inclined to look behind the language and structure of the law to discover and implement the purpose the judge ascribes to it, more willing to modify traditional interpretive methods, and less inclined to defer to the other branches of government. This struggle has obvious consequences for judicial politics.

To return to *The Federalist No. 78*, Hamilton famously said that the judiciary has “neither FORCE nor WILL, but merely judgment,” and that “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point

out their duty in every particular case that comes before them.”<sup>43</sup> These “rules and precedents” operate as internal constraints on the judges to guard against any “deliberate usurpations on the authority of the legislature.”<sup>44</sup> The Federalists believed that because judges were bound by the requirements of traditional judicial method, and because the judiciary had neither purse nor sword, only a comparatively weak external check—the possibility of impeachment—was necessary to maintain the balance of power.<sup>45</sup> Federal judges, appointed for life and removable only by impeachment, enjoy the highest degree of decisional independence.

Not so an elected judiciary. My colleague Judge Posner has written a new book called *How Judges Think*.<sup>46</sup> I haven’t read the whole book yet, but in the opening chapters he discusses (among other things) an economic theory of judicial behavior that consists of evaluating the relative strengths of the internal and external constraints on judges.<sup>47</sup> Elections operate as an external constraint on state judges’ job performance. There is no question that this weakens judicial independence—that’s the whole point. Independence and accountability are important, but conflicting, values. In choosing an elected judiciary, Wisconsin has accepted a reduction in judicial independence in order to achieve a greater level of judicial accountability.

In the ordinary course, the internal constraints on judges operate to prevent this from becoming too great a sacrifice. Most of the time, judges who do not stray too far too fast from the judicial mainstream are reelected, often without opposition. But if the judges start loosening the internal constraints on the use of their power by altering the rules of interpretation too much or too swiftly—and therefore expanding their own power—the other branches of government and those who have an interest in the work of the courts will take notice, and the external constraint of the ballot box will kick in.

The price of direct electoral judicial accountability may be too high. Judges do not represent constituents, nor do they implement the will of the people as other elected officials do. Professor Esenberg notes the countermajoritarian character of some of our most important legal rights—freedom of speech, for example, and the procedural rights of criminal defendants—and is rightly concerned about the possibility that elected judges are influenced by the ballot-box consequences of their decisions.<sup>48</sup> Judges

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43. THE FEDERALIST NO. 78, *supra* note 15, at 227, 232–33.

44. THE FEDERALIST NO. 81, at 245 (Alexander Hamilton) (Roy P. Fairfield ed., 2d. ed. 1966).

45. *Id.*

46. RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

47. *See generally id.*

48. Esenberg, *supra* note 6.

cannot consult popular opinion in deciding cases but (to use Hamilton's words again) must "justify a reliance that nothing would be consulted but the Constitution and the laws."<sup>49</sup> We do not know the extent to which the threat of defeat in the next election might inhibit judges from making unpopular decisions dictated by law.

The colossal amount of money now spent on state high-court elections also leaves the troubling impression of influence-buying. I am not suggesting there is anything inherently sinister about interest-group participation in electoral politics; the people have every right to organize for the purpose of influencing elections. I am also not suggesting that special-interest participation in a judicial election means the judge who happened to benefit from that participation is ethically compromised. This is a problem of perception more than reality; we are not living in a John Grisham novel, at least not in Wisconsin.<sup>50</sup> Our ethics rules prohibit judges and judicial candidates from personally soliciting campaign contributions.<sup>51</sup> Funds are raised by the judge's campaign committee, and contributions are limited in size and subject to reporting and other requirements of state campaign finance law.<sup>52</sup> Receipt of a contribution from a lawyer or citizen does not automatically disqualify the judge from later hearing a case involving a contributing lawyer as counsel or a contributing citizen as litigant.<sup>53</sup> However, special-interest spending on state high-court races now far exceeds the candidates' own spending, and the staggering totals have prompted calls for new rules governing judicial recusal in cases involving direct contributors or third-party interests.

But remember that candidates for the supreme court have no control over the spending of outside interest groups; in Wisconsin coordination between a justice's campaign and third-party organizations is illegal.<sup>54</sup> Requiring recusal based on conduct over which the candidate has no control is ethically unnecessary and could subject the court to gross political manipulation. Disqualification decisions on a court of last resort are highly sensitive and difficult and sometimes affect the outcome of the case. The sideshow created by the clamor for justices to recuse themselves because of money raised and spent during an election<sup>55</sup> threatens to disrupt the work of the court and

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49. THE FEDERALIST NO. 78, *supra* note 15, at 232.

50. *See generally* JOHN GRISHAM, THE APPEAL (2008).

