

## THE VOTERS' VIEWS ON JUDICIAL MERIT SELECTION

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Thank you to Dean Ackerman and Wayne State University Law School for hosting this program. I offer special thanks to President Loretta Ames, Bob Garvey and Paul Rosen of the Michigan Chapter of the American Board of Trial Advocates for planning this conference on “Options for an Independent Judiciary in Michigan” and for inviting the American Judicature Society to participate. It is my great honor and pleasure to share the program today with so many distinguished speakers, including Justice O'Connor, who will address us after lunch.

I am particularly pleased to return to Michigan, the birthplace of the American Judicature Society (AJS).<sup>1</sup> Nearly a century ago, during the height of the Progressive Era, two very different Michiganders joined forces to create a new organization to promote improvements in the administration of justice.<sup>2</sup> Herbert Harley, an idealistic young journalist and attorney, and Charles Ruggles, an older and rather eccentric timber and railroad baron, both saw serious flaws in the organization and operation of the nation's courts—particularly the state courts. In response, they created the American Judicature Society, which was incorporated in Illinois in 1913,<sup>3</sup> but will be forever and proudly tied to its Michigan roots.

In his earlier remarks, Professor Sedler discussed the 1961-62 Constitutional Convention in Michigan. In preparing for today's program, I reviewed the 2001 recollections of former Judge Robert Danhof, who chaired the Judiciary Article Subcommittee of the Constitutional Convention.<sup>4</sup> Judge Danhof noted that the American Judicature Society testified in favor of the Missouri Plan, or merit selection of judges.<sup>5</sup> Nearly fifty years later, the Society continues to

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1. *American Judicature Society Strategic Plan Overview*, AM. JUDICATURE SOC'Y, (May 2004), <http://www.ajs.org/ajs/pdfs/AJS%20Strategic%20Plan%20-%20web%20version.pdf>.

2. *Id.*

3. *American Judicature Society Bylaws*, AM. JUDICATURE SOC'Y (Oct. 2009), <http://www.ajs.org/ajs/pdfs/AJS%20Bylaws%2010-2009.pdf>.

4. See Robert J. Danhof, *Shaping the Judiciary: A Framers Traces the Constitutional Origins of Selecting Michigan's Supreme Court Justices*, 80 MICH. B.J. 15 (2001).

5. *Id.* at 17.

study and promote improvements in judicial selection systems nationwide. Judge Danhof also recalled that there was no great hue or cry for significant judicial selection reform during the Constitutional Convention.<sup>6</sup> At the time, judicial elections were not the high-profile, expensive contests they have become today. While the Constitutional Convention certainly gave very serious consideration to all aspects of the judicial article, Judge Danhof noted that there was no major effort to make constitutional changes in judicial selection methods.<sup>7</sup>

The concerns that drove Harley and Ruggles to create AJS remain relevant to this day. They drew considerably on Roscoe Pound's famous 1906 address to the American Bar Association on "The Causes of Popular Dissatisfaction with the Administration of Justice."<sup>8</sup> Like Pound, Harley and Ruggles feared that "the putting of our courts into politics" and "the making [of] the legal profession into a trade" severely undermined the fairness and integrity of the justice system.<sup>9</sup> Along with lamentations over the public's general lack of knowledge about the actual workings of the courts, these concerns have been echoed in conferences like this one for nearly a century. So what makes today's climate different? Why are we spending a full day talking about problems that have been with us for a century or more?

As previous speakers have noted, there is renewed interest across the country in a range of reforms and improvements to judicial elections. This interest is primarily a result of the skyrocketing cost of judicial campaigns and a host of federal court decisions over the past decade that have impacted judicial elections in the states, most notably and recently, the U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*.<sup>10</sup>

In particular, the meteoric increase in unregulated soft money in judicial elections, coupled with new concerns about unlimited independent expenditures by corporations and unions, have pushed a host of reform proposals back into the spotlight. Over the past seventy years, many reformers and reform organizations, including the American Judicature Society, have focused on commission-based selection of judges, otherwise known as merit selection, as the best alternative to popular election of judges.<sup>11</sup>

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6. *See id.*

7. *Id.* at 19.

8. *Roscoe Pound Kindles the Spark of Reform*, 57 A.B.A. J. 348 (1971).

9. *Id.* at 351.

10. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

11. *See Merit Selection: The Best Way to Choose the Best Judges*, AM. JUDICATURE SOC'Y,

I am not the first to recognize that the term “merit selection” is not completely clear or agreeable to everyone. The American Judicature Society chooses to use this term because it is the most commonly-used description of a system of appointing judges through a nominating commission process and subjecting them to uncontested retention elections for full terms in office. AJS also recognizes that the term merit selection can be off-putting to some people, especially to judges who are elected to the bench in contestable election systems, as it might imply that only judges who are appointed through a nominating commission process have merit. For this reason and others, the American Judicature Society has sought throughout its history to attach the term merit selection solely to the process and not to individual judges. Several other terms are also in common usage and may be referred to by other speakers today, including the Missouri Plan, the Nonpartisan Court Plan, and appointive-elective systems.

Many of you here today may already be quite familiar with merit selection systems in use across the country. The League of Women Voters of Michigan, among other organizations, has had a long-standing policy in favor of a merit selection and retention system.<sup>12</sup> But because Michigan has never used a merit selection and retention system,<sup>13</sup> or any formalized judicial nominating commission for state judges,<sup>14</sup> I will provide an overview of the fundamental features of merit selection systems—with apologies for covering terrain that some of you may already know very well.

Whatever term is used to describe merit selection systems, they are generally characterized by the presence of a commission that nominates finalists for appointment by the governor. These judicial nominating commissions are broadly-based, include lawyers and lay members, and operate under established rules and procedures.<sup>15</sup> They recruit, screen and interview applicants and send a short list of the most qualified

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[http://www.judicialselection.us/uploads/documents/ms\\_descrip\\_1185462202120.pdf](http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf) (last visited Jan. 4, 2011).

12. See *Election Laws: LWVMI Supports*, LEAGUE OF WOMEN VOTERS, <http://www.lwvmi.org/shared/electionlaws.html> (last visited on Jan. 4, 2011).

13. See *Judicial Selection in the States, Methods of Judicial Selection: Michigan, Formal Changes Since Inception*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/reform\\_efforts/formal\\_changes\\_since\\_inception.cfm?state=MI](http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=MI) (last visited on Jan. 4, 2011).

14. *Id.*

15. Larry C. Berkson, updated by Rachel Caufield and Malia Reddick, *Judicial Selection in the United States: A Special Report*, AM. JUDICATURE SOC'Y (2010), [http://www.judicialselection.us/uploads/documents/Berkson\\_1196091951709.pdf](http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf).

nominees to the appointing authority.<sup>16</sup> In most states that have adopted such systems, judges are subject to uncontested retention elections after a short initial term in office.<sup>17</sup> Eight states have also implemented official judicial performance evaluation programs, which provide evaluation results to voters in advance of retention elections.<sup>18</sup>

Proponents of merit selection systems generally argue that they are the best available means of securing a high quality judiciary, while insulating individual judges from the pressures of campaigning and fundraising, and from partisan and interest-group influences. Merit selection and retention systems also represent a middle ground between no-holds-barred judicial elections and the federal system of lifetime appointment by preserving accountability to the electorate through periodic, uncontested retention elections.

Debates over the best methods for selecting judges have raged since our nation's founding.<sup>19</sup> To this day, there is a very robust debate over which selection system produces the highest quality judges and most independent judiciary.<sup>20</sup> I will not attempt to summarize even a fraction of those arguments today, but I would like to highlight a few noteworthy findings and observations.

First, on the subject of judicial quality: I believe that most scholars would agree that it is notoriously difficult to measure judicial quality through empirical research. The quality of judicial decisions is largely in the eye of the beholder, just as judging itself is as much an art as it is a science. That being said, there are sources of data that can be used as effective proxies for measuring judicial quality.<sup>21</sup> Those measures include performance evaluation surveys and disciplinary rates.<sup>22</sup> As I

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16. *Id.*

17. *Id.*

18. See *Judicial Selection in the States, Methods of Judicial Selection: Retention Evaluation Programs*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/methods/judicial\\_performance\\_evaluations.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/judicial_performance_evaluations.cfm?state=) (last visited on Jan. 4, 2011).

