TWO CHEERS FOR THE APPOINTMENT SYSTEM

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There is no perfect system for selecting state supreme court justices.[1] My first title for this Article was *Two and a Half Cheers for the Appointment System*, which eventually became, *Two Cheers for the Appointment System*, as I recognized that some of my inherent support for the appointment system may have been overly influenced by my support for the federal system and the New Jersey system with which I basically grew up. I can remember, as a new lawyer and law professor, being disappointed when campaign advertisements would appear for judges from other states. I can still recall a commercial where a judge running for office was pictured slamming a jail house door and saying something to the effect that he would be tough on crime. As I analyzed my own arguments in favor of the appointment system while working through the various arguments pro and con I became less sure of my own position.[2] However, the ultimate conclusion of this paper is still that the appointment system—appointment by the governor with advice and consent of the state senate—is a better system than an elective system or the so-called merit or Missouri system. I realize that in light of the opinion of some[3] that position makes me an elitist as opposed to a populist.

While the merit system and the elective systems dominate in the state courts, for the entire history of this country—since the ratification of the U.S. Constitution—the appointment system has been used at the federal level to appoint all federal district court judges, circuit court of appeals

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In the spirit of full disclosure, it should be noted that my wife is an appointed judge in New Jersey currently serving on the Appellate Division. My special thanks to Professor Edward Hartnett who reviewed a draft and provided significant insight for this article. My thanks also to Peter Mograbi, my research assistant, for excellent research for the article.

1. While this paper will essentially deal with state supreme court justices, it could and should also apply to selection of all statewide judges as well. While it is clear that it is less likely that trial judges will be making broad decisions, I believe the appointment system works better in that case as well.

2. Additionally after attending a recent meeting of the Council of Chief Judges of Intermediate Courts of Appeal, I was impressed by the quality of the judges. They came from courts selected by all different methods, and thus I recognize that good judges can come from all different systems.

3. *See* Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751 (2009).

judges, as well as the Supreme Court justices. It is also used in a number of states, but the election systems and merit systems, which usually include a retention election, are much more common.[4] Of course, relying upon the federal system for support probably makes me more clearly an elitist. As John Hart Ely recognized, the federal system with its doctrine of judicial review, is in fact an elitist system because the Court has the power to undo the acts of Congress as well as the legislatures, thus substituting its own judgment for that of the people acting through their elected representatives.[5]

I recognize that my position is inconsistent with the various polls that indicate the majority of people in this country favor the election system. Thus, in the common view the populist position wins. The Annenberg Judicial Independence Survey found that 65 percent of those surveyed favored the popular election of judges.[6] A poll for Justice at Stake may explain why so many support the election system. That study indicated that the respondents felt that many judges were legislating from the bench and making, rather than interpreting, law.[7]

In another study reflecting the popular support for the election system, Professor Geyh discusses his "axiom of 80":

Efforts to address threats to independence that arise in the context of selecting judges must take into account four political realities, that together constitute what I am calling the "Axiom of 80": (1) Roughly 80 percent of the public prefers to select its judges by election and does so; (2) Roughly 80 percent of the electorate does not vote in judicial elections; (3) Roughly 80 percent of the electorate cannot identify the

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4. For discussion of the many different systems, see John B. Wefing, *State Supreme Court Justices: Who Are They?* 32 NEW ENG. L. REV. 47, 71 (1997).

5. John Hart Ely, *The Apparent Inevitability of Mixed Government*, 16 CONST. COMMENT. 283, 290-92 (1999). Ely recognized that originally the Senate had been set up to be the wise men who would constitute the elite component of government, but with the eventual change in the method of selection of the Senate (an elective system), the Court became the branch of government to decide when the elected system went astray and although Ely does not support the process, he recognized it is almost inevitable. *Id.* While he says "it turns his stomach," he sees that the "message is clear: government by the people may be an ennobling myth, but sometimes the people get it wrong, and as the reflexive elite element in our law-making system, the justices must keep them within the bounds of what is acceptable to the reasoning class." *Id.*

6. Press Release, The Annenberg Public Policy Center, Judicial Independence Survey (May 23, 2007), http://www.annenbergpublicpolicycenter.org/Downloads/Releases/Release_KHJ_Judicial CampaignFunds20070523/jamieson_judicialelectionsurvey_factcheckconfFINALFINAL .pdf.

7. Results to Justice at Stake Frequency Questionnaire, Greenberg, Quinlan, Rosner Research, Inc., Justice At Stake Campaign (Oct. 30-Nov. 7, 2001), http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf.

candidates for judicial office; and (4) Roughly 80 percent of the public believes that when judges are elected, their decisions are influenced by the campaign contributions they receive.[8]

However, it should be noted that there was far greater support for non-partisan elections than for partisan elections. Professor Streb cites the Justice at Stake Campaign in his statement that "respondents were close to three times more likely to support nonpartisan elections than partisan contests."[9] The "axiom of 80" certainly seems to demonstrate some of the problems with the elective system.

The American Justice Partnership found that 75 percent of voters were in favor of an election system.[10] However the question posed in that poll was: "In general do you think state Supreme Court judges should be elected by the voters, or appointed by a governor?"[11] The most common form of appointment by a governor requires confirmation by the senate.[12] Thus, when the question is posed without considering the important role of the senate in many appointment states, it can slant the vote in favor of election. This is especially the case if the respondents have a negative opinion of a particular governor and believe that governor has the sole voice in the process. It should also be noted that the poll was conducted before the recent decision in *Caperton v. A.T. Massey Coal Co.*[13]

Caperton dramatically demonstrates some of the problems with the election system.[14] The central issue in the case was popularized by the author John Grisham in his novel, *The Appeal*.[15] In the Caperton case, the CEO of a major mining company,[16] Don Blankenship, sought to change

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8. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52 (2003).

9. Matthew J. Streb, *Partisan Involvement in Partisan and Non Partisan Trial Court Elections*, *in* RUNNING FOR JUDGE; THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS, 96, 96 (Matthew J. Streb ed., 2007).

10. Results of a National Voter Opinion Survey, Ayres, McHenry, & Associates, Inc., American Justice Partnership Foundation Survey Initiative (July 2008), http://www.legalreforminthenews.com/2008PDFS/State_Supreme_Court_Elected_vs._Appointed_7-8-08.pdf.

11. *Id.*

12. In Massachusetts and New Hampshire, the consent is by their executive councils. In Maine and Rhode Island the consent comes from the state legislature.

13. 129 S. Ct. 2252 (2009).