51. WIS. SUP. CT. R. 60.06(4).

52. WIS. STAT. §§ 11.06, 11.12, 11.26 (2005–2006).

53. WIS. SUP. CT. R. 60.03, 60.04(4), 60.06(4).

54. WIS. STAT. § 11.06(7).

55. *See, e.g.*, JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS (2008), *available at* [http://brennan.3cdn.net/1afc0474a5a53df4d0\\_7tm6brjhd.pdf](http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf).

undermine the public's confidence in its decisions. The United States Supreme Court will this term hear a case from West Virginia involving a state supreme court justice who cast the deciding vote throwing out a large jury verdict against a corporation whose CEO spent \$3 million to get that justice elected to the court.<sup>56</sup> More than \$500,000 of that total was spent directly on advertising in support of the justice's candidacy; the balance went to a special-interest group for the same purpose.<sup>57</sup>

Finally, the new era ushered in by this year's election also brings the danger that the ongoing, important philosophical clash over the role of the state supreme court will simply get lost in the political din. Crude, negative, and sometimes downright dishonest advertising appears to have overtaken our judicial elections, which have now descended into the partisan and special-interest power struggles that other states have experienced. This phenomenon certainly has the potential to exact too great a toll on judicial independence, distort the electorate's understanding of the judicial function, and shake public confidence in the impartiality of the judiciary.

But no method of judicial selection is perfect; all are prone to manipulation and politicization of some sort. The problem exists in federal judicial selection too, which has in some cases pretty much deteriorated into raw power politics. Special-interest coalitions now routinely subject federal judicial nominees to ideological litmus tests and distort records and attack reputations in order to defeat some nominees.

We have basically three choices when it comes to picking judges: We can have the people do it directly by partisan or nonpartisan election; we can have the people do it indirectly by executive or legislative appointment; or we can have lawyers do it, in combination with the executive by the so-called merit-selection approach. There are a number of problems with having lawyers do it. Merit-selection committees are totally unaccountable, and this method of choosing judges promotes a culture in which the bar—instead of the public and the rule of law—becomes the primary constituency for any judicial aspirant. The merit-selection committees in some states are susceptible of being captured and dominated by the more active and politicized elements of the organized bar, and sometimes have an underrepresentation of prosecutors and those who represent businesses.

Having said that, however, there are plenty of drawbacks to judicial elections, as I have already noted, and the various proposals for campaign finance reform, from public financing to restrictions on independent

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56. *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 WL 918444 (W. Va. Apr. 3, 2008), *cert. granted*, 77 U.S.L.W. 3051 (U.S. Nov. 14, 2008) (No. 08-22); *Petition for a Writ of Certiorari at 2, Caperton v. A.T. Massey Coal Co.*, No. 08-22 (U.S. July 2, 2008), 2008 WL 2676568.

57. *Petition for a Writ of Certiorari, supra* note 56, at 7.

expenditures, are legally and politically controversial and may create more problems than they solve.

It may be that the recent trends in our supreme court elections will abate. It is not impossible to elevate the level of discourse and still articulate the philosophical differences that exist between judicial candidates so that the public understands what's at stake. Drawing these philosophical contrasts does not require playing on voters' fears or hitting them between the eyes with images of bloody knives, dead bodies, empty swings, and mug shots of child molesters.

But if these trends continue, and if merit-selection systems are less desirable from an accountability standpoint, then it may be that the federal model of executive appointment with or without legislative confirmation will emerge as the best way to maintain judicial independence, along with at least some level of public accountability in the state courts. Governors, like presidents, will be inclined to appoint judges of conservative or liberal judicial philosophy, depending upon their own philosophical approaches to government, which the voters have explicitly endorsed by electing them to office.

This is not always the case, however, and many a president and governor has been surprised by a judicial appointee. When Chief Justice Roger Taney died in 1864, President Lincoln was well aware that the greenback legislation, which had been used to finance the Civil War effort, as well as measures pertaining to emancipation, would eventually be challenged in the Supreme Court.<sup>58</sup> In deciding on his nominee, Lincoln is reported to have said to a confidant:

[W]e wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore we must take a man whose opinions are known.<sup>59</sup>

Lincoln made what he expected would be a safe choice: Salmon Chase, his secretary of the Treasury, who had been the architect of the greenback legislation.<sup>60</sup> Chief Justice Chase wrote the first opinion (later overruled) in the so-called "Legal Tender Cases" striking down the greenback legislation as

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58. See 2 GEORGE S. BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 29 (Greenwood Press 1968) (1902).

59. *Id.*

60. *Id.*

unconstitutional.<sup>61</sup> On the other hand, President John Adams, who appointed the great Chief Justice John Marshall, is reported to have said at his retirement, “John Marshall was my gift to the American people.”<sup>62</sup>

I hope we have not reached the point of needing to overhaul the way we select our judges in Wisconsin. Although I don’t travel around the state as much as I used to as a member of the state supreme court, I do not have the sense that the people of Wisconsin are so disgusted by our judicial politics that they are ready to disenfranchise themselves over the direct selection of judges. Time and circumstances, however, will give us the answer to that question.

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61. See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 625 (1869).

62. Chief Justice William H. Rehnquist, Supreme Court of the U.S., Remarks at the Federal Judges Association 2001 Quadrennial Conference (May 8, 2001), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_05-08-01.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_05-08-01.html).