19. See Berkson, *supra* note 15.

20. See *Judicial Selection in the States, History of Reform Efforts: Opinion Polls and Surveys*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/reform\\_efforts/opinion\\_polls\\_surveys.cfm?state=](http://www.judicialselection.us/judicial_selection/reform_efforts/opinion_polls_surveys.cfm?state=) (last visited on Jan. 4, 2011).

21. See KEVIN ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: EXECUTIVE SUMMARY (1998), available at [http://www.judicialselection.us/uploads/documents/Exec\\_Summ\\_Jud\\_Ret\\_Eval\\_4C67B5A81A9B3.pdf](http://www.judicialselection.us/uploads/documents/Exec_Summ_Jud_Ret_Eval_4C67B5A81A9B3.pdf).

22. *Id.* See also MALIA REDDICK, JUDGING THE QUALITY OF JUDICIAL SELECTION METHODS: MERIT SELECTION, ELECTIONS, AND JUDICIAL DISCIPLINE (2010), available at <http://www.ajs.org/selection/docs/JudgingQualityJudSelectMethods.pdf>.

mentioned a moment ago, eight states that use a merit selection and retention election system also have adopted official performance evaluation programs.<sup>23</sup> The relevance of performance evaluation results to the question of judicial quality is probably readily apparent. In those states where judges are evaluated through an objective and broadly-based survey program, scholars have access to data on a range of performance measures for individual judges and for the judiciary as a whole over the course of several decades.<sup>24</sup> Individual judges who have been evaluated have also discussed the value of receiving feedback that enables them to improve their own performance.<sup>25</sup> In the area of judicial discipline, research recently completed by the American Judicature Society shows that elected judges are disciplined for ethical breaches at a higher rate, and for more serious infractions, than are their appointed colleagues.<sup>26</sup>

Surveys of different constituencies that use the courts also provide insight on the perceived fairness and impartiality of judiciaries produced by different selection systems.<sup>27</sup> For instance, surveys of corporate counsel and executives on the fairness and effectiveness of state courts consistently rank appointive and merit selection systems higher than elective systems.<sup>28</sup>

Perhaps to state the obvious, there is no perfect method of judicial selection, and no way to completely remove political considerations from any system of choosing judges. AJS believes the goal should be to remove as much political pressure as possible and therefore ensure that judges are as fair and impartial as possible. Whatever method is used, politics will always be present to some degree.

Currently, thirty-five states and the District of Columbia use some type of judicial nominating commission system to fill some or all vacancies on the bench.<sup>29</sup> No two state judicial selection systems,

23. See *Methods of Judicial Selection: Retention Evaluation Programs*, *supra* note 18.

24. See ESTERLING & SAMPSON, *supra* note 21, at 1-2.

25. *Id.* at 4-5.

26. REDDICK, *supra* note 22.

27. COMM. FOR ECON. DEVEL., ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES (2007), *available* at [http://www.justiceatstake.org/media/cms/CED\\_FINAL\\_repor\\_ons\\_14MAY07\\_BED4DF4955B01.pdf](http://www.justiceatstake.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf).

28. HARRIS INTERACTIVE, 2010 U.S. CHAMBER OF COMMERCE STATE LIABILITY SYSTEMS RANKING STUDY (Mar. 9, 2010), *available* at <http://www.instituteforlegalreform.com/images/stories/documents/pdf/lawsuitclimate2010/2010FullHarrisSurvey.pdf>.

29. AM. JUDICATURE SOC'Y, JUDICIAL MERIT SELECTION: CURRENT STATUS (2010), *available* at

whether appointive or elective, are identical.<sup>30</sup> Among the states that use judicial nominating commissions to advise appointing authorities, there is tremendous variation in the composition and processes of commissions and in the degree to which governors are bound by the list of nominees generated by commissions.<sup>31</sup> At one end of the spectrum are fifteen states and the District of Columbia that have adopted constitutional provisions, statutes, and executive orders creating formal merit selection and retention systems that are used to fill all judicial vacancies at all levels of court.<sup>32</sup> At the other end of the spectrum are a handful of states in which governors have voluntarily created judicial nominating commissions by executive order to advise them only on appointments to fill interim vacancies that occur between elections.<sup>33</sup> In the middle of the spectrum of merit selection and retention systems are sixteen states that use judicial nominating commissions to fill some, but not all, vacancies on the bench.<sup>34</sup>