14. *See id.*

15. JOHN GRISHAM, THE APPEAL (2008).

16. A.T. Massey Coal Co. recently became notorious when an explosion in one of its mines killed many workers. Subsequently there was significant criticism of the safety conditions at the mine. Steven Mufson, *Massey Energy has Litany of Critics, Violations*, WASH. POST (Apr. 6, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040601531.html.

the direction of the West Virginia Supreme Court of Appeals.[17] The court had been leaning towards the plaintiff side and he wanted it to lean in the direction of corporate defendants. There had been a large judgment ($50 million) against Massey and there was to be an appeal.[18] The CEO was convinced that the then-Supreme Court would vote against his company.[19] One of the pro-plaintiff jurists was up for election.[20] Blakenship spent millions of dollars attacking the incumbent,[21] and his opponent, Brent Benjamin, won.[22] When the case came before the West Virginia high court, Benjamin was asked to recuse himself but he refused. The case eventually reached the U.S. Supreme Court on the refusal to recuse and the Supreme Court held in a five-four opinion[23] that the refusal to recuse violated the due process clause of the Fourteenth Amendment.[24]

There has been much discussion of correctness of that decision but, regardless of that dispute, the case clearly brings to the fore the concerns that many have as to the ability of judges, who must run for office and must therefore raise money, to be objective when dealing with cases wherein either the parties to the case or the attorneys for those parties have contributed to their campaigns or perhaps even more importantly where the parties or lawyers have contributed to their opponent's campaign. There is an argument that the same potential problem can arise in an appointment system if a judge is aware that parties appearing before him or her have contributed heavily to the campaign of the governor who appointed him or her to the judgeship. While this is a potential problem particularly in a state that has a process of

17. *Caperton*, 129 S. Ct. at 2252.

18. *Id.* at 2256.

19. *Id.* at 2254.

20. *Id.* at 2257.

21. These ads said the incumbent was soft on child molesters. *See, e.g.*, Adam Liptak, *Case May Alter Judge Elections Across Country*, N.Y. TIMES, Feb. 15, 2009, at A29.

22. *Caperton*, 129 S. Ct. at 2257-58.

23. Justice Kennedy, the swing justice, joined with the liberal justices Stevens, Ginsburg, Breyer and Sotomayor, against Roberts, Scalia, Thomas and Alito. *See, Times Topics: Anthony M. Kennedy*, N.Y. TIMES, (July 1, 2009), http://topics.nytimes.com/top/reference/timestopics/people/k/anthony_m_kennedy/index.html.

http://electionlawblog.org/archives/013784.html

24. *Caperton*, 124 S. Ct. at 2257. Many articles have already been written concerning this case. *See, e.g.*, Jed Handelsman Shugerman, *In Defense of Appearances: What* Caperton v. Massey *Should Have Said*, 59 DEPAUL L. REV. 529 (2010); Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 89 (2009).

reappointment, it seems much less direct and less likely to affect the decision-making of the judge.

Justice O'Connor, in a concurring opinion in a First Amendment freedom of speech case, dramatically voiced her concerns about the use of elections in choosing justices:

> [I]f judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.[25]

Justice Stevens, joined by Justice Souter, also noted their concern with the election system saying:

> Our holding . . . should not be misread as endorsement of the electoral system under review, or disagreement with the findings of the District Court that describe glaring deficiencies in that system and even lend support to the broader proposition that the very practice of electing judges is unwise. But as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: "The Constitution does not prohibit legislatures from enacting stupid laws."[26]

As elections have become more and more expensive, judges in states that utilize an election system have to spend time raising money, and as Justice O'Connor has recognized, often the parties who make contributions expect something in return. Justice O'Connor said: "[C]ontested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds . . . [T]he cost of campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups."[27]

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25. Republican Party of Minnesota v. White, 586 U.S. 765, 789 (2002). In an earlier opinion, the U.S. Supreme Court recognized the difficult position that judicial elections create. *See* Chisom v. Roemer, 501 U.S. 380 (1991). The Court recognized a "fundamental tension between the ideal character of the judicial office," in which public opinion would be "irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment," and "the real world of electoral politics." *Id.* at 400.

26. N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 801 (2008).

27. *White*, 536 U.S. at 789-90.

This concern can only be heightened by another recent decision of the U.S. Supreme Court, where the Court held in a five-four opinion[28] that corporations and labor unions were allowed to participate more actively in supporting candidates.[29] While they were still not permitted to make direct contributions to candidates, they were allowed to expend funds on behalf of candidates.[30] That case was based on the free speech rights of corporations and labor unions.[31] The Court struck down certain provisions of congressional legislation, which prohibited corporations and unions from using their funds to give political support,[32] and in the course of the decision overruled two earlier opinions.[33] It is not the purpose of this Article to discuss the constitutional issues involved in that case, but merely to point out that the issues in *Caperton* are exacerbated by *Citizens United.*

While I would hope these decisions would affect the polls done with regard to support for the elective system, I recognize that most people, who will be polled will not be aware of the *Caperton* or *Citizens United* cases and it would also seem unlikely that the additional number who will be aware of it through Grisham's *The Appeal* would be sufficient to change the outcome of the polls. However, some recent studies have suggested that people are beginning to realize the dangers of the election system. A 2002 poll by the American Bar Association found 72 percent of respondents were at least "somewhat concerned" that the need to raise money could compromise the impartiality desired of judges.[34] Professor Shugerman says:

> More and more polling indicates that the public already perceives a problem . . . For example, in the midst of Michigan's expensive 2008 race, large majorities of Michigan voters perceived a problem of bias: 63% believed that campaign contributions affect judges' decisions, and 85% answered that judges should recuse themselves from a case when a party had contributed more than $50,000 to their campaigns.[35]

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28. The five justices in the majority included Kennedy (the author), Roberts, Scalia, Thomas and Alito. The dissenters were Stevens, Ginsburg, Breyer and Sotomayor.

29. Citizens United v. FEC, 130 S. Ct. 876, 917 (2010).

30. *Id.* at 922.

31. *Id.* at 893.

32. *Id.* at 913.

33. *See* McConnell v. FEC, 540 U.S. 93, 161 (2003); *see also* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 655 (1990).

34. Press Release, American Bar Association, Poll: Confidence in Judiciary Eroded by Judges' Need to Raise Campaign Money (Aug. 12, 2002) (on file with author).

35. Shugerman, *supra* note 24, at 533 (footnote omitted). Shugerman also describes another case in Illinois in which State Farm Insurance Co. heavily supported one

The grant of certiorari in the *Caperton* case did begin to change the dynamics. According to Professor Shugerman:

> West Virginia officials suddenly proposed various reforms of the state's judicial elections, and Governor Joe Manchin appointed an Independent Commission on Judicial Reform that is already garnering praise. Just before Caperton's Supreme Court oral argument, Chief Justice Wallace Jefferson of the Texas Supreme Court called for an end to competitive elections and decried 'the corrosive influence of money' in judicial elections . . . . The Washington state legislature debated a public funding plan for its judicial elections, along with other reforms . . . .[36]

On the other hand, Professor Shugerman also notes that there is a movement in Missouri, the original home of merit selection, to return to partisan elections. That movement failed in 2010, but advocates of the switch are already gearing up for a campaign in 2011.[37]

In discussing the *Caperton* case, Professor Karlan says:

> While the Court's opinion in *Caperton* focused explicitly only on the way that extraordinary infusions of money into a judicial election may threaten judicial impartiality, the Court's analysis cannot be so easily cabined. Money, after all, gains its power in elections because it is the fuel of politics and can be converted into votes. If gratitude for a past financial contribution can pose a sufficiently serious "risk of actual bias or prejudgment" to threaten "the guarantee of due process," then what should we make of the more direct effect that comes from fear of future electoral retaliation? Political calculations could influence judges' decisions in a wide range of cases and might influence them in less visible, and thus more pernicious and less potentially self-correcting, ways than campaign spending does.[38]

Retention elections under the merit systems can also create difficulties. In probably the most notorious case in which state supreme

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candidate who then won and did not recuse himself in a case dealing with a matter concerning State Farm: "He cast the decisive vote overturning the verdict against State Farm for breach of contract. One might say that State Farm received a return of $456 million on a savvy investment of about $1 million." *Id.*

36. *Id.* at 551-52.

