CHANGE FROM ON HIGH? THE POSSIBLE IMPLICATIONS OF *CAPERTON* AND *CITIZENS UNITED* FOR STATE JUDICIAL SELECTION REFORM

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I. INTRODUCTION

F. Andrew Hanssen offers a comprehensive hypothesis explaining why states have adopted different systems for selecting judges over time in his article *Learning about Judicial Independence: Institutional Change in State Courts*.[1] In the article, Hanssen claims that new methods of judicial selection developed sequentially during the nineteenth and twentieth centuries (i.e. partisan elections, nonpartisan elections, and merit selection) in order to protect state judges from being politically influenced by the other branches of government, and that each method gave way to the next when it was perceived to be ineffective at abating this influence.[2] Hanssen also presents a hypothesis to explain why some states did not change their judicial selection methods[3] in the period that he studied. According to Hanssen's hypothesis, whether or not a state changed its judicial selection method was a function of the average size

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1. F. Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in State Courts*, 33 J. LEGAL STUD. 431 (2004).

2. *See id.* at 465.

3. Hanssen's study only concerned initial selection methods for state supreme courts. *Id.* at 434 n.6.

of its legislative majorities, when the state entered the federal union, and whether the adoption of a new selection system required a change in a state's constitution.[4] Hanssen also noted the crucial role that the legal profession played in lobbying for each successive wave of judicial selection reform through history.[5]

Hanssen's study offers a cogent explanation for the timing and nature of judicial selection reform among the states. However, if one accepts his hypothesis regarding the factors that have driven reform efforts in the past, recent events suggest that the U.S. Supreme Court might have entered the scene as an important new factor driving judicial selection reform. Three important developments have brought about this situation. The first development is the ever-increasing amount of money being spent on state judicial races, while the other two are recent U.S. Supreme Court decisions in *Caperton v. A.T. Massey Coal Co.*[6] and *Citizens United v. Federal Election Commission.*[7] This article argues that these decisions have the potential to involve the Court in spurring state judicial selection reform in a way that it has not been involved before in American history. Specifically, the article argues that if the Court proves willing to rigorously enforce the holdings of *Caperton* and *Citizens United*, and if the states fail to make effective reforms for their recusal rules, states might come to see the abandonment of partisan and nonpartisan elections as the most efficient solution to the problems presented by having to comply with these decisions. Accordingly, this development could lead to a significant increase in the number of states changing their judicial selection and retention systems, with more states possibly choosing to adopt merit selection with retention elections, or abandoning elections all together in favor of legislative retention, life terms, or non-renewable terms.

The first part of the article deals with the role of money in judicial elections and its ability to affect the outcome of these elections. The second part presents the argument that, in light of the increasing role that money plays in these elections, the *Caperton* decision could create a crisis situation that would make judicial elections untenable, and that the *Citizens United* decision could increase the number of states where the combination of campaign spending and *Caperton's* rules make elections untenable. The third part will examine actions that the United States Supreme Court or the states could take that would avert the aforementioned crisis. The fourth part considers what reforms might

4. *Id.* at 468.
5. *Id.*
6. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).
7. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

succeed in answering the challenge presented by the confluence of the new rules created by these decisions and big money in elections.

II. THE EVER INCREASING IMPORTANCE OF MONEY

The evidence is clear that the amount of money spent in judicial elections has increased dramatically over the last twenty years. For example, according to the National Institute on Money in State Politics (NIMSP), "state supreme court candidates raised $200.4 million from 1999-2008, compared with an estimated $85.4 million in 1989-1998."[8] Also, for the 2007-2008 election cycle, supreme court candidates in states with partisan and nonpartisan elections raised over $42 million dollars.[9] However, candidate fundraising is not the only source of money in judicial elections. Independent expenditures are another important factor in supreme court elections. A good general definition of an independent expenditure is the one used by the federal government that describes an independent expenditure as an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents."[10] Individuals or organizations can make such expenditures, and they are believed to have been pivotal in the outcome of several high profile state supreme court races in the last twenty-five years.[11] Organizations that engage in independent expenditures go by many different names, but state and federal election law generally give them

8. *Facts, Stats, and Quotes*, JUSTICE AT STAKE CAMPAIGN, http://www.justiceatstake.org/resources/facts_stats_quotes/idex.cfm (last visited Sept. 17 2010).

9. *See Candidate Fund-Raising in State Supreme Court Races by Rank 2000-2008*, JUSTICE AT STAKE CAMPAIGN http://www.justiceatstake.org/media/cms/JAS_20002008CourtCampaignExpenditur_63951A4654869.pdf (last visited Sept. 17, 2010).