Over the past twenty-five years, very few states have seriously considered replacing contestable judicial elections with appointive systems of any kind.<sup>35</sup> In the year 2000, Florida voters rejected a measure to expand the state's merit selection and retention system to the trial courts.<sup>36</sup> South Dakota voters rejected a similar proposal in 2004.<sup>37</sup> The last state to adopt a judicial nominating commission system by constitutional amendment was Rhode Island in 1994, but that vote replaced a long-standing appointive system—not judicial elections.<sup>38</sup> We have to go all the way back to Utah in 1985 to identify a state in which voters approved a constitutional amendment to abolish contestable

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[http://www.judicialselection.us/uploads/documents/Judicial\\_Merit\\_Charts\\_0FC20225EC6C2.pdf](http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf).

30. See *Judicial Selection in the States, Methods of Judicial Selection: Selection of Judges*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=) (last visited Jan. 4, 2011).

31. AM. JUDICATURE SOC'Y, JUDICIAL MERIT SELECTION: CURRENT STATUS (2010), *supra* note 29.

32. See *id.*

33. *Id.*

34. *Id.*

35. See *Chronology of Successful and Unsuccessful Merit Selection Ballot Measures*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/uploads/documents/Merit\\_selection\\_chronology\\_1C233B5DD2692.pdf](http://www.judicialselection.us/uploads/documents/Merit_selection_chronology_1C233B5DD2692.pdf) (last visited Jan. 4, 2011).

36. Seth Andersen, *Examining the Decline in Support for Merit in the States*, 67 ALB. L. REV. 793, 794 (2004).

37. Thomas R. Phillips, *The Merits of Merit Selection*, 32 HARV. L.J. & PUB. POL'Y 67, 78 n. 48 (2009).

38. Andersen, *supra* note 36, at 794 n. 5.

elections altogether and replace them with a merit selection and retention system.<sup>39</sup>

A quick review of the history of adoption of merit selection systems in the states shows that reformers have had success in all regions of the country, but that the momentum towards merit selection slowed considerably after the 1970s.<sup>40</sup> The real heyday of merit selection as a popular reform initiative lasted from the late 1950s to the late 1970s.<sup>41</sup> Those dynamics changed, albeit on a limited scale, in November 2008, when voters in Greene County, Mo.,<sup>42</sup> and two counties in Alabama voted to expand merit selection systems to their jurisdictions. These successful ballot measures represent the first shift in political momentum towards merit selection as a viable option in several decades. This November, a constitutional amendment will be on the ballot in Nevada to replace the state's nonpartisan judicial elections with a merit selection and retention system.<sup>43</sup>

The selection of state judges is a fascinating example of federalism in practice. No two states use precisely the same methods for selecting or electing judges.<sup>44</sup> For instance, Michigan and Ohio are similar in many, but not all, respects.<sup>45</sup> In both states, judicial candidates run on a nonpartisan ballot in the general election, but political parties play a role earlier in the process.<sup>46</sup> Michigan Supreme Court justices are only nominated through party conventions, while in Ohio all judicial candidates are nominated in partisan primary elections and are endorsed by political parties.<sup>47</sup> Both Michigan and Ohio have experienced highly contentious and expensive state supreme court elections over the past

39. UTAH CONST. art. VIII, § 9.

40. LARRY C. BERKSON, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT (2004).

41. See *Chronology of Successful and Unsuccessful Merit Selection Ballot Measures*, *supra* note 35.

42. Phillips, *supra* note 37, at 93.

43. See *Ballot Question No. 1*, NEV. SECRETARY OF STATE, <http://nvsos.gov/Modules/ShowDocument.aspx?documentid=1666> (last visited on Jan. 4, 2010). Ballot Question No. 1 was rejected by voters at the November 2, 2010 general election. *Election Results*, NEV. SECRETARY OF STATE, <http://www.nvsos.gov/soselectionpages/results/2010StatewideGeneral/ElectionSummary.aspx> (last visited Jan. 4, 2010).

44. See, e.g., Andersen, *supra* note 36.

45. See *Judicial Selection in the States: Michigan*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=MI](http://www.judicialselection.us/judicial_selection/index.cfm?state=MI) (last visited Jan. 4, 2011); *Judicial Selection in the States: Ohio*, AMERICAN JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=OH](http://www.judicialselection.us/judicial_selection/index.cfm?state=OH) (last visited Jan. 4, 2011).