37. *Id.* at 552; GAVELGRAB, http://www.gavelgrab.org/?cat=7 (last visited Dec. 29, 2010).

38. Karlan, *supra* note 24, at p. 81 (footnote omitted).

court justices were not reelected in a retention election, Chief Justice Rose Bird and two other members of the California Supreme Court were defeated in 1986 primarily as a result of their decisions in death penalty cases.[39] Would those decisions have changed if the justices had realized that those decisions would affect their future tenure on the Court? Until that retention election, most judges and justices facing a retention election would be almost automatically elected. This continues to be true according to Professor Shugerman, who states: "Between 1% and 2% of judges running in retention elections have been defeated . . . ."[40] However, even this small number could influence judges. A survey of state judges back in 1994 indicated that "27.6% of respondents said retention elections made them more sensitive to public opinion and 15.4% said they would avoid controversial cases and rulings."[41] I assume a populist would say that it was a good thing if a judge was more sensitive to public opinion. An elitist might think the opposite.

Professor Shugerman points out:

> The multi-million-dollar price tag on a West Virginia state supreme court seat and the nastiness of its campaign are increasingly common. Almost 90% of state judges face some kind of popular election . . . . In 2004, the seventeen most expensive judicial elections cost at total of $47 million in direct contributions. In 2006, the eleven most expensive elections cost over $34 million, . . . including the $13 million raised for an Alabama supreme court seat and over $2 million per supreme court seat in Kentucky, North Carolina, Nevada, Ohio, and Texas.[42]

There have been suggestions that one solution to the problem is that the government should fund these campaigns.[43] However, the study done for the American Justice Partnership notes that the majority of those polled opposed using public funds for financing judges' elections.[44] However, the poll was closer on that issue with 53 percent thinking it was a bad idea and 43 percent thinking it was a good idea and 4 percent

39. *See* John Gibeaut, *Taking Aim*, A.B.A. J., Nov. 1996, at 53.
40. Shugerman, *supra* note 24, at 535 (footnote omitted).
41. Gibeaut, *supra* note 39, at 53.
42. Shugerman, *supra* note 24, at 531-32 (footnote omitted).
43. *See* American Justice Partnership Foundation, *supra* note 10, at 4.
44. *Id.*

with no opinion.[45] It may be unlikely that there will be any significant movement in that direction.

The combined appointment system with a retention election is often touted as combining the best parts of both systems. However, as Professor Tarr points out, in recent years many retention elections have become just as contested as partisan elections: "[S]tate supreme court justices running in retention elections may face the same expensive vituperative challenges that were previously confined to partisan races."[46] Professor Tarr further reports on a number of challenges in retention elections and a number of situations in which Justices fearing challenge from outside groups felt it necessary to raise large sums of money even though no challenge was actually made:

> Uncertainty about the likelihood of an electoral challenge may affect judicial decision-making as well, because judges may seek to avoid decisions that will bring the wrath of interest groups down on them. The prospect of an election in which a single decision can be taken out of context and used to attack a judge may have a chilling effect upon judicial independence.[47]

In the elections in 2010, three justices on the Iowa Supreme Court were defeated in a judicial retention election. This was the first time members of that Court had been rejected by the voters. Most stories about the elections referred to the decision of the Supreme Court in favor of gay marriage as the primary reason for the defeat. As *The New York Times* said: "Financed largely by out-of-state organizations opposed to gay marriage, those pushing against the judges were successful in turning the vote into a referendum on the divisive issue."[48] However, there were apparently other issues that also played a role in that decision, including a general feeling that the court had lost contact with the people from issues as simple as changing the court hours without notice, failure to participate in bar events, appearing elitist and taking the position that judges should never be voted against rather than presenting reasons to justify retention.[49]

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45. *Id.*

46. G. Alan Tarr, *Do Retention Elections Work?* 74 MO. L. REV. 605, 613 (2009).

47. *Id.* at 614.

48. A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES (Nov. 3, 2010), http://www.nytimes.com/2010/11/03/us/politics/03judges.html.

49. James Strohman, in an article in Insideriowa.com, said:

> They could have critiqued the Court for more mainstream complaints, such as the time it takes to turn out cases, the general workload of the Court, and the

The *Wall Street Journal* in its Saturday/Sunday edition on November 6/7, 2010, editorialized against the Missouri system and applauded the decision of the voters in Iowa, saying, "Far from a beacon of judicial independence, the three Iowa justices were fired because they put their own political preferences above their commitment to the law. If judges want to avoid recalls, they should leave social legislation to legislators."[50]

The *Wall Street Journal*, however, also printed a letter from the wife of an elected judge supporting the election system. Elizabeth Hammond considered the experience of running for office as the following:

> Physically and mentally demanding . . . however, it strengthens the candidate tempering the steel so to speak, and ultimately makes the officeholder infinitely better prepared to fulfill the responsibilities of the job without succumbing to political pressures or wishes of the person (governor) or panel (merit selection board) who did the appointing. If you know you have won an election, it is much easier to tell a kingmaker that you are not beholden to him, than if you owe a governor or a nomination committee for your appointment.[51]

In another retention election in 2010, a great deal of money was spent. Chief Justice Thomas Kilbride of the Illinois Supreme Court won after his supporters raised $2.5 million, as contrasted with his opponents who spent $650,000. Kilbride's support came from plaintiffs' lawyers and unions, as well as political groups interested in how the court will decide disputes arising out of redistricting, while his opponent was supported by corporate and insurance company interests.[52]

Just prior to the elections in 2010, *The New York Times* reported the following:

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underlying partisan nature of the current appointment process, which some say is controlled by lawyers and heavily influenced by the sitting governor.

James Strohman, *Will Iowa Judges Survive?*, INSIDERIOWA.COM (Oct. 21 ,2010), http://insideriowa.com/index.cfm?nodeID=18894&audienceID=1&action=display&news; discussions with judge from Iowa.

50. *Politics Touches Any Method of Selecting Our Judges*, WALL ST. J., Nov. 8, 2010, at A12.

51. Letter from Elizabeth Hammond to the Editor, *Politics Touches any Method of Selecting Our Judges,* WALL ST. J. (Nov. 8, 2010), http://onlines.wsj.com/article/SB10001424052748704462704457559031009908693O.html.