10. 11 C.F.R. § 100.16(a) (2010).

11. *E.g.*, G. Alan Tarr, *Balancing the Will of the Public with the Need for Judicial Independence and Accountability: Do Retention Elections Work?*, 74 MO. L. REV. 605, 613 (2010); Lorie Hearn, *Rose Bird, Grodin, Reynoso All Ousted*, SAN DIEGO UNION, Nov. 5, 1986, at A1; Traciel V. Reid, *The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White, in* RESEARCH ON JUDICIAL SELECTION 1999 (The Hunter Center for Judicial Selection 2000); A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES, Nov. 3, 2010.

greater freedom than candidates to raise money, and have less stringent reporting requirements for contributions and expenditures.[12]

Many scholars[13] and public interest organizations[14] have expressed concern about the amount of money that is being raised and spent in judicial elections, believing that it represents a threat to the independence of these courts. Furthermore, there is evidence that contributions affect judicial decisions,[15] and the results of a recent national survey reveal that 68% of respondents would doubt the impartiality of a judge who had received campaign contributions from one of the opposing parties in a case.[16] The public's belief that contributions impair judges' impartiality is logical given the existence of studies showing that candidate spending affects the outcome of state supreme court races. [17]

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12. Lloyd H. Meyer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 629-37 (2007).

13. *E.g.*, Kara Baker, *Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for The Ohio Supreme Court*, 35 AKRON L. REV. 159, 171 (2001); Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 134 (1998); Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467 (2001); Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence while Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597, 608-09, 615 (2005).

14. *See, e.g.*, Brief for Justice at Stake et al., as Amici Curiae Supporting Appellee Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (No. 08-205); *Fair Courts*, BRENNAN CENTER FOR JUSTICE, http://www.brennancenter.org/content/section/category/fair_courts/ (last visited Sept.17, 2010); Money & Election, JUSTICE AT STAKE CAMPAIGN http://www.justiceatstake.org/issues/state_court_issues/money__elections.cfm (last visited Sept 17, 2010).

15. *E.g.*, Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 281, 288-90 (2007); Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994-1997*, 31 POL. & POL'Y 314, 326-31 (2003); Aman McLeod, *Bidding for Justice: A Case Study about the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. DET. MERCY L. REV. 385, 398-400 (2008); Eric Waltenburg & Charles Lopeman, *Tort Decisions and Campaign Dollars*, 28 SE. POL. REV. 241, 250-58 (2000).

16. *2009 Harris Interactive National Public Opinion Poll on Judges and Money*, JUSTICE AT STAKE http://www.justiceatstake.org/media/cms/Justice_at_Stake_Campaign_Final_Tab_BE1C0586C9129.pdf (last visited Sept. 17, 2010).

17. Chris W. Bonneau, *Electoral Verdicts: Incumbent Defeats in State Supreme Court Elections*, 33 AM. POL. RES. 818, 834 (2005).

III. *CAPERTON* AND *CITIZENS UNITED* AND THE NIGHTMARE SCENARIO

To note that federal court decisions have an impact on state judicial selection is to note a truism. For example, two decisions by the U.S. Supreme Court, *Buckley v. Valeo*[18] and *Republican Party of Minnesota v. White*,[19] and their progeny[20] have incited much debate about how states can regulate candidate financing and speech in judicial elections.[21] Now, in tandem, *Caperton* and *Citizens United* have the potential to be catalysts for major reform in the way that states select and retain their judges.

Reaffirming that a "fair trial in a fair tribunal is a basic requirement of due process,"[22] the *Caperton* Court held that judges must recuse themselves from cases in which an alleged conflict of interest creates a risk of bias or prejudgment that is inconsistent with due process,[23] and that the receipt of a disproportionate amount of financial support from a litigant in an election campaign can create a risk of bias great enough to demand recusal.[24] This ruling was remarkable in that it went against what had been the dominant line of reasoning in situations where a litigant demanded recusal because of a judge's receipt of financial support in an election campaign. To that point, courts had been nearly unanimous in holding that such financial support from litigants or their lawyers did not require recusal.[25] Furthermore, the Court's decision was roundly criticized by the dissenters as vague and likely to lead to a flood of litigation as litigants try to decipher its meaning and seek guidance about specific situations in which recusal is required.[26] Even more damning, the dissent predicted that public confidence in the judiciary could be eroded by the deluge of often meritless accusations of bias that the Court's ruling could encourage.[27]

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18. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

19. Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

20. *E.g.*, Fed. Election Comm'n, v. Wis. Right to Life, Inc., 551 U.S. 449 (2007); McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

21. *E.g.*, David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 410 (2001); Wendy R. Weiser, *Regulating Judges' Political Activity After White*, 68 ALB. L. REV. 651, 651-52 (2005).