46. See sources cited, *supra* note 45.

47. See sources cited, *supra* note 45.

decade, with interest groups and independent spenders playing an increasingly dominant role.<sup>48</sup> In both states, the governor appoints judges to fill vacancies that occur in between elections, but there are key differences in the appointment process.<sup>49</sup> In Ohio, Gov. Ted Strickland voluntarily created a Judicial Appointments Recommendation Panel in 2007 to advise him on interim appointments to the bench.<sup>50</sup> The names of applicants and candidates for appointment that are recommended by the panel are made public, but the governor is not required to pick from the list of nominees supplied by the commission.<sup>51</sup> In Michigan, governors have traditionally relied upon the State Bar's Standing Committee on Judicial Qualifications to vet potential appointees.<sup>52</sup>

What does the recent history of merit selection reform efforts in other states mean for Michigan? First, I would suggest that renewed interest in merit selection and retention systems across the country may provide an opportunity to promote serious discussion of this option in Michigan. Recent public opinion survey data at the national level and in several states points to increasing public dissatisfaction with the tone, conduct and financing of judicial campaigns, as well as a willingness to consider alternate methods of selecting and retaining judges.<sup>53</sup> In a poll of 600 Michigan voters conducted last year by the Michigan Campaign Finance Network, 63 percent of respondents agreed that campaign contributions affect the decisions judges make, with 31 percent saying campaign contributions make "a lot" of difference.<sup>54</sup> In many states, supporters of judicial elections have argued effectively against merit selection proposals by characterizing them as elitist attempts to take away the right to vote.<sup>55</sup> But there is an effective counter-argument,

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48. James Sample, Adam Skaggs, Jonathan Blitzer, & Linda Casey, *The New Politics of Judicial Elections 2000-2009: Decade of Change* (2010) [http://www.justiceatstake.org/resources/new\\_politics\\_of\\_judicial\\_elections\\_20002009/](http://www.justiceatstake.org/resources/new_politics_of_judicial_elections_20002009/).

49. See Sources cited, *supra* note 45.

50. The Ohio Judicial Appointments Recommendation Panel, <http://www.ojarp.org/default.aspx> (last visited Jan. 4, 2011).

51. Ohio Judicial Appointments Recommendation Panel, OJARP Operational Rules, available at <http://ojarp.org/Documents/OJARP+DRAFT+RULES.pdf> (last visited Jan. 4, 2011).

52. See State Bar of MI.: 2009-2010 Annual Report, Standing Committee on Judicial Qualifications, [http://www.michbar.org/generalinfo/committee\\_pdfs/arJQ2010.pdf](http://www.michbar.org/generalinfo/committee_pdfs/arJQ2010.pdf) (last visited Jan. 4, 2011).

53. See *Judicial Selection in the States*, *supra* note 20.

54. Poll: *Michiganders Want a Firewall Between Judges and Campaign Supporters*, March 17, 2009, MICH. CAMPAIGN FINANCE NETWORK, <http://www.mcfn.org/press.php?prld=80>.

55. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 754 (2009).



which can focus on expanding public input through broadly-based nominating commissions and giving voters the ultimate say through retention elections.

Under the current elective system in Michigan and many other states, most trial court elections are uncontested.<sup>56</sup> According to the Michigan Secretary of State's election data, less than one fourth (23 to 24 percent) of circuit court elections were contested in 2008.<sup>57</sup> That is why the most accurate term for judicial elections is contestable—not contested—reflecting the lack of competition in most judicial elections, particularly at the trial court level. This lack of competition actually constrains voter choice. Appellate court elections are, of course, more likely to be contested in most states, including Michigan.<sup>58</sup>

Arguments in favor of keeping judicial elections also fail to take into account the significant proportion of judges who are initially appointed to fill an interim vacancy on the bench. According to the data AJS has collected on judges serving in 2008 (all appellate judges and a 10% sample of trial judges), 60% of all Michigan judges were first appointed to their seats.<sup>59</sup> So, in practice, most judges are initially appointed, and many incumbent judges do not face challengers come election time.<sup>60</sup> Proponents of merit selection and retention should stress this reality in making their case to legislators and the broader public.