52. *Judges and Money*, N.Y. TIMES, Oct. 29, 2010, at A22, *available at* http://www.nytimes.com/2010/10/30/opinion/30sat2.html.

> [T]wo dozen states are having active judicial elections . . . a total of 18 seats are being contested in multicandidate races in 11 states, while 37 sitting state justices are seeking voter approval in up-or-down "retention elections.

The *Times* editorial went on to quote Adam Skaggs, a lawyer with the Brennan Center for Justice at the New York University Law School, saying that the spending this year "could surpass the total for the entire previous decade.[53]

Professor Tarr also points out another problem with retention elections.[54] Because so many voters have little information about the judge facing a retention election, often incompetent judges are reelected. He states, "[U]nqualified incumbents have been retained, sometimes in the face of public opposition by the bar, presumably because reports of judicial misconduct or ineptitude have not filtered down to the voting public.[55]

There have been many attempts to determine which system creates the best results. However, because there are so many state high courts, and no one can be an expert on all those courts, it becomes virtually impossible for any one person to be able to adequately analyze all those courts. The membership of courts changes over time and some courts with particularly brilliant justices and great reputations may change when those justices leave those courts.

One recent study used the number of opinions rendered as one of its factors to determine judicial quality.[56] Recently, I was speaking with an appellate judge from an election state. I told him of the norm in my state, an appointment state, that the appellate judges write 108 opinions a year. He then said his chambers puts out over four hundred opinions. After further discussion I learned that he had a large number of clerks and that he simply reviewed the opinions written by the clerks. That conversation convinced me that numbers of opinions had little to do with the quality of the system. That same study recognized that "[c]onventional wisdom holds that appointed judges are superior to elected judges because appointed judges are less vulnerable to political pressure."[57] And while

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53. *Fair Courts in the Cross-Fire,* N.Y. TIMES, (Sep. 28, 2010), http://www.nytimes.com/2010/09/29/opinion/29wed1.html.

54. *Id.* at 628.

55. *Id.* at 629.

56. Stephen J. Choi, G. Mitu Gulati, & Eric A. Fraser, *Professional or Politicians: The Uncertain Empirical Case for an Elected Rather that Appointed Judiciary* 10, (Univ. of Chi. Law School, Working Paper No. 357, 2d series, 2007), *available at* http://www.law.uchicago.edu/files/files/357.pdf.

57. *Id.* at 2.

the study supports elected judges, it begins by recognizing that "[a]ppointed judges write higher quality opinions than elected judges do, but elected judges write more opinions, and the evidence suggests that the large quantity difference makes up for the small quality difference."[58] That study relies on three factors to determine the better system: productivity, quality and independence.[59] After concluding that their study did not find any qualitative difference in terms of independence, the authors concluded that the issue comes down to quality versus quantity and seems to conclude that quantity is more important than quality.[60] I, on the other hand, would come down in favor of quality.

In determining quality, the authors relied upon the number of citations from outside states to the opinions of the judges.[61] The study found, "[T]he average judge in a partisan election system in one year writes opinions cited . . . in the aggregate 11.3 times, whereas the average judge in an appointment state writes opinions cited in the aggregate 15.0 times."[62] However, the authors of the study then indicate that because the elected judges write more opinions, they actually get an equal number of citations but based on the larger number of opinions.[63]

One of the concluding paragraphs in the study says:

> The most striking differences are as follows. Compared with Appointed judges, Elected judges make more campaign contributions; are paid less; are on less stable benches; have shorter tenures; are more likely to have gone to a law school in the state in which they sit; are more likely to have gone to a lower-rank law school. They are, in short, more politically involved, more locally connected, more temporary, and less well-educated than appointed judges. They are more like politicians and less like professionals. . . . In sum, a simple explanation for our results is that electoral judgeships attract and reward politically savvy people while appointed judgeships attract more professionally able people. However, the politically savvy people might give the public what it wants—adequate

58. *Id.*
59. *Id.* at 2.
60. *Id.* at 3.
61. *Id.* at 38.
62. Choi, *supra* note 56, at 38.
63. *Id.* at 39.

> rather than great opinions, issued in greater quantity and therefore (given the time constraint) average speed.[64]

These arguments may thus explain, at least in part, the reason why the majority of people want an elected judiciary: they get what they want. However, is that what is best? I can understand that when the discussion focuses on trial court judges, there can be some argument that justice delayed is justice denied, and thus, speed of decision may have some bearing on the quality of justice. However, when it comes to appellate and highest court decisions I would have to conclude that quality has to trump quantity. In the conclusion of Professor Geyh's article on the elected judiciary in which he urges elimination of elected judiciaries, he recognizes that he might be like Don Quixote tilting against windmills.[65] But perhaps the recent extreme example created by the *Caperton* case might galvanize support for change. Therefore, I am also willing to tilt at windmills by suggesting an appointment system in the New Jersey mode.

In my career as a law professor for 42 years, I have taught Federal Constitutional law and New Jersey Constitutional law, and thus, have focused in both courses on courts selected by an appointment system. Even in teaching criminal procedure, I have taught primarily U.S. Supreme Court cases, but have also supplemented it with cases from New Jersey, which diverge from Supreme Court precedent by creating broader protections for New Jersey citizens, particularly in the search and seizure area.

New Jersey essentially follows the federal model with appointment by the chief executive with advice and consent of the senate.[66] One difference is that in New Jersey the initial appointment is for seven years, and if reappointed, the candidate has tenure and is on the court until mandatory retirement at age 70.[67]

It should be noted that New Jersey briefly flirted with election of judges in the Jacksonian era.[68] It was limited, however, to election of local judges, not state or county judges. Chief Justice Richard J. Hughes of the New Jersey Supreme Court, a former governor of New Jersey who

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64. *Id.* at 41-42.

65. Geyh, *supra* note 8, at 79.

66. John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 714 (1998).

67. *Id.*

68. It was during the Jacksonian era when many of the states turned to the election system for selection of their judges and justices.

had appointed numerous judges and was opposed to any election system, describes that flirtation:

> One of the ways in which our second Constitution, that of 1844, reflected the democratic revolt of the Jacksonian era was in providing for the popular election of justices of the peace by townships and in the cities by wards. Such elections, here and elsewhere throughout the country generally, reflected the popular demand of the period for the direct election of judges who would be "close to the people," and no thought was given to imposing any standards of qualifications for the office. Thus the New Jersey Constitution of 1844 put the justice of the peace in local politics with the undesirable results that inevitably flow from mixing judicial work and politics. The election of a justice of the peace as a prank of his neighbors was not unknown and the office shrank in dignity and usefulness.[69]

I am swayed to support the appointment system by my rejection of an election system as well as by my regard for the New Jersey Supreme Court.[70] The 1947 Constitution in New Jersey radically changed the judiciary, streamlined the system, and created a strong court.[71] Prior to that constitution, the system in place was a hodge-podge of different courts and a highest court called the Court of Errors and Appeals with 16 members all of whom had other responsibilities and gave only part of their time to the court.[72] The Constitutional Convention created a system that was praised by many. Arthur T. Vanderbilt was one of the architects of the new court. He had previously served as president of the American Bar Association, and had taken as his mandate for his year in office improving judicial systems across the country.[73] He was thus an

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69. *In re* Yengo, 371 A.2d 41, 45 (N.J. 1977).