22. *Caperton*, 129 S. Ct. at 2259 (citing In re Murchison, 349 U.S. 133, 136 (1955)).

23. *Id.* at 2263.

24. *Id.* at 2264-65.

25. *See* John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2000).

26. *See Caperton*, 129 S. Ct. at 2267.

27. *Id.*

The following year, the Court issued its decision in *Citizens United*.[28] The case centered on the constitutionality of a federal campaign finance law banning corporations and labor unions from using general treasury funds to make independent expenditures on behalf of or against candidates in elections.[29] With its ruling that the law violated these organizations' First Amendment rights,[30] the Court struck down not only the provision of the federal law in question,[31] but also laws in twenty-four states that restricted independent expenditures by unions and corporations in political campaigns.[32]

The potential effect of the *Citizens United* decision on elections for courts of all levels, but in particular on state supreme court campaigns, is enormous. This is because corporations, other commercial and professional organizations, and to a lesser extent, labor unions have enormous financial resources and important political interests to advance in the political arena.[33] Although the effect of *Citizens United* on judicial races is likely to be greatest in states with partisan and nonpartisan judicial elections, [34] given that independent expenditures appear to be greater in partisan and nonpartisan judicial elections than in retention elections,[35] judges in retention elections are not immune from the effects of concerted campaigns to defeat them,[36] and have reason to expect that

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28. *Citizens United*, 130 S. Ct. at 876.

29. *Id.* at 886.

30. *Id.* at 896-99.

31. 2 U.S.C.A. § 441b (2010).

32. *Life After Citizen's United*, NATIONAL CONFERENCE OF STATE LEGISLATURES http://www.ncsl.org/default.aspx?tabid=19607 (last visited Sept.17, 2010).

33. *See e.g.*, Jeffrey Milyo et. al., *Corporate PAC Campaign Contributions in Perspective*, 2 BUS. & POL. 75, 77-78 (2000) (showing that in the recent past, corporations, commercial and professional organizations and labor unions spent hundreds of millions to influence political campaigns, but unions spent less than the organization in the other two categories).

34. The following states had laws that were affected by *Citizens United* and used partisan elections for their courts: Alabama, Pennsylvania, Texas, West Virginia. The following states had laws that were affected by *Citizens United* and used nonpartisan elections for their courts: Kentucky, Michigan, Minnesota, Montana, North Carolina, North Dakota, Ohio and Wisconsin. For a description of each state's judicial selection system see *Judicial Selection in the States*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state = (last visited Nov. 19, 2010).

35. *See, e.g.*, JAMES SAMPLE ET. AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE 12 (2010); RACHEL L. WEISS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES 3 (2005) (showing high levels of independent corporate campaign activity in states with partisan and nonpartisan elections, but not in states with retention elections).

36. *Supra,* note 11.

better funded campaigns could be mounted against them after *Citizens United.*

Perhaps the best way to think about the implications of these two cases for judicial selection reform, would be to think of *Caperton* as the match that could light the fire, and *Citizens United* as the fuel that could spread the fires of reform. If the federal courts rigorously and consistently enforce *Caperton's* central holding that disproportionate financial support in an election from a litigant can require a judge's recusal,[37] the nightmare scenario that the dissent in *Caperton* mentioned[38] could occur as courts are forced to consider an ever increasing number of recusal motions, and appeals of those motions as the amount money spent in judicial campaigns increases, in addition to having to grapple with the administrative difficulties of replacing judges who have to recuse themselves because of an ethical conflict. *Citizens United* adds to the likelihood of this scenario occurring in a larger number of states, since it removes any restraints on corporate and union independent expenditures in campaigns. If the nightmare scenario occurs, there could be pressure to do away with judicial elections as the storm of recusal motions slows down the litigation process, increases litigation costs, and further erodes public confidence in the impartiality and independence of the judiciary.