Two other recent developments may also be noteworthy for Michigan. The U.S. Chamber of Commerce's Institute for Legal Reform recently issued a report, "Promoting Merit in Merit Selection."<sup>61</sup> The US Chamber guide advances a model for merit selection systems that is based largely on the systems used in Arizona and Massachusetts, and on the AJS Model Judicial Selection Provisions and the American Bar Association Standards on State Judicial Selection.<sup>62</sup> The U.S. Chamber's

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56. Michael J. Nelson, *Uncontested and Unaccountable? Rates of Contestation and the Quest for Accountability in General Jurisdiction Trial Courts*, JUDICATURE (forthcoming).

57. 2008 Official Mich. Gen. Candidate Listing, MICH. DEP'T OF STATE, [http://miboecfr.nictusa.com/election/candlist/08GEN/08GEN\\_CL.HTM](http://miboecfr.nictusa.com/election/candlist/08GEN/08GEN_CL.HTM) (last visited Jan. 4, 2011).

58. Matthew J. Streb, Brian Frederick, & Casey LaFrance, *Contestation, Competition, and the Potential for Accountability in Intermediate Appellate Court Elections*, 91 JUDICATURE 70, 70-78 (2007).

59. Data available from the author.

60. 2008 Official Mich. Gen. Candidate Listing, *supra* note 57.

61. U.S. CHAMBER INST. FOR LEGAL REFORM, PROMOTING "MERIT" IN MERIT SELECTION (Oct. 2009), available at <http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/meritselectionbooklet.pdf>.

62. *Id.*

advocacy for strong merit selection systems with meaningful public participation could be very important in developing broader support among voters, business leaders and opinion leaders.

The other recent development is, of course, the *Citizens United*<sup>63</sup> decision. No one knows yet, of course, what the true impact of *Citizens United* will be on judicial elections. But it is safe to assume that corporations and unions will increase their independent expenditures to influence state high court campaigns. More spending by corporations and unions is also likely to reduce the control that the actual direct players have over judicial elections.<sup>64</sup> Judicial candidates are likely to be subjected to even more negative campaigning and attack advertisements by independent spenders, which will result in further loss of control over judicial campaigns by the actual candidates.<sup>65</sup> Critics of the *Citizens United* decision have warned that corporations and unions will now be free to essentially blackmail elected officials into serving their interests by threatening to mount independent campaigns against their re-election.<sup>66</sup> The specter of corporate and union entities directly threatening sitting judges with negative campaigns unless their rulings come out a certain way is perhaps the most frightening scenario that could result from *Citizens United*. It may be an unlikely scenario, but it certainly appears to be possible.

As participants in this conference, and other stakeholders in Michigan, consider potential reforms, I strongly suggest that you consider one easily achievable interim step: merit selection through executive order for midterm vacancies only. As I noted earlier, several governors across the country have voluntarily adopted judicial nominating commission systems to advise them on the filling of vacancies that occur between elections.<sup>67</sup> AJS has models and sample executive order plans to share.<sup>68</sup> The advantages of an interim vacancy merit plan are its ease of adoption and implementation, and the fact that it can serve as a testing ground to support future expansion of nominating commissions. Given the requirement that a two-thirds supermajority of

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63. *Citizens United*, 130 S. Ct. 876.

64. Adam Skaggs, *Judging for Dollars*, NEW REPUBLIC, April 3, 2010.

65. *Id.*

66. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. (forthcoming 2011).

67. See AM. JUDICATURE SOC'Y, JUDICIAL MERIT SELECTION: CURRENT STATUS (2010), *available at* [http://www.judicialselection.us/uploads/documents/Judicial\\_Merit\\_Charts\\_0FC20225EC6C2.pdf](http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf).

68. See AM. JUDICATURE SOC'Y, MODEL JUDICIAL SELECTION PROVISIONS (2008), *available at* [http://www.ajs.org/selection/docs/MJSP\\_web.pdf](http://www.ajs.org/selection/docs/MJSP_web.pdf).

both houses of the Michigan legislature approve any constitutional amendments,<sup>69</sup> it will of course be very difficult to move a full-blown merit selection and retention proposal to the voters in the near future.

Whatever changes Michigan ultimately considers, the American Judicature Society and other national organizations will continue to offer research, models and analysis of different judicial selection systems. Thank you for your kind attention.

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69. MICH. CONST. art. XII, § 1.