70. This is not to suggest that I agree with all the opinions rendered by the New Jersey Supreme Court. I disagree strongly with a number of the opinions, but on the whole, the system in New Jersey has managed to create a generally independent, thoughtful court, which has broken ground in a number of important areas of the law. *See* Stewart G. Pollock, *Celebrating Fifty Years of Judicial Reform Under the 1947 New Jersey Constitution*, 29 RUTGERS L.J. 675, 676 (1998); Wefing, *supra* note 66; John B. Wefing, *Search and Seizure—New Jersey Supreme Court v. United States Supreme Court*, 7 SETON HALL L. REV. 771 (1976).

71. ARTHUR T. VANDERBILT II, CHANGING LAW: A BIOGRAPHY OF ARTHUR T. VANDERBILT 161 (Rutgers Univ. Press 1976).

72. *Id.* at 80-81. It included the chancellor, the nine justices of the Supreme Court and six lay members. *Id.*

73. *Id.* at 90-95. He had also been dean of NYU Law School, *id.* at 135, Republican leader of Essex County, *id.* at 28, and a well-regarded trial attorney. *Id.* at 19.

important figure pushing for judicial reform. He would eventually become the first chief justice in New Jersey under the new system. His high standing in the legal world was confirmed when he was seriously considered to be chief justice of the United States but lost out to Earl Warren.[74]

There were a number of facts about the newly formed court system in New Jersey which would aid in making the appointment system work. The chief justice was the administrative head of the court system. In that capacity he/she has the authority to assign the judges of the superior court. Once a person is appointed to the superior court, the chief justice determines that person's assignment. This even applies to assignment judges or appellate division judges. There is no separate appointment to the appellate division. Thus, the chief justice decides who will serve in that intermediate appellate court. The chief will generally consult with senior members of the appellate division to determine which trial judges appear to have the writing and analytical skills, which make them appropriate for the appellate division. Since governors sometimes pick members of the appellate division to serve on the supreme court their abilities have already been vetted and their training as appellate judges serves them well when they are appointed to the supreme court. While historically, many of the appointees to the supreme court have not come from the appellate division, with governors often choosing the counsel to the governor or the attorney general of the state, recently governors have begun selecting some of the new supreme court justices from the ranks of the appellate division.[75] It is somewhat similar to the fact that in recent years, most of the members of the United States Supreme Court had previously served on the federal appellate courts.[76]

The New Jersey system has another unwritten but strictly followed component which may improve on other appointment systems. This part of the appointment process appears to be almost unique to New Jersey:[77] the tradition—unwritten but strictly adhered to—is the balancing of political parties. There always has to be a balance on the Court. For years, that meant that there had to be either four Democrats and three

74. VANDERBILT II, *supra* note 65, at 213.

75. Recently, Justices Virginia Long, John Wallace, and Helen Hoens were all serving on the Appellate Division when nominated for the Supreme Court.

76. Until the recent appointment of Justice Kagan to the U.S. Supreme Court, all nine members of the Supreme Court had served as circuit court judges before their appointment to the Supreme Court.

77. The Delaware Constitution mandates bi-partisanship. *See* DEL. CONST. art IV, § 3. It provides: "First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party." *Id.*

Republicans, or four Republicans and three Democrats. However, currently, there are four Democrats, two Republicans, and one independent on the court—although the one Independent is seen as a Republican because the independent worked in a number of positions within Republican administrations.

This tradition of bi-partisanship actually goes back prior to the 1947 Constitution.[78] In his book, *The Challenge of Law Reform*, published in 1955, Arthur T. Vanderbilt, the first chief justice under the 1947 Constitution, said: "There is another principle of judicial selection the wisdom of which cannot be stressed too strongly. I refer to a bipartisan judiciary . . . such as New Jersey has enjoyed for a century as a matter of unbroken tradition without constitutional or statutory compulsion."[79] Vanderbilt, a longtime Republican leader of Essex County demonstrated his awareness of political pressures in his next comment: "A bipartisan system insures that at least half of the judges will not be appointed for political considerations, but rather because they are competent lawyers with judicial temperament."[80] Further, he said that an important effect is that "the decisions of a bipartisan court in cases which are of political importance have more weight with the profession and the public, especially if the decisions are unanimous or substantially so, than would the decisions of a court chosen exclusively or preponderantly from one political party."[81]

He concluded by saying: "Paradoxically though it may sound, a bipartisan judiciary is the only way in this country to achieve a nonpartisan judiciary, and who would deny that all justices should be nonpartisan?"[82] In his first yearly assignment of superior court judges, Chief Justice Vanderbilt also discussed the importance of the bipartisan nature of the courts.[83] He said: "I have tried throughout to give effect to the recognized tradition in this State for bipartisan courts. Thus I have

78. ARTHUR T. VANDERBILT, THE CHALLENGE OF LAW REFORM 32-33 (Princeton Univ. Press 1955).

79. *Id.*

80. *Id.* at 33.

81. *Id.* When the Florida Supreme Court made decisions regarding the election dispute between George Bush and Al Gore, many individuals pointed out that the court was almost exclusively Democratic. *See, e.g.*, Jessica Reaves, *They Who Must Decide: The Florida Supreme Court*, TIME (Nov. 15, 2000), *available at* http://www.time.com/time/nation/article/0,8599,88402,00.html.

82. VANDERBILT, *supra* note 78, at 33.

83. Arthur T. Vanderbilt, *Assignments of Superior Court Judges*, N.J.L.J., Sept. 16, 1948 at 9.

appointed three Democrats and three Republicans in the Appellate Division."[84]

Some authors find the appointment system by the governor with advice and consent of the Senate to be less elitist than the "merit selection" of judges.[85] I dislike the use of the phrase "merit selection" because it implies that other systems are not based on merit. That is not necessarily true. An appointment system that does not use the "Missouri" or "merit selection" system can be just as based upon merit as the Missouri system. In those cases, it is the governor and the senate who determine who is meritorious enough to be on the highest court, not a committee, which may be politicized. Stephen Ware said, "[T]he Missouri Plan is the most elitist (and least democratic) of the three common methods of selecting judges in the United States."[86] Under the Missouri system a commission is created, which then gives a list of approved candidates to the governor, and the governor must select from that list.[87]

A further development in New Jersey, which helps to ensure a quality judiciary, is the tradition of asking the New Jersey State Bar Association to vet candidates for judicial appointment.[88] Since the 1960s, governors have agreed to send all proposed judicial nominees to the State Bar Association for review by its Judicial Appointment Committee.[89] While the governor is not bound to follow its decision, it is another part of the process that helps to ensure quality appointments. Some might suggest that this is really having a commission make the selection, but in New Jersey the governor is not bound by the review done by the Bar Association Committee, and in at least one recent case the governor did appoint a justice who was not approved by the Bar Association Committee.[90]

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84. *Id.*

85. *See, e.g.*, Ware, *supra* note 3, at 755.