IV. HOW THE NIGHTMARE COULD BE AVERTED—A NUMBER OF EVENTS THAT MIGHT PREVENT THE SCENARIO FROM OCCURRING

A. Supreme Court Indifference or Reversal

There is no guarantee that the U.S. Supreme Court or state courts will strongly and consistently enforce the central holdings of either *Caperton* or *Citizens United.* In both cases, the Supreme Court divided five to four,[39] and a change in either the Court's membership or in one justice's opinion could cause either decision to be overturned or modified in such a way as to stunt the policy effects of the original decisions. For example, such a modification could come in the form of an opinion interpreting *Caperton* so that it is essentially narrowed to its facts and would be, therefore, not applicable to future cases. Also, the Court might simply refuse to decide cases coming from the states that concern

37. *Caperton*, 129 S. Ct. at 2262-66.

38. *See id.* at 2267.

39. *Compare Caperton*, 129 S. Ct. at 2256 (2009) *with Citizens United*, 130 S. Ct. at 886 (2010). Justice Anthony M. Kennedy was the only justice in the majority in both cases, and authored the opinion of the Court in both instances.

judicial conflicts of interest due to campaign spending, which would make *Caperton* a dead letter in states that chose to ignore its central holding. The consequences of a reversal or narrowing of *Citizens United,* on the other hand, would, in effect, withdraw fuel from the fire that *Caperton* started, since it would allow states more freedom to restrict independent expenditures by corporations and unions, which would limit the potential for conflicts of interest to arise. Without strong and consistent enforcement of these decisions, especially *Caperton*, the nightmare scenario will not happen or could be less widespread.

B. Effective State Recusal Reform

Assuming the Supreme Court stands by *Caperton* and *Citizens United*, there are a number of reforms regarding judicial ethics rules that states could enact that might make the nightmare scenario somewhat less likely. An important change that could be made to state judicial ethics codes would be the establishment of clearer rules describing when litigant campaign spending on behalf of a judge or judge's opponent requires a judge's recusal. Such changes would make it clearer to judges when they should recuse themselves, and to courts or other bodies that make or review recusal decisions, whether judges should recuse themselves.[40] Another helpful reform would be to allow litigants to peremptorily disqualify judges from hearing their cases, if a litigant believed that the judge would be prejudiced against them.[41] Typically, the only requirements for these motions are the payment of a fee, and that they are filed in a timely manner (not more than thirty days after service of process).[42] As of 2008, nineteen states allowed litigants to peremptorily disqualify judges,[43] although some states limit the number of challenges to one per trial.[44] If these challenges were permitted in

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40. *See, e.g.,* Penny J. White, Comment, *Relinquished Responsibilities*, 123 HARV. L. REV. 120 (2009); Aman McLeod, *Changing the Rules of the Game: Deriving New Rules and Practices from Caperton v. A.T. Massey Coal Co.* NEW ENG. L. REV. (forthcoming 2010) (discussing of how states and state courts should comply with *Caperton's* holding).

41. James Sample & Michael Young, *Invigorating Judicial Disqualification: Ten Potential Reforms*, 92 JUDICATURE 26, 27 (2009).

42. *Id.*

43. *Id.* The states allowing peremptory disqualification of judges are as follows: Alaska, Arizona, California, Hawaii, Idaho, Illinois, Indiana, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, Oregon, South Dakota, Washington, Wisconsin, and Wyoming. JAMES SAMPLE ET. AL., FAIR COURTS: SETTING RECUSAL STANDARDS 26 (2008), *available at* http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/ .

44. *See* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 574 (2004).

more states, and if litigants were permitted to make multiple challenges at both the trial and appellate stages, this system could provide an easy and quick way for litigants to remove judges whom they believe would be biased in favor of the other party without the need lengthy hearings or appeals.[45] Despite their apparent utility, there are a number of objections that could be raised about the use of peremptory judicial challenges. The first objection is that the practice is unfair to judges, because it does not allow them an opportunity to rebut the appearance of bias that the challenge implies.[46] Another criticism is that opportunistic attorneys would use their challenges to "shop" for a favorable judge, and that the use of the system would make administering the judicial system more costly.[47]

While abuse of any procedure is always a risk, many of the same criticisms of the use of judicial peremptory challenges could be leveled at the jury system, in which litigants are allowed to use peremptory challenges to remove jurors.[48] Still, the potential costs of the greater use of peremptory judicial challenges would probably not be negligible. For example, if more money is spent in judicial court campaigns and more races are targeted by corporate or union interests, particularly in light of the decision in *Citizens United,* there could be more challenges than there would have been in the past when there was less spending in judicial court races. If that happens, states would have to find some way to accommodate these challenges, perhaps by creating new judgeships at the trial and appellate levels, or devising systems to temporarily replace judges on an ad hoc basis so that there would be a sufficient supply of judges to replace those who have to recuse themselves when a conflict of interest exists or when a peremptory challenge is used.[49] Recent efforts by states to expand their judiciaries suggest that a new judgeship initially costs, at a minimum, many hundreds of thousands of dollars,[50] and

45. *See* Sample & Young, *supra* note 41, at 27.