86. *Id.* at 752.

87. *Missouri Nonpartisan Court Plan*, YOUR MISSOURI COURTS, http://www.courts.mo.gov/index.nsf/516c7664fda1528a862565ec00504473/3febf2c901768abe862564ce004ba8a1?OpenDocument (last visited Sept. 28, 2010).

88. JOHN B. WEFING, THE LIFE AND TIMES OF RICHARD J. HUGHES: THE POLITICS OF CIVILITY 120 (Rutgers Univ. Press 2009).

89. NJSBA SELECTION PROCESS, http://www.njsba.com/activities/index.cfm?fuseaction=judicial_selection#10 (last visited Nov. 15, 2010).

90. Former Gov. Christine Todd Whitman did appoint one justice who was not deemed qualified by the Bar Association Committee to the New Jersey Supreme Court. By the time that justice resigned from the bench, he was generally recognized in New Jersey legal circles as a fine jurist.

Some years ago, Gov. Jon Corzine of New Jersey issued an executive order creating another layer of review that would further increase the review of prospective judges.[91] This review, however, was limited to superior court judges and did not include state supreme court justices.[92] It stated: "The Governor will rely heavily on the Panel's evaluations in deciding whether to nominate an individual to the court."[93] It goes on to say: "[T]he Governor retains sole authority to determine whom to nominate to all judicial positions."[94] That executive order created a commission consisting primarily of former justices and judges to review all candidates for judicial positions other than the supreme court.[95]

More recently, Gov. Christopher Christie revised the executive order with regard to the membership, reducing the number of former judges, but maintaining the other language about relying on the panel and maintaining ultimate authority.[96] The New Jersey method of appointment thus provides for a system that relies on the expertise and judgment of former judges, other prominent members of the public, and the bar, but also retains the ultimate judgment in the hands of the governor and senate.

The system has led to a court that has made numerous innovations. In the area of torts, New Jersey is known for its groundbreaking decision in *Henningsen v. Bloomfield Motors*.[97] In the *Quinlan* case, the court decided the first case in the country dealing with the right to die.[98] In *Robinson v. Cahill*[99] and *Abbott v. Burke*,[100] the court broadly interpreted the "thorough and efficient system of free public schools"[101] language of the New Jersey Constitution to require the state to provide funds for

91. N.J. Exec. Order No. 36 (2006), *available at* http://www.state.nj.us/infobank/circular/eojsc36.htm.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* The membership of that commission had to include five retired justices or judges and two other public members who were not practicing lawyers. *Id.* The explanation for excluding practicing lawyers was that they were already represented in the process through the actions of the state bar association committee. *Id.*

96. N.J. Exec. Order No. 32 (2010), *available at* http://www.state.nj.us./infobank/circular/eocc32.pdf. The system was modified to provide for three retired judges or justices and four other members. *Id.* Those members could include practicing lawyers. *Id.*

97. 161 A.2d 69 (N.J. 1960).

98. *In re* Quinlan, 355 A.2d 647 (N.J. 1976).

99. *See* 287 A.2d 187 (N.J. Super. 1972), *aff'd*, 303 A.2d 273 (N.J. 1973).

100. *See* 575 A.2d 359 (N.J. 1990).

101. N.J. CONST. art. VIII, § IV, para 1.

schools in poor districts. In *Mount Laurel*, the court broadened the rights of people seeking affordable housing by limiting the ability of towns to engage in exclusionary zoning.[102] While these cases have broken new ground, there has been criticism that the court has gone too far in some cases—most notably in cases dealing with school funding.[103] At first, the cases basically dealt with increasing funding for inner-city schools.[104] But eventually, the court became more and more involved, ordering the expenditures of funds for programs, mandating improvements of school buildings, and requiring the state to provide funding for preschool programs for three- and four-year-old children,[105] despite the wording of the Constitutional provision that requires a thorough and efficient system for students who are ages 5 to 18.[106]

The New Jersey Supreme Court has been careful in dealing with complicated issues. For example, just recently, the court appointed a special master to study the problems of eyewitness identifications.[107] Some years ago the court had required that in certain cases, in which the eyewitness identification is by a caucasian of an African-American, the trial judge was required to give a cautionary instruction concerning the particular difficulties of a white person identifying a black person.[108] Subsequently, as commentators have recognized that the problems inherent in eye-witness identification are even more serious than previously thought, the court utilized its power to appoint a special master who has recommended even more steps to ensure the validity of eye-witness identifications. The Special Master reviewed numerous studies and concluded:

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102. S. Burlington Cnty. NAACP v. Mount Laurel, 336 A.2d 713 (N.J. 1975) [*Mount Laurel I*]; S. Burlington Cnty. NAACP v. Mount Laurel, 456 A.2d 45 (N.J. 1983) [*Mount Laurel II*].

103. Wefing, *supra* note 88, at 251; *see also* John B. Wefing, *The performance of the New Jersey Supreme Court at the Opening of the Twenty-First Century*, 32 Seton Hall L. Rev. 769, 782 n. 78 (2003).

104. *See, e.g., Robinson*, 303 A.2d 273.

105. *See, e.g.*, Abbott v. Burke, 495 A.2d 376 (N.J. 1985); *see also* Abbott v. Burke, 710 A.2d 450 (N.J. 1988).

106. The Constitutional provision states: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. CONST. art VIII, § 4, para. 1.

107. *See Special Master Appointed by N.J. Supreme Court Calls for Major Overhaul of Legal Standards for Eyewitness Testimony*, INNOCENCE PROJECT (June 21, 2010), http://innocenceproject.org/content/special_master_appointed_by_nj_supreme_court_calls_for_major_overhaul_of_legal_standards_for_eyewitness_testimony.php#.

108. *See* State v. Cromedy, 727 A.2d 457 (N.J. 1999).

> The science abundantly demonstrates the many vagaries of memory encoding, storage and retrieval; malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications.[109]

The Special Master has recommended to the court that in cases of eyewitness testimony, the prosecution utilizing eyewitness evidence be required to meet "at least an initial burden . . . to produce, at a pretrial hearing, evidence of the reliability of the evidence . . . . Such a procedure would broaden the reliability inquiry beyond police misconduct to evaluate memory as fragile, difficult to verify and subject to contamination from initial encoding to ultimate recording."[110] Secondly, the Special Master recommends "that judges and juries are informed of and guided by the scientific findings."[111] While no final decision by the court has been issued, the mere appointment of a special master to study the problems with eyewitness-identification shows the court's concern for fairness and accuracy in cases in New Jersey. New Jersey has also mandated new procedures in identification practices, such as line-ups, in an effort to eliminate suggestiveness in those proceedings.[112] It has also mandated that in most situations, a confession must be videotaped.[113]

New Jersey has a strict Code of Judicial Conduct.[114] For example, judges may not be paid for any outside activities.[115] While federal judges can be paid for teaching at a law school, New Jersey judges may be allowed to teach with supreme court permission, but they cannot receive

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109. *See* Report of the Special Master at 72, State v. Henderson, 937 A.2d 988 (N.J. Super. 2008) (No. A-8-08), *available at* http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20(00621142).PDF.

110. *Id.* at 84.

111. *Id.* at 85.

112. State v. Herrera, 902 A.2d 177, 181 (N.J. 2006).

113. State v. Cook, 847 A.2d 530, 546 (N.J. 2004).

114. *See* N.J. CODE OF JUDICIAL CONDUCT (1994). The seven canons included are: 1) A judge shall uphold the integrity and independence of the judiciary; 2) A judge should avoid impropriety and the appearance of impropriety in all activities; 3) A judge should perform the duties of judicial office impartially and diligently; 4) A judge may engage in activities to improve the law, the legal system, and the administration of justice; 5) A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations; 6) A judge shall not receive compensation for quasi-judicial and extra-judicial activities.; 7) A judge shall refrain from political activity. *Id.* at Canon 1-7.

115. *Id.* at Canon 6.

any remuneration.[116] Additionally, if a judge writes an article, which would normally be paid for, the judge may not be paid.[117] This is to ensure that the judges are devoting their full efforts to their primary role of serving as judges.[118] The ban on participating in any political activity is particularly strict. Some years ago, a number of judges who attended an inaugural ball were censured by the court for attending the political event.[119] In 2010, when the lieutenant governor was being sworn into office, the supreme court had to approve the request of her husband, a superior court judge, to attend the festivities after the inauguration.[120] There was hesitation on the part of the court, but the court ultimately agreed.[121] The court also wrote a statement explaining the unique circumstances which led the court to permit the attendance.[122]

There is an advisory committee on extrajudicial activities which advises on whether or not a judge may be involved in extrajudicial activities. More importantly, the supreme court has the power to discipline all judges in New Jersey. This can result in a "public reprimand, censure, suspension or removal."[123] Over the years, even members of the New Jersey Supreme Court itself have been sent before the committee, and in a few cases, they have received a reprimand or censure.[124] Some superior court judges and municipal court judges have been removed from office for various infractions.[125] This system could allow judges to protect each other. However, it has not worked that way, and the supreme court has carefully assessed all misconduct situations.[126]

The statute giving this authority to the New Jersey Supreme Court provides: "A judge may be removed from office by the Supreme Court

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116. *Id.* at Canon 4-6.

117. *Id.* at Canon 5B.

118. *Id.* at Canon 6.

119. Statement on Behalf of the New Jersey Supreme Court Concerning Judge Alexander D. Lehrer and Judge Sybil R. Moses (January 29, 1990).

120. Max Pizarro, *Kyrillos and Guadagno Take the Stage at Prudential Center,* POLITICKERNJ (Jan. 19, 2010), http://www.politickernj.com/max/36236/kyrillos-and-guadagno-take-stage-prudential-center.

121. *Lt. Gov. Kim Guadagno's Date Night,* BLOG.NJ.COM (Jan. 24, 2010), http://blog.nj.com/njv_auditor/2010/01/lt_gov_kim_guadagnos_date_nigh.html.

122. *Id.*

123. N.J. CT. R. 2:15-15 (1997).

124. David W. Chen, *Highest Court In New Jersey Censures One Of Its Justices,* N.Y. TIMES (July 21, 2007), http://query.nytimes.com/gst/fullpage.html?res=9C06E2DB1531F932A15754C0A9619C8B63.

125. *In re Yengo,* 84 N.J. 111 (1980).

126. Anthony Ramirez, *New Jersey Supreme Court Justice Accused of Ethics Violation,* N.Y. TIMES (May 13, 2007), http://www.nytimes.com/2007/05/13/nyregion/13ethics.html?_r=1.

for misconduct in office, willful neglect of duty, or other conduct evidencing unfitness for judicial office, or for incompetence."[127] Proceedings for removal "may be instituted by either house of the Legislature acting by a majority of all its members, or the Governor, by the filing of a complaint with the clerk of the Supreme Court, or such proceeding may be instituted by the Supreme Court on its own motion."[128] The supreme court must find the cause for removal beyond a reasonable doubt.[129]

The chief justice of New Jersey Supreme Court also has an unusual power: he or she gets to appoint a tiebreaker in the process of reapportionment.[130] For many years, many of the legislatures of the states were improperly apportioned. This continued for many years because of the "political question" doctrine developed by the Supreme Court, which provided that the Court should not be involved when the issue concerned an issue that other branches of the government should determine.[131] However, the Supreme Court in *Baker v. Carr*[132] rejected the political question doctrine in apportionment cases and permitted a challenge. Eventually, in *Reynolds v. Syms*,[133] the Court adopted the "one man one vote" requirement. As a result, many states had to restructure both their congressional districts and state legislative districts. However, the states still had the obligation to do the redistricting subject to review by the courts for compliance with "the one man one vote" dictate.[134] In most states, the redistricting is done by the legislatures. In an attempt to get this difficult issue away from the legislature, New Jersey devised a commission system at a constitutional convention in 1966.[135] For legislative redistricting in New Jersey, each party, Democratic and Republican, would select five members.[136] If those ten members cannot

127. N.J. STAT. ANN. § 2B:2A-1 (West 2010).

128. *Id.* at 2B:2A-3.

129. *Id.* at 2B:2A-9.

130. Another extraordinary power which the chief justice had for many years, but which was recently eliminated when the Prudential Insurance Co. switched its corporate structure, was the power to appoint six members of the company's board of directors. N.J. STAT. ANN. § 17:34-3.13 (1953) (renumbered in 1971 as N.J. STAT. § 17B:18-19).

131. Colgrove v. Green, 328 U.S. 549 (1946) (refusing to hear a challenge to the congressional districting scheme in Illinois wherein the argument was presented that the congressional districts were unconstitutional because the districts were not approximately equal in population).

132. 369 U.S. 186 (1962). That opinion was penned by a former New Jersey Supreme Court justice, William Brennan. *See id.*

133. 377 U.S. 533 (1964).

134. *Reynolds*, 377 U.S. at 566.

135. *See* N.J. CONST., art. II, § II. para. 1.

136. *Id.*

reach agreement, the chief justice appoints a tiebreaker.[137] In recent years, that process has resulted in much criticism of the chief justices. The Republicans believed that in two different situations the chief justices chose tiebreakers who would lean in favor of the Democratic plan. Whether accurate or not, the perception by some was that the chief justice was playing politics.[138] That is one power that I would remove from the chief justice. New Jersey has worked diligently to keep justices and judges out of politics, and this particular power inevitably ends up being seen by whichever group loses in the redistricting process as being political.