46. *Id.* at 27.

47. *Id.* at 28.

48. *Id.* at 27-28.

49. *See e.g,* James L. Buchwalter, *Construction and Validity of State Provisions Governing Designation of Substitute, Pro Tempore, or Special Judge,* 97 A.L.R.5TH 537 (2009) (discussing judicial decisions regarding different procedures that states use to temporarily replace judges).

50. *See e.g.,* Charles S. Johnson, *Bill Adding District Court Judges Becomes Law,* BILLINGS GAZETTE (MT), May 5, 2009; *Ranks of ND Trial Judges Set to Expand,* BISMARCK TRIB. (ND), Apr. 17, 2009, at 1B-6B; Hank Rowland, *Judge Timeline Unknown,* BRUNSWICK NEWS (GA), Jul. 23, 2009; Jack Zimlicka, *Wisconsin Legislation, Budget Creates 8 New Judicial Branches,* WIS. L. J., Nov. 26, 2007.

represents an increased cost to the judiciary for as long as the judgeship is in existence.

The scenarios described above demonstrate how, given the confluence of big money in judicial campaigns, *Caperton* and *Citizens United* might not create an environment that spurs judicial selection and retention reform. Scholars differ over how U.S. Supreme Court Justices are influenced by stare decisis when they decide cases,[51] so it is hard to predict how likely the Court is to uphold either *Caperton* or *Citizens United*. That said, the states' response to *Caperton* in terms of changes to their judicial ethics codes and procedures does not look promising thus far. For example, a number of states have considered changes to their ethics rules that would require recusal in situations where litigants donated more than a certain amount to a judge.[52] Other states have considered or enacted laws to provide public financing for judicial campaigns.[53] However, none of these ideas have any chance of reducing the probability of the nightmare scenario occurring, because they do nothing to curb the ability of wealthy individuals, corporations, unions or other special interests from spending unlimited amounts of money on independent expenditures. For example, *Caperton* involved a situation in which a wealthy individual who was the chief executive officer of Massey Coal spent massive amounts to help elect the West Virginia Supreme Court justice whose failure to recuse prompted the appeal to the U.S. Supreme Court.[54] Accordingly, public financing of judicial campaigns, and ethics rules that demand recusal only for the receipt of direct contributions to judicial candidates, would do nothing to solve the problem that *Caperton* directly addressed.

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51. *Compare* Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996) (concluding that Supreme Court justices are not strongly influenced by precedents with which they disagree), *with* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996) (concluding that the justices frequently show respect for stare decisis by appealing to it and justifying the opinions using it).

52. *E.g.*, David Eggert, *Michigan Court Asked to Require Campaign Disclosures*, ASSOCIATED PRESS: BATTLE CREEK METRO AREA, Sept. 6, 2009; Timm Herdt, *When is Justice for Sale?*, VENTURA CO. STAR, June 10, 2009. *But see* Jack Zemlicka, *Contributions Not Enough for Recusal*, WIS. L. J. July 5, 2010 (noting that the Wisconsin Supreme Court has adopted a rule stating that receipt of campaign contributions from a litigant is not by itself enough to mandate a judge's recusal).

53. *E.g.*, Patrick Marley & Lee Bergquist, *Doyle Signs High Court Election Bill*, MILWAUKEE J. SENTINEL, Dec. 2, 2009, at 01; Lawrence Messina, *Election Bills Could Attract Lawsuits*, CHARLESTON DAILY MAIL, Mar. 29, 2010, at 9B.

54. *See Caperton*, 129 S. Ct. at 2252.

V. IF THE WORST HAPPENS: SOLUTIONS TO THE NIGHTMARE

The fact that no states have enacted any reforms that promise to effectively deal with the potential problems created by the confluence of the ever increasing amount of money flowing into judicial campaigns, and *Caperton* and *Citizens United* suggests that reforming judicial ethics rules, particularly rules regarding recusal, is difficult. Recusal reform would certainly increase the judicial branch's administrative costs and the new rules could be abused by litigants seeking to pick favorable judges. What's more, especially in states with partisan and nonpartisan judicial elections, legislators and judges who are responsible for changing recusal procedures might fear incurring the wrath of wealthy special interests by making it harder for them to directly benefit from their efforts to elect favored judicial candidates.

However, if the confluence of increased campaign spending and tough enforcement of *Caperton* by the U.S. Supreme Court comes to pass, states could extricate themselves from the court delays, increased litigation and administrative costs, and the erosion of confidence in the judicial branch that could result by changing how their judges are selected and retained. Reforming the way that judges are chosen and retained could be a cheaper option for escaping the nightmare scenario than recusal reform, since it would avoid the need for the creation of new judgeships, and would not create new rules that litigants could abuse. One reform scenario could involve the abandonment of partisan and nonpartisan elections for initial selection for the bench and retention. Many scholars[55] and civic groups[56] have advocated for the abandonment of these methods of judicial selection, and their elimination would mean an end to the two types of elections that occasion the most fundraising from judicial candidates[57] and independent expenditures from

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55. *See, e.g.*, Laura Benson, *The Minnesota Judicial Selection Process: Rejecting Judicial Elections in Favor of a Merit Plan*, 19 WM. MITCHELL L. REV. 765 (1993); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 44 (2003); Ryan L. Souders, Note, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 530 (2006).

56. *See e.g.*, A.B.A, JUSTICE IN JEOPARDY 70-71 (2003); AMERICAN JUDICATURE SOC'Y—FAQ, http://www.ajs.org/selection/sel_faqs.asp (last visited Sept. 17, 2010); *Why Merit Selection?* PENNSYLVANIANS FOR MODERN COURTS, http://www.pmconline.org/node/28 (last visited Sept. 17, 2010); *The Solution*, MINNESOTANS FOR IMPARTIAL COURTS, http://www.impartialcourts.org/the-solution/ (last visited Sept. 17, 2010).

57. *See* JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 16 (2006) (showing that in 2005-2006, candidates in partisan and nonpartisan judicial elections raised far more money than judges in retention elections (*see infra* notes 72-73 and accompanying text), who, in many cases, raised no money at all).

corporations, labor unions and other special interests.[58] In addition to ending the administrative burdens, delays and litigation costs imposed by the confluence of money in judicial campaigns, and the new recusal rules mandated by *Caperton*, this solution would also save states money, because they would not have to hold primary and general elections.

Many advocacy groups[59] and scholars[60] favor merit selection as an alternative to elections for initial selection to the bench. In this system, the governor selects the new judge from a list of nominees approved by a commission composed of lawyers, non-lawyers, and sometimes judges who vet all applicants before presenting the final list to the governor.[61] In addition to removing the stigma of judges seemingly beholden to their campaigns' financial supporters, advocates of merit selection say that that this method of judicial selection reduces the prominence of political considerations in the judicial selection process, while enhancing the focus on professional merit.[62] Some also claim that merit systems increase diversity on the bench in terms of race and gender.[63] Conversely, detractors say that merit selection is elitist because the system places the decision about who becomes a judge in the hands of a select few,[64] and there is evidence that political considerations also play a prominent role in the commissioners' deliberations about which

58. *See supra* note 33.

59. *E.g.*, A.B.A., *supra* note 55, at 71; *Merit Selection: The Best Way to Choose the Best Judges 2-3*, AM. JUDICATURE SOC'Y; *Fund for Modern Courts* JUDICIAL SELECTION, http://www.moderncourts.org/Advocacy/judicial_selection/index.html; *Common Cause Pennsylvania*, JUDICIAL SELECTION, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4952375 (last visited Jan. 7, 2011).

60. *E.g.*, 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, 304-05 (2002); Mark S. Cady & Jess R. Phelps, *Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J.L. & PUB. POL'Y 343, 381 (2008); Steven Zeidman, *Making the Case for Merit Selection*, 68 ALB. L. REV. 713, 718 (2005).

61. *See* AM. JUDICATURE SOCIETY, *supra* note 59, at 1.

62. *See e.g., id.* at 2-3.

63. *See e.g., id. But see*, Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84, 89 (2001) (showing no evidence that minorities and women make up a higher percentage of judges on state appellate courts using nominating commissions when compared to the percentage of minorities and women on state appellate courts that do not use nominating commissions).