The role of the tiebreaker, together with some of the more far-reaching decisions of the New Jersey Supreme Court, had led some, particularly Republicans, to believe that the court had become too liberal.[139] These factors may have led to a recent decision by Gov. Christopher Christie, a Republican, in his first year in office, to refuse to reappoint Justice John Wallace as a member of the New Jersey Supreme Court. Governor Christie had campaigned in part on his promise to change the direction of the New Jersey Supreme Court. Governor Christie believed that a number of the decisions of the New Jersey Supreme Court had caused some of the fiscal problems which the state was facing—probably most particularly—the school funding cases in which the New Jersey Supreme Court went very far in mandating additional funding for schools in the inner city.[140] While it is quite common for presidents to run on platforms that include changing the direction of the U.S. Supreme Court, recently, that has not been a significant issue in New Jersey. Justice Wallace was the first supreme court justice to not be reappointed since the adoption of the new constitution in 1947, although one justice retired when both candidates for governor indicated that he would not be reappointed.[141] The governor never alleged that Wallace was not a competent justice.

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137. *See* JOHN B. WEFING, THE LIFE AND TIMES OF RICHARD J. HUGHES: THE POLITICS OF CIVILITY 153 (Rutgers Univ. Press 2009).

138. McNeill v. Legislative Apportionment Comm'n, 177 N.J. 364 (2003); *see also* State v. Apportionment Comm'n, 125 N.J. 375 (1991).

139. While New Jersey has had a number of Republican governors in recent years, including Thomas Kean and Christine Todd Whitman, they have come from the more moderate wing of the Republican Party and did not appoint conservative justices to the court.

140. *E.g.* Abbott v. Burke, 495 A.2d 376 (1985). The Court decided seven *Robinson* cases dealing with school funding and about twenty *Abbott* cases dealing with school funding.

141. In fact, Justice Wallace retired before his term ended to protect his pension situation.

History is replete with attempts by presidents to change the direction of the Supreme Court. There are a number of twentieth-century examples. President Franklin Roosevelt was incensed by the decisions of the U.S. Supreme Court in striking down important parts of his New Deal legislation. He went so far as to suggest increasing the membership of the Court, commonly referred to as the "court-packing plan," to add his own supporters to the Court. While that plan failed, eventually as the result of retirements of a number of members of the Court, Roosevelt was able to get much of his new legislation deemed constitutional.[142]

President Eisenhower was disappointed by the direction that two of his appointees to the Court followed. He often referred to his two biggest mistakes—the appointments of Chief Justice Warren and Justice Brennan. President Johnson appointed two liberals to the Court: Thurgood Marshall and Abe Fortas. President Nixon was particularly active during his campaign against Vice President Humphrey, calling for a change in the direction of the Court. Nixon wanted justices who would be tough on crime. After his election, Nixon was able to appoint more conservative justices to the Court.[143] President Carter did not get the chance to appoint a Supreme Court justice, and President Reagan continued in Nixon's footsteps by appointing more conservative Justices.[144]

Both President George H. W. Bush and President George W. Bush, appointed more conservative justices, although in one case, the first President Bush appointed Justice Souter, who turned out to be more liberal than some had anticipated.[145] Interestingly, some seemed to know in advance the direction Souter would go. Souter was the replacement for Justice Brennan. In a conversation I had with Justice Brennan's son, William J. Brennan III, some years ago, he told me that after reviewing Souter's record, he assured his father that Souter would not undermine his father's legacy.[146] President Clinton appointed two justices who

142. In Roosevelt's long tenure, he made nine appointments to the Supreme Court.

143. Nixon appointed Chief Justice Burger, Justice Blackmun, Justice Powell, and Justice Rehnquist.

144. Reagan raised Justice Rehnquist to Chief Justice and appointed Justices O'Connor, Scalia, and Kennedy.

145. President George H. W. Bush, in addition to Justice Souter, also appointed Justice Thomas, a conservative. President George W. Bush appointed Chief Justice Roberts and Justice Alito.

146. In a fascinating article, Professor Michael S. Paulsen discusses his own realization as an attorney working in the Bush White House that Justice Souter was not likely to overrule *Roe v. Wade*, 410 U.S. 113 (1973), as many on the left feared, and that many in the White House may have understood that as well. He also felt that Justice Souter would not be a conservative on the Court as it turned out to be. Michael S. Paulson, *Hell,*

joined the more liberal wing of the Court,[147] and it appears that President Obama has also selected two justices more likely to side with the liberal position.[148]

The difference between what the presidents did and what Governor Christie did, however, is that the presidents were all making new appointments, while Governor Christie was refusing to reappoint a sitting justice. No one ever made allegations suggesting that Justice Wallace was not a competent jurist; the issue focused on the direction of the court. Within New Jersey legal circles, there was a great deal of consternation and belief that the failure to make the reappointment was impinging on the integrity of the court. It was the first time since the new constitution of 1947 that a justice had not been reappointed. Although, as already noted, one justice resigned from the court after both candidates for governor—a Democrat and a Republican—indicated that he would not be reappointed. However, in that case, the reasoning behind the position of the governor was based on the justice's activities before he had taken the bench.[149] In another instance, a chief justice was renominated, but almost failed to obtain senatorial confirmation as a result of decisions made by the court.[150] He was ultimately confirmed, obtaining the absolute minimum number of votes necessary for confirmation.

It is my belief that an appointment system by the governor, with advice and consent of the senate, with input from a governor-appointed commission, input from the New Jersey State Bar in conjunction with the

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Handbaskets, and Government Lawyers: The Duty of Loyalty and Its Limits, 61 LAW & CONTEMP. PROB. 83, 91 (1998).

147. Justices Ginsburg and Breyer.

148. Justices Sotomayor and Kagan.

149. The justice had been attorney general before becoming a justice. He was in charge when a big issue came up regarding racial profiling. While he was sitting on the court, that issue became even more controversial and he was soundly criticized for his handling of the situation. Both candidates for governor in the next campaign pledged that they would not reappoint him. The difference in the two cases is that in his case he would not have been reappointed for conduct prior to his role as judge. In an interesting twist, the former justice has recently been chosen by Governor Christie to chair the Governor's Committee to vet new judges for the state superior court.

150. There was an argument that the opposition to his reappointment was the fact that he was living primarily in New York City and only had a summer home in New Jersey. Most observers believed that the true reasons were his decision in *Mount Laurel II* mandating affirmative steps by municipalities to provide low- and moderate-income housing, as well as his selection of the tiebreaker in a reapportionment dispute and the school-funding cases. Then-Governor Kean, a Republican, and a former Democratic governor, then-Chief Justice Hughes, fought for what they considered essential for the independence of the judiciary and convinced twenty-one hesitant senators to support the re-nomination.

strictly adhered-to requirement of a balance of political parties, a strong canon of judicial ethics, and an ability by the Supreme Court to remove a judge for misconduct, can produce an excellent judicial system. Of course, as with every system it depends ultimately on the people involved in the process: the governor, state senators, advisory committee members, and bar association members.