64. *See e.g.*, Michael R. Dimino, *Judicial Elections vs. Merit Selection: The Futile Quest for a System of Judicial Merit Selection*, 67 ALB. L. REV. 803, 811-12 (2004); James Harris, *Missouri's Judicial Selection Process is in Need of Reform*, SHOW ME BETTER COURTS http://www.showmebettercourts.com/index.php/news/showme-better-courts-files-signatures/pd-op-ed/ (last visited Nov. 19, 2010).

candidates go on the list that is sent to the governor,[65] and additionally into the governors' decisions about which candidates from the list to nominate.[66] There is little empirical support for the claims made by supporters of merit selection,[67] except that there is some evidence that partisan considerations might be somewhat less prominent in appointment systems that use commissions than in those that do not.[68]

Still, even if the decision regarding who fills vacancies on a state's courts is taken from the people, one question still remains: who should decide whether an incumbent judge should remain in office? One answer that many states have chosen, especially those that use merit selection, is the retention election.[69] In these elections, citizens vote on whether an incumbent judge should be retained for another term in office, and the judge is returned to office if he/she receives a majority of the vote.[70] There are no other candidates in these elections, and party affiliations are not listed on the ballot.[71] Retention elections were conceived of as a way to ensure that the public had some input on the makeup of state courts, while at the same time reducing the influence of political parties, or the need for candidates to raise large amounts of money to defend themselves against opponents.[72] It is true that candidates in retention elections tend to raise far less campaign money on average than candidates in partisan and nonpartisan elections, and that retention elections tend to attract less independent campaign spending by interest groups.[73] However, judges hardly ever lose these elections,[74] and research shows that when compared to partisan and nonpartisan elections, they are a very poor way of promoting judicial accountability

65. Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 732-33 (2002).

66. Aman McLeod, The Party on the Bench: Party Politics and State High Court Appointments 6-8 (unpublished manuscript) (on file with the author).

67. *See* Dimino, *supra* note 64, at 812.

68. McLeod, *supra* note 66, at 15.

69. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS 4-11 (2010), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf (showing that twenty states use retention elections to retain their state supreme court justices in some or all circumstances).

70. *See* Dimino, *supra* note 64, at 804.

71. *Id.*

72. Tarr, *supra* note 11, at 610.

73. *See supra* note 35.

74. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 319 (2001) (showing that between 1980 and 1995, only 1.7 percent of state incumbent supreme court justices in retention elections were defeated, as opposed to 8.6% in nonpartisan elections, and 18.8% in partisan elections).

to the electorate.[75] Furthermore, these elections are not immune from the effects of high-profile campaigns against incumbent judges, and although judges are very rarely defeated in these races, a few state supreme court justices have lost retention elections in the last twenty-five years.[76]

A move combining retention elections with some form of appointment might be the easiest option for states seeking to avoid or extricate themselves from the nightmare scenario resulting from the increase in campaign spending in judicial races, *Caperton*, and *Citizens United*. Despite polls showing that the public suspects that contributions undermine judges' impartiality,[77] no state has completely eliminated judicial elections since Virginia in 1864,[78] which is evidence of how politically difficult it would be to win approval of a proposal that would take away the people's ability to hold their judges accountable at the ballot box. Given this reality, when faced with the nightmare scenario, adoption of a system combining appointment with retention elections might be a more politically feasible alternative to the complete elimination of elections from the process of judicial selection and retention. That said, some state polls have shown that the public favors partisan or nonpartisan elections,[79] and two recent efforts to abandon partisan and nonpartisan election in favor of a commission-based appointment system that would be used in tandem with retention elections have failed in two states.[80] Furthermore, no state has adopted retention elections since Tennessee did so for its supreme court in

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75. Chris W. Bonneau & Melinda Gann Hall, IN DEFENSE OF JUDICIAL ELECTIONS 28 (2009).

76. *Supra* note 11.

77. *See supra* text accompanying note 16.

78. Glenn R. Winters, *Selection of Judges- An Historical Introduction*, 44 TEX. L. REV. 1081, 1083 (1966); *See generally,* Am. Judicature Soc'y, *Judicial Selection in the States -Formal Changes Since Inception, available at* http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state= (showing that no state that has adopted judicial elections has completely eliminated them since Virginia 1864).

79. *E.g.*, *Judicial Selection in the States, Texas Opinion Polls and Surveys*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/reform_efforts/opinion_polls_surveys.cfm?state=TX (last visited Nov. 21, 2010) (describing a 2002 poll showing that 59 percent of Texas voters disagreed with the statement that Texas judges should be appointed); Justice at Stake, Minnesota state poll, Jan. 2008, *available at* http://www.justiceatstake.org/media/cms/MinnesotaJusticeatStakesurvey_717C253F67D9B.pdf (showing that 52% of respondents favored nonpartisan elections for state judges).

80. *See One Dem Impedes Judicial Reform*, TIMES LEADER (Wilkes Barre, Pa.), June 19, 2010, at 11A (describing how a bill to adopt merit selection for judges in Pennsylvania died in the state legislature); *Nevada Voters Reject Judicial Ballot Measures*, ASSOCIATED PRESS: RENO METRO AREA (NV), Nov. 3, 2010.

1994,[81] which suggests that the scheme of combining appointment with retention elections is no longer a popular option for states contemplating judicial selection reform.

If states decided not to use commissions to screen judicial candidates, and not to use retention elections to retain their judges, there are other methods available for both selecting and retaining judges. One would be to adopt a system like that in states such as Maine, where judges have to be reappointed by the governor or confirmed by the state legislature when their terms expire,[82] or they could adopt legislative elections, as in Virginia where the legislature alone decides whether incumbent judges serve another term.[83] New Jersey's judicial retention system presents a third option, in which judges are appointed by the governor with legislative confirmation for an initial seven year term, at the end of which, the judge must be reappointed and reconfirmed, after which he/she serves until age seventy.[84] All of these options end elections, but allow the public to hold judges accountable indirectly by putting responsibility for their reappointment in the hands of elected officials.

Alternatively, the states could opt for judicial tenure schemes that maximize judicial independence at the expense of judicial accountability by further removing the public and elected officials from the process of retention, or by eliminating any opportunity for reselection to the bench. For example, states could follow the example provided by Hawaii, where judges take their seats after being nominated by the governor from a list provided by the state's judicial selection commission, and confirmed by the state senate, and are retained by applying to the judicial selection commission for retention.[85] This option would allow some measure of accountability to be built into the system for retaining judges, while at the same time removing elected officials directly from the process of deciding whether a judge should be retained. Alternatively, states could opt for a system life tenure, perhaps with a mandatory retirement age, as

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81. *See generally,* AM. JUDICATURE SOC'Y, *Judicial Selection in the States—Formal Changes Since Inception, available at* http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state= (last visited Nov. 19, 2010) (showing that no state that has adopted retention elections to retain its supreme court judges since Tennessee in 1994).

82. AM. JUDICATURE SOC'Y, supra note 69, at 5.

83. *Id.* at 8.

84. *Id.* at 6.

85. *See* AM. JUDICATURE SOC'Y, *Judicial Selection in the States—Methods of Judicial Selection, available at* http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Nov. 21, 2010).

is used in Massachusetts and New Hampshire,[86] or without one, as is the case in Rhode Island.[87] One final option would be to look to the example presented by the system of tenure used for the German Federal Constitutional Court, in which judges are elected by the two houses of the national parliament and serve a single twelve-year term without the possibility of reelection.[88]

VI. FINAL THOUGHTS

This article has noted the possible emergence of the U.S. Supreme Court as a major catalyst for state judicial selection reform. Additionally, the article has sketched a possible nightmare scenario in which significant increases in campaign spending in state court elections by candidates and special interests, and the holdings in *Caperton* and *Citizens United* could combine to create a crisis of legitimacy, procedural delays and increased public and private costs. This development would represent the introduction of the Supreme Court as an important new independent variable in addition to those identified by Hanssen as being among those that dictate the nature and timing of judicial selection reform. It could also speed the process of reform from the glacial pace that has reigned since the 1970s. For example, after eleven states changed their systems for selecting and retaining their supreme court justices in the 1970s, four did so in the 1980s, five in the 1990s, and only one in the last decade.[89] If the nightmare scenario occurs, this decade or the next could see a marked increase in the number of states making changes and it is difficult to predict what form these changes will take if they occur.

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86. *Id.* at 5-6.

87. *Id.* at 9.

88. Bundesverfassungsgerichts—Gesetz [BVerfGG] [Federal Constitutional Court Act] Mar. 12, 1951, FEDERAL LAW GAZETTE I, 243, as amended July 16, 1998, FEDERAL LAW GAZETTE I, 1823, Art 4-5 (Ger.); *see generally, Federalist Society Transcript: Showcase Panel II: Judicial Tenure: Life Tenure or Fixed Non-renewable Terms?*, 12 BARRY L. REV. 173 (2009) (discussing the pros and cons of adopting nonrenewable terms for federal judges in the United States).

89. *See* AM. JUDICATURE SOC'Y, *Judicial Selection in the States—Formal Changes Since Inception*, *supra* note 81.